



Issue Date: 11 February 2004

BALCA Case No.: 2003-INA-39
ETA Case No.: P2000-CA-09508538/GH

In the Matter of:

ESCAMILLA & SONS, INC.,
Employer,

on behalf of

NOE CORTEZ,
Alien.



Appearances: Kenji Delgado, Esquire
Santa Ana, California
For Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by Escamilla and Sons (“Employer”) on behalf of Noe Cortez (“the Alien”) for the position of Farmer, Diversified Crops. (AF 26-27).² The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification and Employer’s

¹ 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 20 C.F.R. Part 656.

²“AF” is an abbreviation for “Appeal File”.

request for review, as contained in the Appeal File (“AF”) and any written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On March 20, 2000, Employer filed an application for alien employment certification on behalf of the Alien for the position of Farmer, Diversified Crops. The job duties included growing multiple kinds of crops based on market conditions and weather. Minimum requirements for the position were listed as two years experience in the job offered. (AF 26-27).

A Notice of Findings (“NOF”) was issued by the CO on July 19, 2002, citing 20 C.F.R. §§ 656.24(b)(2)(v) and 656.21(g). The CO proposed to deny labor certification based upon a finding that Employer had tested the wrong labor market and buried its advertisement. (AF 22-25). The CO found Employer’s recruitment effort insufficient in that it had advertised in The Visalia Times-Delta, a newspaper which serves a locality other than the one where the job offer is located. The CO also found Employer’s advertisement deficient in that it was placed in the “Legals” section of the newspaper’s classified advertisements, not the appropriate “Help Wanted” section. The CO instructed Employer to readvertise the job opportunity for three days in a newspaper of general circulation in Monterey County and to ensure that the advertisement was placed in the Help Wanted section, not the Legals section.

In Rebuttal, Employer disputed the CO’s conclusion that Employer tested the wrong market, stating that The Visalia Times-Delta is in fact the appropriate publication, as Employer needs an employee to work “in the surrounding areas of Visalia.” (AF 10-21). Employer submitted copies of several invoices issued by Employer to growers in the Visalia area. Employer also stated that The Visalia Times-Delta handled the placement of the advertisement and Employer had no control over the section in which the advertisement ran. (AF 10).

On September 16, 2002, the CO issued a Final Determination (“FD”) denying labor certification based upon a finding that Employer had failed to conduct an adequate test of the labor market. (AF 7-9). The CO acknowledged that Employer tested the appropriate geographic area by placing the advertisement in The Visalia Times-Delta, but found Employer’s rebuttal failed to document that the advertisement was placed in the appropriate section of classified advertisements.

Employer filed a Request for Reconsideration and Review by letter dated October 18, 2002. The Request for Reconsideration was denied on October 24, 2002 and the matter was docketed in this Office on December 24, 2002. (AF 1-2).

DISCUSSION

Fundamental to the recruitment effort is an advertisement in a newspaper or other publication, whichever is appropriate to the occupation and is most likely to attract responses from able, willing qualified and available U.S. workers. 20 C.F.R. § 656.21(g)(1)-(9). Employer bears the burden of proving that a publication is appropriate. *J.F. Fashions Factory*, 1993-INA-148 (June 28, 1994). Failure to place the recruitment advertisement in the paper and location most likely to draw qualified U.S. applicants is grounds for denial. *Computech Int’l*, 1994-INA-43 (Feb. 26, 1996); *Amikam*, 1994-INA-474 (Aug. 17, 1995). The goal of 20 C.F.R. § 656.21(g) is to place the advertisement where it is most likely to bring responses. If the advertisement appears outside of a publication’s employment section, this goal may be frustrated. The result is the same whether or not the employer controls the section placement of the advertisement. *Wailua Associates*, 1998-INA-533 (June 14, 1989).

In the instant case, Employer’s advertisement was placed in the Legals section of the classifieds. The Visalia Times-Delta, the publication chosen by Employer, has a separate section of advertisements for employment opportunities and as noted by the CO, it is unlikely that potentially qualified applicants would have seen the advertisement in the Legals section. The goal of advertisement, as mandated by 20 C.F.R. § 656.21(g), is

to notify potentially qualified applicants of the job opportunity, not to simply comply with a legal requirement. Employer's rebuttal offers no evidence that the Legals section of the classifieds is a more appropriate section for recruitment than the Help Wanted/Employment Opportunities section. Employer bears the burden of conducting an appropriate recruitment effort and could have readily instructed the newspaper to place the advertisement in the Help Wanted/Employment Opportunities section. Employer failed to document that it conducted an adequate test of the labor market. Accordingly, labor certification was properly denied.

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.

