U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Issue Date: 30 November 2004

BALCA Case No.: 2003-INA-243
ETA Case No.: P2001-CA-09510156

In the Matter of:

FUTURE CONSTRUCTION,
Employer,

on behalf of

ROBERTO GARCIA,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Moza Yontov
Van Nuys, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification filed on behalf of Roberto Garcia ("the Alien") by Future Construction ("the Employer") pursuant to § 212(a)(14) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 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 and the Alien 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.

STATEMENT OF THE CASE

On July 1, 1998, the Employer through its owner, Mr. Jon McKee, filed an application for alien employment certification on behalf of the Alien for the position of drywall applicator. (AF 25-28).

By letter dated August 9, 1999, the Manager of the Alien Labor Certification Office of the EDD issued an Assessment Notice in which the Employer was informed of deficiencies in the ETA 750A and 750B. Among the noted deficiencies, the Employer was informed that the $11.00 hourly wage offered for the advertised position was below the prevailing wage paid to workers similarly employed in the area. The Manager informed the Employer that the prevailing wage in the area was $19.00 per hour. The Employer was also informed that the Alien's address was incorrect. (AF 53).

On November 20, 2002, after reviewing the application, the CO issued a Notice of Findings ("NOF") advising the Employer of his intent to deny the application. (AF 15-17, 21-23). The CO noted that the Employer's application contained unlawful terms and conditions of employment. In particular, the Employer's California Employer Tax Identification Number ("CA TIN") was inactive, thereby making it invalid. (AF 22). To remedy this deficiency, the CO required the Employer to submit a valid CA TIN and evidence that he has employees for whom he is reporting wages in connection with this account. The CO also advised the Employer that correspondence amending the ETA 750A to reflect a change to the prevailing wage rate and providing the Alien's address was unsigned and had to be re-submitted.

The Employer submitted a rebuttal to the NOF by letter dated December 6, 2002. In response to the NOF, the Employer informed the CO that since the termination of his

corporation over ten years ago, he has ceased to use a tax identification number; instead, the Employer files taxes under his social security number. (AF 19).

The CO issued a Supplemental Notice of Findings ("SNOF") on January 29, 2003, concluding that there is no bona fide job opportunity. The CO pointed out that a CA TIN is needed in order to report employment taxes for employees. The CO also pointed out that because the Employer had not used a CA TIN for approximately ten years, it appeared as if the Employer had no employees. The CO requested that the Employer submit proof that he has employees and that he had regularly reported and paid both California and federal employment taxes on the wages of these employees. (AF 16).

By letter dated February 26, 2003, the Employer responded to the SNOF. (AF 11-13). The Employer explained that he downsized his business but still hires and supervises individuals to work for him. The Employer further explained that in the construction trade, it was common knowledge that the jobs are filled mostly by undocumented aliens.

The CO issued a Final Determination ("FD") denying certification on May 15, 2003, as a result of the Employer failing to document that a bona fide job opportunity exists, contrary to 20 C.F.R. § 656.20(c)(8). (AF 3-5). The CO noted that "employment" as termed in 20 C.F.R. § 656.3 means permanent full-time work by an employee for an employer other than oneself. The CO stated that the Employer admitted that he retained the services of independent contractors.

On June 6, 2003, the Employer submitted a request for BALCA review. (AF 1-2). In his brief, the Employer indicated that he has the financial ability to hire workers and the job offer for a drywall applicator is legitimate and is open to qualified U.S. workers or legal resident aliens.

DISCUSSION

Under 20 C.F.R. § 656.20 (c)(8), the employer must attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." *Pasadena Typewriter and Adding Machine Co., Inc. v. U. S. Dept. of Labor*, No. CV 83-5516-AABT, (C.D. CA 1987). This provision infuses the requirement of a *bona fide* job opportunity and places the burden on the employer to provide clear evidence that a valid employment relationship exists, that a *bona fide* job opportunity is available to domestic workers, and that the employer has, in good faith, sought to fill the position with a U.S. worker. *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*); *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*).

In the instant case, the CO found the Employer's evidence unconvincing with respect to the bona fide nature of the job opportunity. Specifically, the CO questioned whether the Employer had a *bona fide* offer of permanent full-time employment. The CO concluded that the Employer has used the services of independent contractors for the offered position and that the offered position is for an independent contractor, thus making it inappropriate for labor certification. The CO also questioned whether the Employer's practice of using Form 1099s to pay undocumented aliens wages violated his obligations to report these wages and pay the required Federal and State employment taxes.

We agree with the CO's findings that the Employer has failed to establish that there is a *bona fide* job opportunity available. It is also unclear whether the offered position meets the requirements of "employment" under 20 C.F.R. § 656.3. In the NOF, the CO commented that the Employer's failure to use a tax ID number for approximately a decade gave the impression that the Employer had no employees and thus, no *bona fide* job opportunity existed. In his rebuttal, the Employer responded by saying that the job offer is legitimate and the opportunity was given to any qualified U.S. worker or legal resident alien. The Employer also says that it is common knowledge that in the construction trade the jobs are mostly filled by undocumented aliens. The Employer

further states that he has had quite a few undocumented aliens respond to the help-wanted sign advertising the offered position and the day an alien working for him can show him either an authorization for employment or alien resident card, he would be able to hire them as permanent employees. The Employer stated that he would activate both the Federal and State tax identification numbers.

This response leads the Board to conclude that it is the Employer's practice to employ undocumented aliens for temporary employment projects. The Employer has failed to demonstrate that the offered position is a permanent one pursuant to 20 C.F.R. § 656.3, thus suggesting that the job opportunity is not a *bona fide* job opportunity pursuant to 20 C.F.R § 656.20(c)(8). As such, we find that the Employer has failed to establish that a *bona fide* job opportunity exists.

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.