

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 13Jun2002

BALCA Case No. 2001-INA-121
ETA Case No. P2000-WA-10238303

In the Matter of:

CRAWFORD & SONS,
Employer,

on behalf of

RIGOBERTO MEJIA-NARANJO,
Alien.

Appearance: Franklin S. Abrams, Esq.
New York, New York
For Employer

Certifying Officer: Larry Heasty
Seattle, Washington

Before: Chapman, Holmes and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Landscape Gardner.¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

¹ Permanent 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 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 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 January 14, 1998, Employer, Crawford & Sons, filed an application for labor certification to enable the Alien, Rigoberto Mejia-Narranjo, to fill the position of Landscape Gardner. (AF 42). The requirements for the position were two years of experience in the job offered or two years in the related occupation of landscape laborer. The rate of pay was listed as \$7.50 per hour.²

The CO issued a Notice of Findings (“NOF”) on February 7, 2001, proposing to deny certification. (AF 9). The CO noted that according to the ETA 750, Employer required two years in the job offered and two years in a related occupation, while ETA 750 Part B indicated that the Alien’s total work experience in the occupation of Landscape Gardner was gained in the employ of Employer. The CO advised Employer that the application for alien labor certification could not include as a job requirement experience gained by the Alien in that occupation while working for Employer.

The CO also noted that the Alien did not have the required two years of experience in the job offered and two years of related experience as a landscape gardener. Therefore, the Alien did not meet the experience requirements as listed on ETA Form 750 A. Since, when initially hired, the Alien did not meet the minimum requirements, Employer could not now require terms and conditions of employment which were less favorable to U.S. workers than those offered the Alien. The CO found that Employer needed to establish that the jobs of Landscape Laborer and Landscape Gardner were dissimilar in nature and to provide proof that the Alien had two years of experience in the job offered and two years of related experience as a Landscape Gardner outside the employ of Employer.

Citing 20 C.F.R. § 656.20(c), the CO pointed out that the job offer needed to clearly show that the wage offered equaled or exceeded the prevailing wage determination pursuant to Section 656.40. In this respect, the CO found that the Alien’s wage history showed a wage considerably higher than the wage offered on ETA 750A, item 12(a). Employer needed to increase the wage offer and retest the labor market. Finally, the CO found that Employer’s employees did not work from December 1, until February 15th, and that no worker worked a full quarter in either the fourth or first quarter of the year. Therefore, this was not year round permanent employment, as there were about 2 ½ months of no work at all. Employer was advised it needed to supply contrary documentation that the position was permanent in nature.

Employer submitted rebuttal on March 7, 2001. (AF 7). Therein, Employer stated that the positions of Landscape Gardener and Landscape Laborer were not the same, as the former

² By letter dated February 20, 1998, counsel for Employer advised the State of Washington Employment Security Division (“ESD”) that it was willing to increase the rate of pay to \$8.07 per hour. (AF 39). On September 27, 2000, Employer advised that it was willing to pay \$8.50 per hour. (AF 18).

supervised other workers and planned and executed operations. The latter did none of this, as he was a considerably lower-level worker. The Alien's experience with Employer was as a landscape laborer, not a landscape gardener. Employer contended that the Alien's experience in Mexico as a farm worker consisted of the same type of work. Employer stated that it was willing to amend the wage offer to \$8.50 per hour and to re-advertise. It requested, however, that the other issues raised in the NOF be decided first, as this was preferable to going through the expense of new advertising if the case was going to be denied on other grounds.

With regard to the issue of whether the work was permanent full-time employment, Employer stated that all parties "agreed that this is not year-round employment, and that there is two and a half months without work." Employer argued that the Alien had worked for it for seven years now, which "shows that this is a permanent job." It was Employer's argument that the Alien was paid higher than the minimum required rate precisely because he was only paid for nine and a half months per year. Employer argued that if it could be informed of the minimum required salary, it could spread it out over the full year so that the Alien would be paid for a full year at the minimum acceptable rate.

The CO issued a Final Determination ("FD") on March 21, 2001, denying certification. (AF 2). The CO relied on *Vito Volpe Landscaping, et al.*, 91-INA-300, *et seq.*, (Sept. 29, 1994)(*en banc*), which held that employment of less than ten months duration was not permanent employment. The CO also found that (1) ETA Form 750 A required two years of experience in the job offered and two years of experience in the related occupation of Landscape Laborer, and that Employer failed to establish that the Alien met the minimum requirements when initially hired.

By letter dated April 17, 2001, Employer requested a review of the denial of labor certification by the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). (AF 1). Therein, counsel for Employer contended that (1) the job requirement was listed and meant as two years in the job offered or two years as a landscape laborer; (2) the CO erroneously asserted that the position of Landscape Laborer was very similar to that of Landscape Gardener, which was an improper use of 20 C.F.R. §656.21(b)(5); (3) the CO refused to credit the Alien's experience as a farm laborer in Mexico as too dissimilar, while claiming that the work done for Employer was too similar; and (4) in Employer's opinion, *Vito Volpe Landscaping, et al.*, 91-INA-300, *et seq.*, (Sept. 29, 1994)(*en banc*) was improperly decided.

DISCUSSION

On appeal, Employer's counsel argues that the position of the dissent in *Vito Volpe Landscaping, et al.*, 91-INA-300, *et seq.*, (Sept. 29, 1994)(*en banc*) is the correct position, and that the job opportunity at issue should be considered permanent and full-time. Employer raises the argument that a landscaping gardener position is similar to that of a teacher who works a ten-month year.

Initially, it must be noted that Employer is correct in its argument that the experience

requirements were intended to be in the alternative, as the job advertisement clearly indicates. (AF 22). This error on the CO's part is harmless, however, given that labor certification must be denied on other grounds.

Employer has the burden of proving that a position is permanent and full-time. If an 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). Employer correctly cites the case of *Vito Volpe Landscaping* as controlling herein. However, it is not the position of the dissent which controls. In that case, a majority of the Board would not certify a landscaping position as permanent employment because the job duties could only be performed approximately ten months per year on account of climatic conditions. The four member majority found that the position fit the definition of "seasonal employment" as found under the temporary labor certification regulations in that it is "exclusively performed at certain seasons or periods of the year." Accordingly, despite the fact that the position was full-time and recurring, the job was not permanent. This holding was reiterated in *E & E Landscaping Co., Inc.*, 1994-INA-574 (Apr. 2, 1996), and in *Birch Hill Landscaping*, 1995-INA-129 (Jan. 2, 1997). In the latter case, the position of landscape gardener, which entailed employment for 42 weeks per year, was found to be "seasonal employment," governed by the temporary labor certification regulations since "it is exclusively performed at certain seasons or periods of the year." While the position was found to be full time and reoccurring, it was not permanent. The instant case is no different. Labor certification was properly denied, and the following Order shall issue.

ORDER

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

For the panel:

A
JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for 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 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten 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.