



Issue Date: 07 March 2005

BALCA Case No.: 2004-INA-7
ETA Case No.: P2001-CA-09509870/JS

In the Matter of:

PROFESSIONAL STAFFING SERVICES OF AMERICA,
Employer,

on behalf of

ADEL GEORGI MEKHAEIL,
Alien.

Appearance: Alexander S. Vista, CEO
For the Employer, *Pro Se*

Certifying Officer: Martin Rios
San Francisco, California

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

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by a professional staffing company for the position of Accountant. (AF 64-65).² The following 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 Appeal File.

¹ Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² "AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

On May 4, 2000, the Employer, Professional Staffing Services of America, filed an application for alien employment certification on behalf of the Alien, Adel Mekhaeil, to fill the position of Accountant. The job to be performed was described as follows:

Compiles and analyzes financial information to prepare entries to general ledger accounts. Documenting business transactions. Analyzes financial information detailing assets, liabilities and capital. Prepares balance sheets, profit and loss statements, and other reports to summarize current and projected company financial position using calculation and computer.

Minimum requirements for the position were listed as a Bachelor's degree in Accounting and two years of experience in the job offered. Hours of employment were listed as a 40-hour workweek from 8:00 to 5:00. The location of the job to be performed was listed as at the Employer's address in Riverside, California. (AF 64-65).

The Employer received five applicant referrals in response to its recruitment efforts. (AF 97).³

A Notice of Findings (NOF) was issued by the Certifying Officer on November 1, 2002, questioning the validity of the job opportunity. (AF 57-62). The CO also questioned whether the Employer lawfully rejected a U.S. worker as uninterested on the basis of the job location and salary, given that no other worksite but Riverside was ever disclosed in the application or advertisements. Citing information provided by the local job service office, the Employer was asked to document the validity of its business and also that of a full-time, permanent position as an accountant, given that the Employer had

³ Although the record reflects that the Employer received five applicant referrals in response to its recruitment efforts, there is no recruitment report in the record and the Notice of Findings only mentions one referral. (AF 72-97, 63).

advised that it refers its workers out on contract to work elsewhere. Specifically, as pertinent herein, the Employer was instructed to provide documentation showing its employment of an accountant(s) on a continuous and full-time basis and/or contract(s) sufficient to establish that the Employer is offering a full-time, permanent position for an accountant as distinct from a temporary assignment or assignments.

In Rebuttal, the Employer asserted that its failure to disclose the other work locations was “harmless error”. (AF 19-56). In response to the permanent, full-time position issue, the Employer submitted two “STAFFING AGREEMENTS” between Professional Staffing Services and International Star Textiles and Colleen’s Care Centers, wherein “upon request by client” the Employer agrees to “refer Healthcare Professionals, Accountants, Analysts, Computer Programmers, Engineers, Architects, Information Technologies, Dentists, Social Workers and all other professionals . . .” (AF 48-51). In addition, the Employer submitted payroll records showing varying wages for a number of employees from September to December 2002 and identified its two current accountants and their payroll records for the Employer’s most recent payroll summary. (AF 20, 29-34, 45-47).

A Final Determination denying labor certification was issued by the CO on December 31, 2002, based upon a finding that the Employer failed to document lawful rejection of a U.S. worker, and had failed to adequately document that there is a permanent, full-time job offer for an accountant at a location or locations in the United States. (AF 10-12).

The Employer filed a Request for Review dated January 27, 2003 and the matter was referred to and docketed in this Office on November 18, 2003. (AF 1-9).

DISCUSSION

In the labor certification process, pursuant to 20 C.F.R. § 656.3 Definitions, “Employment” means permanent full-time work by an employee for an employer other

than oneself. The employer bears the burden of proving that a position is permanent and full-time. If the employer's own evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full-time, the employer must provide it. *Rajwinder Kaur Mann*, 1995-INA-328 (Feb. 6, 1997); *Collectors International, Ltd.*, 1989-INA-133 (Dec. 14, 1989). The burden of proof in the labor certification process is on the Employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. § 656.2(b).

The Employer, a staffing agency, seeks labor certification for the position of an Accountant to be sent out to various job locations on a contract basis to perform the duties of an accountant. Because its workers are referred out on contract, the Employer was specifically instructed to show that it has contract(s) sufficient to constitute a full-time, permanent position for an accountant as distinct from a temporary assignment or assignments. In response, as was noted by the CO, the Employer submitted staffing agreements which "express only a general agreement to use the Employer's personnel when wanted. Neither of the staffing agreements stipulate any specific number of employees to be referred, or length of employment for the worker or workers referred, or number of hours that would be worked when employed, or that there would be positions specifically for accountants at any given time for any specified duration of time". The Employer provided no documentation to show that there is a permanent, full-time job offer for an accountant at a location or locations in the United States. While the Employer submitted a copy of a contract purportedly "to provide the service of a full time Accountant (40 hrs/wk) to Client" with its Request for Review, the regulations preclude consideration of evidence which was not "within the record upon which the denial of labor certification was based". 20 C.F.R. § 656.26(b)(4). *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989)(*en banc*). "Under the regulatory scheme of 20 C.F.R. Part 656, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Carlos Uy III*, 1997-INA-304 (Mar. 3,

1999)(*en banc*). The Employer having failed to do so, we conclude that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

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 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, NW, 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 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.