Date: September 18, 1997

Case No.: 95-INA-453

In the Matter of:

BADSEY DESIGN OF CALIFORNIA, INC.,
Employer

On Behalf Of:

IRENE OLIVE COMMINS,
Alien

Appearance: Thomas H. Bohrer, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), 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.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

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 reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 26, 1993, Badsey Design of California, Inc., Employer, filed an application for alien employment certification to enable Irene Olive Commins, Alien, to fill the position of Secretary. The duties of the job were described as follows:

> Schedules appointments, gives information to callers, takes dictation, & otherwise relieves the Managing Director of clerical and minor administrative work. Reads & routes incoming mail; takes dictation in shorthand or by machine & transcribes notes on typewriter or transcribes from voice recordings. Composes & types routine correspondence. Answers telephone; schedules appointments; greets visitors; locates files; records minutes of staff meetings; keeps inventory records.

The Employer required that applicants have two years of experience in the job offered (AF 30).

The CO issued a Notice of Findings (NOF) proposing to deny certification on August 12, 1994 (AF 25-28). The CO stated that it appears that the Employer is operating in violation of state law by its failure to report employees to the State Employment Development Insurance Division (EDD) and its failure to submit reports evidencing compliance therewith. 20 C.F.R. § 656.20(c)(7). The Employer was instructed to submit a copy of its DE3 for the fourth quarter of 1993 and the first and second quarters of 1994, and a copy of its DE1 showing its state tax account and/or ID number.

The CO also stated that the Employer had failed to submit a copy of the posted job notice and the results of the posting. 20 C.F.R. § 656.21(g). The Employer was instructed to submit a copy of the notice and the results.

The Employer, by Counsel, submitted rebuttal on September 9, 1994 (AF 15-24). Counsel stated that the posted notice was submitted to EDD and that a copy was enclosed (AF 19). He stated that there were no referrals from EDD as a result of the notice. Counsel also stated that he incorrectly advised EDD that the Employer has three employees; that the three workers are independent contractors employed on a contractual basis; therefore, the Employer has no employees and no reason to file DE3 forms with the state.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Counsel further stated that whether or not the Employer has a state tax ID number is irrelevant to the labor certification application; that possession of such a number has nothing to do with the terms and conditions of the job opportunity; that many new employers petition for labor certification without having a tax number, including almost all petitions for domestic workers.

The CO issued a Final Determination denying certification on October 31, 1994 (AF 13-14). The CO stated that the Employer had failed to meet its burden of documenting compliance with 20 C.F.R. § 656.20(c)(7). The CO further stated that according to the rebuttal, three independent contractors are employed on a contractual basis; if that is so, what makes the petitioned position different from the Employer's past and current business practice of using only contracted personnel? The CO stated that breaking the pattern seemed unlikely.

The Employer, by Counsel, requested review of the denial. The Employer's brief in support of its appeal was filed on July 14, 1995.

Discussion

The issue is whether certification was properly denied for failure of the Employer to prove compliance with 20 C.F.R. § 656.20(c)(7), which provides that "the employer's job opportunity's terms, conditions and occupational environment are not contrary to Federal, State or local law."

The CO appears to have determined that if the Employer uses three people who are independent contractors to operate its business, it is not likely that the Employer would break this pattern and hire the Alien as an employee. The Employer contends that it has no employees and, therefore, is not required to file employee insurance documents, and that tax ID numbers are irrelevant to the certification process. The Employer stated that ". . . it makes no difference if the employer has violated some general law or has violated the law in respect to some other job. Absent a showing that the alleged violation in question directly affects the terms and conditions of the specific job offered to the alien said alleged violation is irrelevant to labor certification." (Employer's appeal brief, p. 3). The Employer refused to provide a state tax I.D. number.

The CO does not have to prove that the Employer's business is being operated in violation of state law, the Employer has the burden of proof in this proceeding and, when questioned, must prove that its business is operated in compliance with the law. The Employer's tax ID number is relevant in that it would be evidence of a lawfully operated business. This Board has held that an employer must provide relevant information requested by a CO. *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*); *Kogan & Moore Architects, Inc.*, 90-INA-466 (May 10, 1991).

Moreover, we do not agree with the Employer's contention that because no employment relationship currently exists between the Employer and the Alien, there are no state obligations arising with respect to the offered job (Employer's appeal brief, p. 4). The Employer seeks to hire the Alien and bring her into the company. Whether the Alien is employed at the time certification is sought is irrelevant to the application of the regulations which requires, among

other things, that the occupational environment not be contrary to law. 20 C.F.R. § 656.20(c)(7). The term "occupational environment" encompasses more than the worker's immediate physical surroundings. It includes the lawful operation of the company offering the job. We conclude that certification was properly denied.

ORDER

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

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF 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 decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review 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 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.