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Issue Date: 20 May 2004

BALCA Case No.: 2003-INA-18
ETA Case No.: P2000-CA-09497647/LA

In the Matter of:

LAW OFFICES OF JEAN-PIERRE KARNOS,¹
Employer,

on behalf of

CESAR RENE ESPINOZA,
Alien.

Appearance: James G. Roche, Esquire²
Santa Ana, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONI
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Cesar Rene Espinoza (“the Alien”) filed by Law Offices of Jean-Pierre Karnos (“the Employer”) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C.

¹ As discussed herein, the name of the new employer is the “Law Offices of James G. Roche.”

² The ETA 750 was signed by Jean-Pierre Karnos. (AF 24-25). As discussed herein, Mr. Karnos passed away, and Mr. Roche has pursued the application for labor certification.

§ 1182(a)(5)(A) (“the Act”), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer (“CO”) of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and the Employer's 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 January 14, 1998, the Employer, Law Offices of Jean-Pierre Karnos, filed an application for labor certification to enable the Alien, Cesar Rene Espinoza, to fill the position of Accountant. (AF 24). The job duties for the position included accounting and financial analysis of company operations. The stated job requirements were a Bachelor of Science degree in Accounting, two years of experience in the job offered, and a resume or letter of qualifications. (AF 24).

In a Notice of Findings (“NOF”) issued on March 25, 2002, the CO proposed to deny certification on the grounds that it was unclear whether there is a bona fide employer with a bona fide job opportunity, in light of the death of Jean-Pierre Karnos. (AF 18-20). The CO instructed the Employer to show that there is an on-going business under the name of “Law Offices of Jean-Pierre Karnos” and that there is a current job opportunity.

In rebuttal, dated April 11, 2002, James G. Roche, Esquire, stated that despite Mr. Karnos’ death, an on-going business continued under his administration. (AF 14-17). Mr. Roche enclosed a copy of his City Business License and stated that aside of minor administration changes, the business is the same and a current job opening existed. (AF 15-16).

In a supplemental NOF (“SNOF”), dated May 31, 2002, the CO proposed to deny certification on the same grounds. (AF 11-13). The CO instructed the Employer to document that the business and the business name were the same. The CO requested evidence in the form of a contract or agreement showing that Mr. Roche had a partnership interest in the firm or that Mr. Roche inherited or took over the firm from Mr. Karnos. The CO also required a statement confirming that the terms and conditions of employment, including that the wage rate of \$23.81 per hour remained the same. (AF 11-13).

In the rebuttal, dated July 2, 2002, Mr. Roche stated that “due to the untimely nature of Mr. Karnos’ death, no formal contract was drafted.” Mr. Roche stated that the business was ongoing under the name of Law Offices of James Roche. Mr. Roche confirmed that he wished to continue the labor certification application under the same terms and conditions set forth in the application. (AF 7-10).

On August 28, 2002, the CO issued a Final Determination (“FD”) denying certification. (AF 5-6). In the FD, the CO stated that Mr. Roche was “unable to provide that he and Jean-Pierre Karnos had a written contractual or inheritance agreement.” Therefore, the CO found that Mr. Roche was a separate employer and should not be entitled to the application signed by another party. The CO denied certification on the ground that two “distinctly different employers” were involved and there was no agreement to “attest to the legality of this condition.” (AF 5-6).

On September 23, 2002, the Employer filed a Request for Review, together with supporting documents. (AF 1-4). The matter was docketed in this Office on October 29, 2002 and the Employer filed “Appellant’s Statement of Position” on November 27, 2002. In the Appellant’s Statement of Position, the Employer contends that the CO’s position is unfounded. The Employer argues that a new application is not required when the Alien is working in the exact same position, performing the same duties, and in the same area of intended employment for the same salary or wage, as determined in *International Contractors, Inc., and Technical Programming Services, Inc.*, 1989-INA-278 (June 13,

1990). The Employer stated that he was offering the same position of accountant, under the same terms and conditions, including the same wage, set forth in the original application.

DISCUSSION

Upon review, the Appellant's Statement of Position is accurate. In general, a new employer must file a new application unless the same job opportunity and the same area of intended employment are preserved. *International Contractors, Inc., supra; Germania Club, Inc.*, 1994-INA-391 (May 25, 1995). When the employer has clearly demonstrated that the job opportunity, including the wage paid, remains the same such that there is still a bona fide job opportunity, a new application is not required.

In this case, there is a bona fide job opportunity and an adequate test of the labor market has been performed. The new Employer, Mr. Roche, has indicated that the duties of the job remain the same and that the salary is the same. The same job opportunity has been preserved. The absence of a contractual agreement between Mr. Karnos and Mr. Roche does not negate the fact that a bona fide job opportunity exists with Mr. Roche as the employer. The new Employer has clearly demonstrated that there is a bona fide job opportunity which remains the same, despite the change in employers.

Therefore, in light of the particular factual circumstances presented by this case, we hold that the change in employers, when an adequate test of the labor market has been performed and when the position remains the same, does not offend the policies of labor certification. The former Employer attempted to recruit a U.S. worker for the position and the new Employer has certified that the position remains the same as that originally petitioned for, in the same area of employment. In such circumstances, labor certification should not be denied solely on the change in employers. Thus, the CO improperly denied certification.

ORDER

For the reasons stated, the denial of certification is REVERSED, and labor certification is hereby GRANTED.

For the Panel:

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JOHN M. VITTON
Chief Administrative Law Judge

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.