**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



**Issue Date: 04 August 2004**

**BALCA Case No.: 2003-INA-221**
ETA Case No.: P95-CA-40717

*In the Matter of:*

**MASAKO LANDSCAPE & GARDEN,**
*Employer,*

*on behalf of*

**JESUS M. MEDINA-SANCHEZ,**
*Alien.*

Appearance: Susan Jeannette, Immigration Processor
Del Mar, California
For the Employer and the Alien

Certifying Officer: Rebecca Marsh Day
San Francisco, California

Before: Burke, Chapman, and Vittone
Administrative Law Judges

# DECISION AND ORDER[1]

**PER CURIAM.** This case arose from an application for labor certification[2] on behalf of Jesus Medina-Sanchez ("the Alien") filed by Masako Landscape & Garden ("the Employer") for the position of landscape supervisor. The Certifying Officer ("CO") denied the application and this appeal ensued.

[1] Citations to the record of this proceeding will be abbreviated as follows: "AF" refers to the Appeal File.

[2] Permanent 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 Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and the Employer's request for review and any written argument. 20 C.F.R. § 656.27(c).

## STATEMENT OF THE CASE

The Employer filed the application for labor certification on November 18, 1994. The position was listed as landscaping/gardening supervisor. The job required two years of experience in the job offered. (AF 35).

On March 21, 1997, the CO issued a Notice of Findings ("NOF") indicating the intent to deny certification pursuant to 20 C.F.R. §§ 656.3, 656.29(c)(8), 656.21(b)(2)(i)(C), and 656.24(b)(3). (AF 30-33). Specifically, the CO advised the Employer that there was a question as to whether the Employer has a current job opening and could provide permanent, full-time employment. While citing to 20 C.F.R. § 656.20(c)(8), the CO also questioned whether a *bona fide* job opportunity exists that is clearly open to any qualified U.S. worker. Furthermore, the CO found the foreign language requirement to be unduly restrictive. Finally, the CO questioned whether the Alien actually meets the requirements of the job as set forth in the ETA 750A.

Accordingly, in order to cure the deficiency under 20 C.F.R. § 656.3, the CO requested documentation establishing the Employer's ability to provide permanent, full-time employment to a U.S. worker, along with a copy of the Employer's business license and State and federal business income and business tax returns. (AF 31). To correct the Employer's violation of 20 C.F.R. § 656.20(c)(8), the CO requested documentation that the job exists and has been previously filled with the same requirements, such as position descriptions, organizational charts, or payroll records. In the alternative, the Employer could demonstrate that some "major change in the business operation" occurred creating a need for the job position. In order to cure the deficiency under 20 C.F.R. § 656.21(b)(2)(i)(c), the CO explained that either (1) the foreign language requirement must be deleted, or (2) the Employer must establish that the requirement exists out of business necessity or is customary for such jobs in the United States. The NOF contained specific instructions on how to properly delete the requirement or establish a business necessity. (AF 32). Finally, in order to cure the deficiency under 20 C.F.R. § 656.24(b)(3), the CO instructed the Employer to submit an amendment to the ETA 750B,

accurately describing whether the Alien possesses the qualifications or if he does not, to amend the position requirements in the ETA 750A.

In rebuttal, the Employer submitted an "amendment to the ETA 750, Part A, describing changes to items 9, 14, and 15." Specifically, the Employer changed the position from "supervisor" to "landscape gardener." Additionally, the Employer deleted the foreign language requirement by asking the CO to remove the language as it appears in item #15 of the form. (AF 22). The Employer also submitted a draft advertisement reflecting the new requirement and job title changes. (AF 23). In an attempt to cure the deficiency under 20 C.F.R. § 656.3, the Employer submitted a copy of her "business license," federal self-employment tax forms (Schedule SE and Schedule C) for 1995, along with a written explanation of the 1996 yearly and monthly income.[3] (AF 24-27). Finally, the Employer submitted a copy of a handwritten list of residential customers and a copy of a page from a phonebook listing the business name and telephone number. (AF 28-29).

On April 30, 1997, the CO issued a Final Determination ("FD") denying labor certification because the Employer did not meet the requirements of 20 C.F.R. Part 656. (AF 17-18). The CO determined that the Employer did not establish that she has the ability to provide a permanent, full-time position. The CO noted that the tax returns supplied by the Employer, which show she grossed $17,000 in 1995, failed to demonstrate how she can afford to pay a full-time gardener a wage of $15,600 per year. The CO further noted that the Employer failed to furnish a landscape contractor's license; the submitted business license, according to the CO, was not requested, and is dated two years after the Employer filed its petition. In short, the evidence submitted did not establish that the Employer could provide a full-time position.

The FD further stated that the position appears "created for the alien." The presence of "overly restrictive requirements and a question about the bona-fides of the

[3] The Employer explained that, at the time, her 1996 taxes were not complete. However, her business "tripled" from the previous year. According to the Employer, she earned $4,455.00 per month and $53,460.00 for the year in 1996.

petition," coupled with the Employer's failure to substantiate the alleged "sudden growth" of the business, led the CO to conclude that the Employer created the position for the Alien.

By letter dated May 6, 1997, the Employer filed a "Request to Certifying Officer for Reconsideration of Final Determination and/or Forward to BALCA for Review of Final Determination." (AF 11-15). By letter dated June 19, 1997, the CO denied the Employer's request for reconsideration, stating that "motions for reconsiderations [sic] will be entertained only with respect to issues which could not have been addressed in the rebuttal." The matter was docketed in this Office on June 27, 2003; the CO failed to explain the delay in forwarding the AF to this Office.

The Employer argues that the CO failed to provide sufficient reason for the denial of certification. Specifically, the Employer asserts that the CO is obligated to cite to an authoritative source upon which the decision to deny certification was based. The Employer further argued that it provided a "business license," as the CO requested in the NOF.[4] The Employer insisted that she could afford to pay a full-time gardener because she could still support herself with her husband's income. Finally, the Employer accused the CO of deliberately trying to "confuse" the Employer, and of ignoring proffered evidence.

## DISCUSSION

Initially, the Employer contends that the NOF and FD failed to include citations to authoritative sources, such as regulation subsections and BALCA decisions, upon which the CO's denial was based, and that the CO failed to "enunciate" the reasons for denial. (AF 11).

[4] In the FD, the CO stated that the Employer failed to furnish a "landscape contractor's license" on rebuttal, and that the CO did not request a "business license" as submitted by the Employer. However, the Employer maintains that it supplied the CO with exactly what she requested (i.e. a "business license") and the Employer is not required under California law to have a "contractor's license." Along with its letter requesting reconsideration, the Employer submitted copies of her last three business licenses and her 1996 tax returns. (AF 7).

Upon review of the AF, it is evident that the NOF satisfies the CO's obligation to provide the reasoning for denying certification. It is incumbent upon the CO to identify which sections or subsections of the regulations allegedly have been violated and state with specificity how the employer violated that section or subsection. *Flemach, Inc.,* 1988-INA-62 (Feb. 21, 1989)(*en banc*). The NOF clearly sets forth the specific subsection allegedly violated. Following each subsection listed, the NOF contains a detailed "finding" explaining how that subsection was violated. Finally, under each "finding," the CO provided with great detail the "corrective action" necessary to rebut the finding. (AF 31-33). In no way is the NOF insufficient under the regulations. Despite the Employer's contention, the regulations do not require a CO to cite to any specific BALCA decision as support for a denial. Instead, the regulations provide that an NOF shall "[s]tate the specific bases on which the decision to issue the *Notice of Findings* was made." 20 C.F.R. § 656.25(c)(2).

The explanation provided in the FD also meets the standards set forth in the regulations. Twenty C.F.R. § 656.25(g)(2) provides that if certification is denied, the FD shall "state the reasons for the determination." 20 C.F.R. § 656.25(g)(2)(ii). Here, the CO stated that the "[Employer] remain[s] in violation of the regulations at 20 CFR 656." (AF 18). Although the CO did not specifically identify the sections or subsections by number upon which she based her decision to deny certification, she did provide a means of identifying the regulation provisions sufficient to place the Board and the Employer on notice of which violations were the bases for denial. Instead of listing the specific provisions within the regulations in the FD, as she did in the NOF, the CO simply referred to the headings and sub-headings listed in the original NOF that correspond to the specific section or subsection of the regulations.

NOFs are required to contain specific statements of alleged violations to enable and encourage the employer to file clear responses in rebuttal. Similarly, precise statements in an FD are vital for the Board and the employer to understand the specific violation being alleged. Despite the fact that the FD does not technically cite to the

specific section number, the CO's method of identifying the violated regulations adequately places both the Board and the employer on notice of the grounds for denial. Indeed, a technical error may not invalidate an FD, unless the employer has been harmed by the error. *JLM Industries, Inc.*, 1988-INA-80 (Sept. 30, 1988). Here, the FD reasonably identifies the alleged violations, and the Employer suffered no harm because of the CO's failure to cite to BALCA decisions or section numbers of the regulations. Thus, we cannot hold that the CO's denial of certification was in error for failure to adequately enunciate the reasons for denial or identify the regulations as the Employer contends.

The Employer next contends that the CO erred when she denied certification for failure to establish the existence of a business or job opening. Specifically, the Employer maintains that she followed the CO's "corrective action" requests exactly as instructed in the NOF.

In the NOF, the CO identified the Employer's violation of 20 C.F.R. § 656.3 and found that "there is some question whether [Employer] [has] a current job opening, operate[s] an on-going business, and/or can provide permanent, full-time employment." (AF 31). In order to cure the deficiency, the CO requested rebuttal documentation establishing an ability to provide full-time employment. Specifically, the CO directed the Employer to submit "a copy of [Employer's] business license," and "State and federal business income and business tax returns." (AF 31). In the findings, the CO expressed her concerns that the Employer had not paid employer taxes for employees in previous years, the Employer runs her business out of a single-family dwelling, and the Employer has no landscape contractor's license.

The Employer now argues that by submitting a copy of a "certificate of payment of business tax" (which the Employer refers to as a "business license"), and a copy of her 1995 tax return, she followed the CO's instructions, and her application should not have been denied. (AF 24-27). Instead, the Employer asserts that the CO should have issued a "Supplemental NOF" allowing her another opportunity to rebut the violations. We

disagree. While an application may be remanded for clarification where a CO provided confusing or conflicting grounds for denial, such action is not appropriate here, where the Employer's application was properly denied on other grounds. *See, e.g., Western Yarns, Inc*., 1989-INA-60 (Feb. 23, 1990). Even assuming that the CO's request for a "business license" and subsequent denial for failure to provide a "contractor's license" may have been confusing, the FD contained other valid grounds upon which a proper denial was based.

In the FD, the CO found that the Employer did not establish an ability to provide permanent employment for two reasons: first, the Employer's 1995 tax returns show that the Employer cannot afford to employ a gardener full-time and second, the Employer failed to provide a contractor's license on rebuttal. (AF 18). The focus of the Employer's argument is that because the CO simply asked for a "business license" in the NOF,[5] the CO cannot now deny certification for failure to provide a "contractor's license," something not specifically requested in the NOF. The Employer emphasizes that she is not a landscape contractor as the request implies, but rather a gardener who is not required to have a contractor's license in order to operate. Nevertheless, the CO clearly explained that the Employer did not establish that she has the ability to provide a permanent, full-time position based on the tax returns submitted. Thus, despite any confusion that may have existed regarding the request for a "business license," the fact remains that the tax returns submitted by the Employer failed to establish that she could afford to employ a full-time gardener.

Furthermore, the FD explained that certification was denied because the "position [was] created for the alien." The Employer provided no documentation establishing that her business experienced a "sudden growth" to justify the need for a full-time gardener, or otherwise justified creating the position for the Alien; she now simply asserts that she "grossed three times" in 1996 what she earned in 1995. (AF 15). In support of her assertion, the Employer enclosed a copy of her 1996 tax returns along with her request

[5] Under the sub-heading "Corrective Action," the NOF states, "[i]nclude with this a copy of your business license (a Seller's Permit does not fulfill this requirement), State and federal business income and business tax returns." (AF 31).

for administrative-judicial review. However, evidence first submitted with the request for review cannot be considered by the Board. *See e.g. Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *Kelper International Corp*., 1990-INA-191 (May 20, 1991); *Kogan & Moore Architects, Inc*., 1990-INA-466 (May 10, 1991); *White Harvest Mission*, 1990-INA-195 (Apr. 19, 1991). Twenty C.F.R. § 656.27(c) provides that the Board "shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made, the request for review, and any Statements of Position or legal briefs submitted." Consequently, because the CO's determination was not based on the new evidence, we cannot now consider that evidence on review.

Based on the foregoing, we hold that the CO properly denied labor certification based on the Employer's failure to establish that she could provide permanent, full-time employment and failure to rebut the finding that the position was created for the Alien.

## ORDER

The CO's denial of labor certification in this matter 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.