U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 June 2004

BALCA Case No. **2003-INA-134 (formerly 1999-INA-123)**
ETA Case No. P1996-CA-09046916/JS

In the Matter of:

EMILY WALDER,
Employer,

on behalf of

ISABEL PADILLA,
Alien.

Appearance: Andrew J. Vazquez, Esquire
Pasadena, California
For Employer

Certifying Officer: Martin Rios
San Francisco, California

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

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from an application for labor certification on behalf of Isabel Padilla ("the Alien") filed by Emily Walder ("the Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") 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

This is the second time this matter has been appealed to the Board of Alien Labor Certification Appeals ("Board"). By *Decision and Order* dated August 27, 1999, a panel of the Board found that there were no qualified U.S. workers who applied for the job offered of Assistant Technician,[1] but remanded the matter for a determination of the proper Employer and for consideration of whether the "alien may have been trained by the named employer, thus indicating different minimum standards than previously used." (AF 149-154).

On December 13, 2000, the CO issued a Notice of Findings ("NOF") directing that the Employer submit documentation to establish, pursuant to 20 C.F.R. § 656.21(b)(5), that the actual minimum requirements for the job were as advertised and, therefore, the Alien did not obtain the required two year's of experience for the job offered while working for the Employer. (AF 144-148). Second, the CO sought clarification that the petitioning Employer would be the actual employer for the Alien. In particular, the CO noted the following:

> The case record shows that the petitioning employer, a veterinarian, leases the worker, a laboratory technician, from a firm named Physician's Staff Management. Before labor certification can be issued, it must be determined that the petitioning employer is offering a full-time job to its own employee. Question has arisen as to whether the beneficiary of this labor certification application is or will be a full-time employee of the petitioning employer, Dr. Walder.

(AF 145).

The Employer submitted its rebuttal on January 17, 2001. (AF 102-143). The Employer clarified that she met the Alien at the last company "where they worked

[1] The *Dictionary of Occupational Titles* (DOT) position is "Scientific Helper," at DOT 199.364-014.

together." Further, the Employer submitted W-2 forms establishing that she was not the Alien's employer during the time at issue. The petitioning Employer also submitted a *Subscriber Service Agreement* with Physician's Staff Management ("PSM"), along with two letters from PSM and a declaration. The Employer argues that PSM merely serves as the bookkeeper for her business and PSM does not have supervision or control over her employee, the Alien. The Employer's January 9, 2001 declaration provides the following:

> I am the sole proprietor of 'Emily J Walder, VMD, DACVP, An independent biopsy service'. Isabel Padilla has been employed by me since July 25, 1994. Since then she has worked full-time of "An independent biopsy service" directly under my supervision. I have no other employees. Because of the small size of my business, I elected to hire the services of a contract personnel agency in order to avoid dealing with payroll, taxes, health insurance, workers' compensation and related paperwork. I entered into a contractual agreement with Physicians' Staff Management (PSM) on July 20, 1994 whereby they became the employer of record for purposes of recordkeeping only. Ms. Padilla's contractual arrangement with PSM was entered into at my request in July 1994 and was based on my previous selection of Ms. Padilla to be my assistant histotechnician.
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> . . .
>
> PSM had no relationship with Ms. Padilla prior to July 1994. PSM does not lease Ms. Padilla's services to any other employers. I do not use PSM to obtain any other personnel. I am the employer in fact of Ms. Padilla. I alone determine her wages, hours and benefits. I alone determine and supervise her daily tasks. PSM essentially serves the role of bookkeeper for me by handling payroll, administering employee benefit programs such as health insurance, and by reported wages to the state and federal government.

(AF 111). In fact, the Employer submitted invoices requesting that she deposit funds with PSM sufficient to cover gross payroll, administrative fees, workers' compensation, and health insurance costs for each pay period. (AF 119, 123, 126).

On October 3, 2002, the CO issued a Final Determination ("FD") denying labor certification. (AF 99-101). Although the CO found that the Alien did not receive training to qualify for the job offered while working for the Employer such that the actual

minimum requirements for the job were advertised pursuant to 20 C.F.R. § 656.21(b)(5), the CO denied labor certification on grounds that the petitioning Employer and PSM had a "shared employee contract" and the CO stated that he could not "determine how the petition can be found to be the employer of the worker who is actually leased by contract from Physician's Staff Services." (AF 100).

DISCUSSION

The regulatory provisions at 20 C.F.R. § 656.50 define "employment" as permanent, full-time work by an employee for an employer, other than self-employment. In this case, the CO does not challenge whether the job is permanent or full-time; rather, he is unable to determine the proper employer for purposes of this labor certification petition.

Upon review of documentation submitted by the petitioning Employer, it is evident that, under the particular circumstances of this case, PSM is not the Alien's "employer" for purposes of the Act.[2] The July 20, 1994 *Subscriber Service Agreement* between the Employer and PSM provides that PSM performs all bookkeeping functions for the Employer-Subscriber. Indeed, the *Agreement* states that the Employer will report an employee's hours to PSM and PSM will process the payment of wages in compliance with federal, state, and local laws. PSM will also collect (from the Employer-Subscriber), report, and pay all applicable taxes and administer and pay health benefits and workers' compensation. The *Agreement* specifically states that PSM "will be the W-2 employer for purposes of recordkeeping." Indeed, the Employer is required to "maintain a deposit (with PSM) equal to the total service fee for one payroll period," which will be kept in trust for use each pay period. PSM may terminate its "employment relationship" with the Alien if the Employer fails to maintain sufficient funds in the trust account.

[2] We note that the CO did not submit a brief on appeal in this matter.

It is clear from the foregoing that PSM merely serves as a "pass-through" of funds from the Employer for payment of wages, taxes, and benefits to the Alien. PSM charges the Employer a "service fee" for the costs of bookkeeping. PSM does not manage or supervise the Alien's work, nor does it determine the wages and benefits the Alien will receive. This does not qualify for, or constitute, an employer-employee relationship as contemplated under the Act.

On the other hand, the petitioning Employer submitted an uncontradicted declaration that she hired the Alien as her permanent, full-time assistant technician prior to retaining PSM as her bookkeeping service. *Ben Thomas Design*, 1988-INA-411 (Mar. 31, 1989) (*en banc*) (an individual can be an employer so long as she proposes to hire a full-time, permanent worker). PSM did not act as an employee referral service, nor did it "lease" the Alien to the Employer. The Employer determines the Alien's wages and hours and she assigns and supervises the Alien's daily tasks without any consultation with, or intervention by, PSM. Thus, the record demonstrates that the Employer and the Alien have the requisite employer-employee relationship and labor certification for permanent employment of the Alien at the Employer's independent biopsy service should be granted.

We stress that the decision in this matter is based on the unique circumstances presented. In general, "shared employee contracts" would not support a grant of labor certification under the Act. Of particular relevance, the Alien was hired by the petitioning Employer prior to the Employer's retention of PSM for bookkeeping purposes. Each pay period, the Employer pays PSM a bookkeeping service fee in addition to the statutorily required wages, workers' compensation, and health care costs for the Alien. The Employer remains liable for all wages, taxes, and benefits paid to the Alien and the Employer determines the amount of such wages and benefits. The Employer, not PSM, is the guarantor of the Alien's wages and benefits. PSM's contract with the Alien states that it is the "W-2 employer for purposes of recordkeeping" only. The Employer manages and supervises the Alien's work and reports the hours worked to PSM for bookkeeping purposes. On balance, it is determined that the "job opportunity's

terms, conditions and occupational environment are not contrary to Federal, State or local law" and there is a *bona fide* employment relationship between the Employer and the Alien. 20 C.F.R. § 656.20(c)(7).

Consequently, for the above-stated reasons, we reverse the CO's denial and the following order will enter:

ORDER

The CO's denial of labor certification in this matter is hereby **REVERSED** and the CO is directed to **GRANT** labor certification.

A

JOHN M. VITTONE
Chief Administrative Law Judge

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, N.W.
Suite 400-North
Washington, D.C. 20001-8002

Copies of the petition must also be served on the 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.