U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 31 March 2004

BALCA Case No.: **2003-INA-142**
ETA Case No.: P2000-CA-09509157/ML

In the Matter of:

PROGRESSIVE GREENERY,
Employer,

on behalf of

CARLOS TORAL,
Alien.

Appearance: Joe Culbertson
For the Employer

Eleanor Lomeli
Immigration Unlimited, Inc.
For the Alien[1]

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification[2] on behalf of

[1] Eleanor Lomeli of Lomeli's Immigration Unlimited represented both Employer and Alien before the Certifying Officer. In his petition for BALCA review, however, Employer expressed dissatisfaction with Ms. Lomeli's services and requested that he be contacted and permitted to respond directly on BALCA review.

[2] Permanent alien labor certification is governed by § 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."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record

Carlos Toral ("the Alien") filed by Progressive Greenery ("the Employer") for the position of Landscape/Maintenance Foreman. The Certifying Officer ("CO") denied the application and this appeal ensued.

STATEMENT OF THE CASE

The Employer filed the application for labor certification on April 20, 2000. (AF 16). The position was listed as "Landscape/Maintenance Foreman." The local job service categorized the job under the DOT Code 408.131-010, "Supervisor, Spray, Lawn and Tree Service." The job requirements were stated to be an eighth grade education and two years of experience in the job offered.

The ETA 750B stated the Alien's work experience as a self-employed landscape gardener from 1982 to present. (AF 43). The description of his duties did not mention supervisory experience.

In a Notice of Findings ("NOF") issued on October 3, 2002, the CO proposed to deny certification on the grounds, *inter alia*, that the Alien did not have two years of supervisory experience, citing 20 C.F.R. § 656.24(b)(3). (AF 11-13). The CO directed the Employer to submit an amendment to the ETA 750B to accurately reflect the Alien's qualifying experience or to amend the ETA 750A relative to the experience requirement. (AF 13).

The Employer submitted a rebuttal dated December 10, 2002. (AF 7-8). In the rebuttal letter, the Employer wrote that the Alien had supervisory experience on a previous job, and listed amendments to the ETA 750B to show that experience.[3] Specifically, the Alien was stated to have worked for Gearhart Development Co. from

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upon which the CO denied certification and Employer's request for review and any written argument. 20 C.F.R. § 656.27(c).

[3] The rebuttal letter is under the letterhead of the Employer's representative but is signed by both the Employer's owner and the Alien.

November 1994 to December 1996 as a laborer, for Tack Roofing from November 1992 to September 1994 as a Roofing Supervisor, and for Angeles Roofing from November 1984 to October 1986 as a Roofer. The Employer argued that the Alien has qualifying experience because "[h]e has over 2 years of experience as supervisor and over 2 years experience of landscaper." (AF 8).

On January 24, 2003, the CO issued a Final Determination ("FD") denying labor certification because the rebuttal only showed supervisory experience in roofing and not in landscaping. (AF 5-6).

The Employer's owner also submitted an appeal letter. In the letter he argued that the rebuttal letter was "improperly interpreted and poorly worded." He stated "As [the Alien's] employer, I am informing you emphatically and directly that Mr. Carlos Toral has worked diligently for me for over 7 years and as a Landscape Maintenance Foreman for at least 4 years of that time. He was originally hired on 5/10/97 and became foreman in January of 1999. Also, please note the attached copy of prior employment letter submitted December 10, 2002. I have highlighted his experience as supervisor of Landscape operations including maintenance." Attached to the appeal letter is a copy of the December 10, 2002 rebuttal letter, with a handwritten notation "Labor/Supervisor" below the entry about Gearhart Development Co., and with an arrow pointing to the duties. The duties are described as "Construction work on new developed homes, concrete work, clean up, landscape new developments, plant shrubs, plant lawns, install drainage systems and drip irrigation systems, etc." (AF 3).

DISCUSSION

An employer must establish that the alien possesses the stated minimum requirements for the position. Stated another way, an employer may not require more experience of U.S. workers than the alien possesses. Where the alien does not meet the employer's stated job requirements, certification is properly denied under 20 C.F.R. § 656.21(b)(6). Similarly, a job opportunity's requirements may be found not to be the

actual minimum requirements where the alien did not possess the necessary experience prior to being hired by the employer. *Super Seal Manufacturing Co*., 1988-INA-417 (Apr. 12, 1989) (*en banc*).

In the instant case, the NOF stated the issue as being that the Alien did not possess two years of supervisory experience. The NOF did not expressly state that the supervisory experience had to be in landscaping, although such a qualification is implicit in that the Employer's labor certification application was for a landscape foreman with two years of experience. The only supervisory experience shown in the rebuttal letter was slightly less than two years when the Alien worked as a Roofing Supervisor. In the appeal letter, the Employer maintains that the Alien has at least four years of experience as a landscape maintenance foreman. This argument is not persuasive for several reasons.

First, under the regulatory scheme of 20 C.F.R. Part 656, rebuttal following the NOF is the employer's last chance to make its case. It is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) *(en banc*). Thus, evidence of supervisory experience as a landscaper submitted in the request for review comes too late. *See University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988). This ground alone requires affirmance of the CO's denial of labor certification.

Second, the appeal letter indicates that the Alien was promoted to landscape maintenance foreman in January 1999. The application was filed in April 2000. Thus, assuming this evidence was timely submitted, it shows only one year and three or four months of supervisory experience at the time of the filing of the application – clearly establishing that the Employer's true minimum job qualifications are not two years in the job offered.

Third, the qualifying experience cannot have been with the sponsoring employer. *Super Seal Manufacturing Co., supra.*

Fourth, the handwritten note on the December 10, 2002 rebuttal letter attached to the appeal letter now claiming that the Alien's work for Gearhart Development Co. was as a "laborer-supervisor" is too sketchy and too self-serving to constitute credible evidence that the Alien possessed two years of experience as a Landscape-Maintenance Supervisor prior to being hired by the Employer. Although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *M.N. Auto Electric Corp*., 2000-INA-165 (Aug. 8, 2001) (*en banc*). Here, the original version of the rebuttal letter made no mention of supervisory duties even though that was the very issue being addressed in rebuttal. There is no evidence that the owner of Progressive Greenery has any first-hand knowledge of the Alien's work at Gearhart Development, and the duties listed – although showing some landscaping related tasks – are construction and concrete work, indicating that at best the Alien's work was only partly landscape related.

Finally, although the Employer expressed dissatisfaction with the quality of his representative in this matter, we do not find the circumstances sufficient to require equitable relief from the general rule that that the acts and omissions of an attorney [or in this case, representative] are attributable to his or her client. *Compare Madeleine S. Bloom*, 1988-INA-152 (Oct. 13, 1989) (*en banc*) *and Park Woodworking, Inc.*, 1990-INA-93 (Jan. 29, 1992) (*en banc*) (manifest injustice sufficient to require equitable relief would only obtain upon a showing of some egregious conduct beyond mere attorney negligence or administrative oversight).

ORDER

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

Entered at the direction of the Panel by:

A

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.