U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 July 2004

BALCA Case No.: 2003-INA-158
ETA Case No.: P2001-CA-09509168/ML

In the Matter of:

VERDUGO CONSTRUCTION,
Employer,

on behalf of

NOEL CASTANEDA-PEREZ,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Mark Turner, Esquire
Arcadia, California
For the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Verdugo Construction ("the Employer") filed an application for labor certification[1] on behalf of Noel Castaneda-Perez ("the Alien") on January 13, 1998. (AF 46).[2] The Employer seeks to employ the Alien as a construction laborer (DOT Code

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision, AF is an abbreviation for Appeal File.

869.664-014).[3] This decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the AF, and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

In the application, the Employer described the duties of the position as demolition and removal of structures for remodeling, including flooring, kitchen and bathroom fixtures. The Employer did not require advanced education, but required six months of experience. (AF 46).

In the first Notice of Findings ("NOF"), issued October 4, 2002, the CO found that the Employer did not demonstrate a timely good faith effort to contact four qualified U.S. applicants referred by the job service on August 21, 2000. (AF 42-44).

In rebuttal, dated November 5, 2002, the Employer argued that the U.S. applicants were contacted in a timely manner. The Employer stated that the U.S. workers were contacted by certified letters. In support, the Employer submitted copies of the postmarked return receipt cards and copies of the receipt for the certified mail (none of which were postmarked). (AF 23-41).

The CO issued a second NOF ("SNOF") on December 6, 2002, stating that deficiencies remained in the application for labor certification. In the SNOF, the CO noted that the Employer had submitted return receipt cards for interview letters mailed to the four applicants. The CO found that all four return receipts were sent to the Employer's and the Alien's agent in Santa Ana, California. The CO cited 20 C.F.R. § 656.20(b)(3)(i), which states that "it is contrary to the best interests of U.S. workers to have alien and/or agents or attorney for the alien participate in interviewing or considering U.S. workers." (AF 20-22).

[3] In this decision, DOT is an abbreviation for the Dictionary of Occupational Titles.

In rebuttal to the SNOF, the Employer stated that the return receipts were sent to the Alien's agent for safe-keeping; however, the letters were sent on the Employer's letterhead, the letters were from the Employer, the interviews were scheduled at the Employer's place of business and were to be conducted by the Employer with no participation from the Alien's agent. (AF 17-19).

The CO issued a Final Determination ("FD") on February 5, 2003, denying the Employer's application for labor certification. (AF 15-16). The CO indicated that the issue of the Alien's agent's involvement in the interview process remained. The CO noted that the return receipt listed the address of the Alien's agent and showed the Alien's name and "labor cert," rather than the Employer's address. The CO stated that the Employer did not explain the "safekeeping" by the Alien's agent. (AF 15-16).

By letter dated February 26, 2003, the Employer requested review by this Board and the matter was docketed in this Office on April 10, 2003. The Employer contended that he had responded to each issue in the two NOFs and noted his submission of interview letters and return receipt cards. The Employer argued that the letters were on the Employer's letterhead, the interviews were scheduled at the Employer's business and the interviews were to be conducted by the Employer. Thus, the Employer contended that there is no evidence that he did not act in good faith and the CO's denial was based on unfounded speculation and conjecture.

DISCUSSION

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability. It is the employer who bears the burden of proving that all regulatory requirements have

been satisfied, and this burden of proof must be met before an application for labor certification can be approved.

In the second NOF, the CO raised the new issue concerning the agent's return address, which was listed on the return receipt cards. The CO cited the regulations at 20 C.F.R. § 656.20(b)(3)(i)[4] in support of his finding that the Employer was not in compliance with the regulations. The Employer argued in response that although the agent's return address was used for "safekeeping" of the return receipt post cards, the letter was from the Employer, on the Employer's letterhead, the interviews were scheduled for the Employer's place of business and the letter clearly indicated the interviews would be conducted by the Employer. The CO did not respond to these arguments raised by the Employer, but objected to the agent's return address on the return receipt postcard and noted that the Employer did not state why it was necessary for the Alien's agent to "safeguard" the return receipts.

On consideration of the Employer's arguments, we find they are without merit, as the regulation clearly prohibits the agent from participating in the interview process. The purpose of this regulation is to avoid contact between the alien's agent and the employer. In this case, the Alien's agent would have to communicate with the Employer regarding the return receipts; at the very least, the agent would have to notify the Employer as to which return receipts had been received. This involvement is a per se violation of the regulations. See 20 C.F.R. § 656.20(b)(3)(i). The Agent cannot represent the best interests of the Alien, while at the same time communicating with the Employer

[4] 20 C.F.R. § 656.20(b)(3)(i) states: It is contrary to the best interests of U.S. workers to have the alien and/or agents or attorneys for the alien participate in interviewing or considering U.S. workers for the job offered the alien. As the beneficiary of a labor certification application, the alien cannot represent the best interests of U.S. workers in the job opportunity. The alien's agent and/or attorney cannot represent the alien effectively and at the same time truly be seeking U.S. workers for the job opportunity. Therefore, the alien and/or the alien's agent and/or attorney may not interview or consider U.S. workers for the job offered to the alien, unless the agent and/or attorney is the employer's representative as described in paragraph (b)(3)(ii) of this section.

(ii) The employer's representative who interviews or considers U.S. workers for the job offered to the alien shall be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certifications.

regarding the U.S. applicants for the position. Although the Employer has argued that the contact was minimal and for the purpose of "safe-keeping," any involvement by the Alien's agent cuts against the purpose of the regulation and is grounds for denial. As such, 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.