U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 05 November 2004

BALCA Case No.: 2003-INA-284
ETA Case No.: P2002-MD-03383256

In the Matter of:

GOOD EARTH GARDEN CENTER,
Employer,

on behalf of

SEGUNDO FIDENCIO BENAVIDES,
Alien.

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Appearances: Michael B. Schwartz, Esquire
Rockville, Maryland
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. 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, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 26, 2001, the Employer filed an application for labor certification on behalf of the Alien to fill the full-time position of Landscape Gardener. (AF 41). Minimum requirements for the position were two years of experience in the job offered. The job duties included landscaping and maintaining trees and plants for commercial and residential properties, as well as "maintain[ing] flowers and plants in greenhouse and build[ing] boxes and other storage devices" during colder months.

On February 3, 2003, the CO issued a Notice of Findings ("NOF") with an intent to deny certification on the basis that the position was not permanent and full-time, as required by 20 C.F.R. § 656.3. (AF 36). The CO noted that landscape gardeners generally do not work during all seasons of the year, and instructed the Employer to provide additional information in order to determine whether the position provides work "on a full-time year round basis." Specifically, the Employer was requested to provide detailed weekly payroll records for all workers employed in this or similar positions for the three prior years.

The Employer responded with a rebuttal to the NOF on February 26, 2003. The Employer claimed that the offered position is "a full-time permanent position" providing work "on a non-seasonal permanent basis" and that the Employer "provides landscape services throughout the year." (AF 7). However, the Employer also states that a "down period of between four to six weeks per year is 'non-workable' and it is during this period that vacation periods are taken." A letter submitted by the manager of the landscape division likewise stated that the position is permanent and full-time, but acknowledged that "due to weather conditions, there are generally six to eight weeks of winter during which the ground is completely frozen, preventing workers from carrying out daily tasks." (AF 9). Finally, the payroll records submitted by the Employer show that the

three employees whose records were provided for 2001 received no pay for the month of January and the first half of February 2001. (AF 11, 14, 19). Similarly, the payroll records show that the four employees who were on the payroll for the entire first quarter of 2002 worked either part-time or not at all during the months of January and February 2002. (AF 12, 15, 22, 23).

The CO issued a Final Determination ("FD") denying labor certification on May 15, 2003. (AF 5-6). The CO found that the payroll records submitted by the Employer did not establish that the offered position was a full-time, permanent position. (AF 6). The CO also relied on the Employer's statements regarding "down time" and "non-workable time" due to poor weather conditions in January and February to make his determination.

On June 4, 2003, the Employer filed a request for review of the denial of certification. (AF 1-4). In the request for review, the Employer argued that the CO had erred in concluding that the offered position is not "permanent full-time work" as defined in the regulations. (AF 1). In a position statement filed by the Employer dated September 22, 2003, the Employer reiterated that the offered position is not just seasonal yard care work, but is "a 'landscape gardener' position requiring year-round service to the applicant's customers."

DISCUSSION

This matter is governed by *Vito Volpe*, 1991-INA-300 (Sept. 29, 1994) (*en banc*). In *Vito Volpe*, the Board determined that the landscaping gardener positions in question were "for work which is performed on a seasonal basis" as they offered work "only for a maximum of 10 months per year." Consequently, such positions "cannot be considered permanent employment," and should be considered for temporary labor certifications under 20 C.F.R. § 655 rather than for permanent labor certifications under 20 C.F.R. § 656. More recently, the Board explicitly reaffirmed *Vito Volpe* while holding that a landscape gardener position for which no work could be done during two and one-half

months in mid-winter was not a permanent position, despite the employer's offer to spread salary payments evenly over twelve months. *Crawford & Sons*, 2001-INA-121 (Jan. 9, 2004) (*en banc*).

In this case, the Employer has not demonstrated that job duties can be performed year-round. Rather, the statements and payroll records submitted by the Employer establish that, like the positions considered in *Vito Volpe* and *Crawford*, the position offered is not a permanent full-time position. As noted earlier, the Employer stated in its NOF that four to six weeks per year were "non-workable," and an accompanying letter written by a manager employed by the Employer stated that workers are prevented from carrying out their daily tasks during six to eight weeks during the winter. These statements were confirmed by the payroll records submitted by the Employer. We therefore agree with the CO's determination that the offered position does not provide permanent full-time work.

Based on the foregoing, we determine that the 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.