



ETA Case No.: **Issue Date: 01 March 2004** BALCA Case No.: **2002-INA-220**
P2001-NJ-02465539

In the Matter of:

PROPERTY MASTERS INC.,
Employer,

on behalf of

CESAR RAVO-CARDENAS,
Alien.

Appearance: Geoffrey Stewart, Esquire
Long Island City, New York
For Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges



DECISION AND ORDER

PER CURIAM: This case arises from an application for labor certification¹ filed by a Landscaping Business for the position of Landscape Gardener. (AF 12-13).² The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification and Employer’s request for review, as contained in the Appeal File (“AF”).

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”.

STATEMENT OF THE CASE

On August 28, 2000, Employer, Property Masters, Inc., filed an application for alien employment certification on behalf of the Alien, Cesar Ravo-Cardenas, to fill the position of Landscape Gardener. The job to be performed consisted of landscaping private businesses and residences, grading terrain, sodding lawns, applying fertilizer and making repairs on concrete walks, among other duties. Minimum requirements for the position were listed as two years experience in the job offered. (AF 12-13). Employer received no applicant referrals in response to its recruitment efforts. (AF 2).

A Notice of Findings (“NOF”) was issued by the CO on February 21, 2002, questioning Employer’s ability to guarantee permanent full-time (year-round) work for the petitioned position. The CO noted that the duties described in item 13 of the ETA 750A are normally performed on a seasonal basis during the warmer months and not during the winter. Employer was instructed to document how permanent full-time (year round) work was guaranteed by submitting copies of payroll records for all Landscape Gardeners for the last three years for the months of December through February, evidencing they were retained on the payroll on a full-time basis during this non-seasonal period and documenting what specific duties they would perform, as well as any other documentation that would show guaranteed full-time (year-round) work. (AF 18-19).

In Rebuttal, Employer stated that its company operates year-round providing snow removal services to over sixty homes and commercial properties, maintaining the outside beds and parking areas, using mulch and performing major pruning on shrubs and trees, as well as providing home services such as checking mail, watering plants, checking lights, timers, heating systems and alarms. Employer indicated that it employs three to four-year round employees, averaging sixty hours per week April through November, thirty hours per week December through February and forty hours per week in March. Employer advised the CO that she could contact its accountant to review any payroll records. (AF 20-21).

A Final Determination (“FD”) denying labor certification was issued by the CO on April 18, 2002, based upon a finding that Employer had failed to establish that permanent full-time work was guaranteed for this job offer. The CO found Employer’s rebuttal lacking in that the duties described during the winter months were not those normally performed by a Landscape Gardener and the thirty-hour work week was not full-time. In addition, the CO cited Employer’s failure to produce the requested payroll records. (AF 23-24).

Employer filed a Request for Review by letter dated May 13, 2002 and the matter was docketed in this Office on July 2, 2002. (AF 25-35). Employer filed a Statement of Position on July 17, 2002.

DISCUSSION

This matter is governed by *Vito Volpe*, 1991-INA-300 (Sept. 29, 1994) (*en banc*). As held in *Vito Volpe* and recently affirmed in *Crawford and Sons*, 2001-INA-121 (Jan. 9, 2004) (*en banc*), a landscape gardener position for which duties can only be performed during approximately nine to ten months per year cannot be considered permanent employment for the purposes of labor certification. Rather, this employment should be considered seasonal employment. An employer’s method of payment (either only during the working months or continuous throughout the entire year) bears no relevance on this determination. The payment of wages continuously throughout the course of the year does not cure the defect.

Employer has not demonstrated that the job duties can be performed year-round; instead, Employer argued that different duties would be performed during the winter months. The alternative duties described during the winter months are not duties normally performed by a Landscape Gardener and were not listed in the job description. These duties included snow removal, mail retrieval and other house-sitting duties, such as checking alarms, lights and timers.

Moreover, Employer was instructed to submit payroll records for the last three years evidencing that workers in the position were retained on a full-time basis during this non-seasonal period, but elected not to do so. As was noted by the CO, while Employer indicated payroll records can be reviewed by setting up an appointment with its accountant, the NOF clearly instructed Employer to produce such evidence. The payroll ledger included with the Request for Review was tardy and failed to satisfy the CO's instructions.

As noted in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), “[u]nder the regulatory scheme of 20 C.F.R. Part 656, rebuttal following the NOF is the employer’s last chance to make its case. Thus, it is the employer’s burden at that point to perfect a record that is sufficient to establish that a certification should be issued.” Employer’s failure to produce the records is a failure to sustain his burden of proof.

Based upon the foregoing, we determine that labor certification was properly denied.

ORDER

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

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 of Labor 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, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.