U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 17 October 2006

BALCA Case No. **2005-INA-181**
ETA Case No. P2002-CA-09538071/JS

In the Matter of:

CUSTOM LANDSCAPE CONSTRUCTION,
Employer.

on behalf of

CONRADO MARTINEZ,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Scott Blank, Owner[1]
Pro Se For the Employer

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[2] We base our decision on the record upon which the CO denied

[1] Peter H. Morgan of the National Immigration Center appeared as the agent for the Employer and the Alien before the Certifying Officer; however, the appeal was filed pro se by the Employer's owner.

[2] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On March 26, 2001, the Employer filed an application for labor certification on behalf of the Alien for the position of Landscaper/Gardener. (AF 26-27).

On September 13, 2004, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on two grounds. First, the CO found that because the Employer hired one of the U.S. applicants, the position the Alien was applying for no longer existed. Consequently, the labor certification process could not continue and had to be denied. The CO was not convinced by the Employer's assertion that there was more than one job opening. Second, the CO found that the Employer had not made sufficient attempts to contact a second U.S. applicant. The CO noted that the Employer did not provide a return receipt for its letter to the applicant, giving the appearance that the applicant never received the letter, and that the only additional attempt to contact that applicant was a single phone call. (AF 22-24)

In its Rebuttal dated September 22, 2004, (AF 16-17), the Employer asserted that the fact that there was a single labor certification application did not mean that there was a single job opening. The Employer argued that the fact that the letter sent to the second applicant was never returned was an indication that the applicant received the letter. The Employer's owner added that he made two phone calls to the applicant: one on November 2, 2002, and a follow up phone call on November 11, 2002. The last telephone call was made after submitting the Recruitment Report. The Employer argued that it had made a good faith effort in recruiting U.S. workers.

On November 10, 2004, the CO issued a Final Determination denying certification. The CO found that by hiring one of the U.S. workers referred by the state agency, the job was filled by a qualified U.S. worker. The CO also found that, because of the lack of evidence

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Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

demonstrating that Employer's letter was received by the second applicant, the Employer should have made a more vigorous attempt at contacting that applicant. (AF 14-15).

On December 3, 2004 the Employer filed a request for review by this Board. (AF 01-02). The Employer argued that there was still a position open for the Alien and that it continued to advertise for that position. Moreover, the Employer asserted that it made good faith efforts in recruiting the second applicant through two attempts by telephone, but could not provide any documentation as the phone calls were never answered, and therefore there was no record of them in the telephone bill.

DISCUSSION

In order to obtain labor certification, it must be demonstrated that there are not sufficient U.S. workers who are able, willing, qualified and available to perform the job. 20 C.F.R § 656.1(a)(1). The Employer's hiring of a U.S. applicant indicates that sufficient qualified U.S. workers were available and therefore certification should be denied unless more than one job was offered. *IMT Italian Marble & Tile Co.,* 1991-INA-179 (Dec. 11, 1992).

While the Employer contends that multiple job openings existed, the record is devoid of any evidence that, in fact, more than one opening existed. The ETA Form 750A and the advertisements set forth the position of "Landscaper/Gardener" and not "Landscaper**s**/Gardener**s**" which would imply the existence of only one position. (AF 26-27 and 67-69). It was not until after the hiring of the U.S. worker and the proposed denial of certification by the CO that the Employer stated, in its Rebuttal, that multiple job openings existed.

The Employer argued that a job opening still existed and that the fact that there was a single labor certification pending with the Department of Labor did not prohibit the Employer from utilizing other methods of recruiting for other vacancies. (AF 16). It is the Employer's responsibility, however, to state explicitly, at the initiation of the application procedure and throughout the certification process, that it seeks more than one worker for the position. *Precision Airparts Support Services, Inc.*, 1988-INA-508 (Feb. 8, 1990).

Since the record indicates that the Employer had only one Landscaper/Gardener position available, the Employer failed to show that there were no U.S. workers qualified and available for the position. Because certification was properly denied on this ground, we do not reach the issue of whether sufficient effort was made by the Employer to contact the second applicant.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.