

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue date: 22Apr2002**

CASE NO: 2001-INA-00063

*In the Matter of*

Lawson Philpott Hill  
Employer

*on behalf of*  
Adolfo Sernadas  
Alien

Appearances: International Immigrant's Foundation<sup>1</sup>  
For Employer and Alien

Certifying Officer: Delores Dehaan, Region II

Before: Huddleston, Jarvis, and Vittone  
Administrative Law Judges

DONALD B. JARVIS  
Administrative Law Judges

DECISION AND ORDER

This case arises from Lawson Philpott-Hill's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment 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.

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<sup>1</sup> The International Immigrant's Foundation transmitted the Form ETA-750 on March 10, 1997. On May 27, 1998, Alfonso F. Ramos, Esq. filed appearances on behalf of employer and the Alien. There is no withdrawal of these appearances in the record. On August 11, 2000, International Immigrant's Foundation filed a request for an extension of time to file a rebuttal to the NOF. International Immigrant's Foundation filed the request for review.

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 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 the 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 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 the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

#### Statement of the Case

On March 10, 1997, the Employer filed a Form ETA-750 Application for Alien Employment Certification with the New York Department of Labor (NYDOL) on behalf of the Alien, Adolfo Sernadas. (AF 2-5). The job opportunity was listed as Foreman.

NYDOL referred the resumes of 12 applicants to Employer. On September 1, 1998, Employer filed a Results of Recruitment Report which indicated that none of the 12 applicants was hired. (AF 34-35). The file was forwarded to the CO.

On July 6, 2000, the CO issued a Notice of Findings ("NOF") in which she proposed to deny the application for two reasons. First, the CO found that two of the twelve U.S. applicants were not rejected solely for lawful job-related reasons. Second, the CO questioned whether Employer had sufficient funds available to guarantee the salary offered the Alien. (AF 41-43) On the question of sufficient funds, the NOF stated:

"To rebut, employer must submit evidence which clearly establishes his ability to guarantee the salary offered the alien. Documentation must include, but is not limited to copies of business tax returns for the years 1998 & 1999, copies of contracts for construction work performed by employer's company for the one year period immediately prior to the date of this Notice and any other evidence or information that will demonstrate compliance with above cited regulation." (AF 41).

On August 11, 2000, Employer requested an extension of time in which to file his rebuttal, which was granted. (AF 45). Employer filed a rebuttal on September 15, 2000. The rebuttal addressed the issue of the two rejected U.S. applicants but did not discuss or present any information on the question of sufficient funds. (AF 47-48).

On October 12, 2000, the CO issued a Final Determination ("FD") which denied the application. The CO found that the Employer had adequately documented that the two U.S. applicants were rejected solely for lawful job-related reasons but that Employer had failed to document that he has sufficient funds available to guarantee the salary of the Alien. (AF 50-51).

On November 20, 2000, Employer sent a misaddressed Request for Review to NYDOL, which was forwarded and received by the Board on February 14, 2001 (AF97). The request for Review had attached to it some work orders, contracts and a perfunctory one page balance sheet. On March 8, 2001, the Board entered a Notice of docketing and Order Requiring Statement of Position or Legal Brief. No brief or statement has been filed.

#### Discussion

We note that the Request for Review Contains material not previously submitted to the CO. Since it was not part of the record upon which the denial of certification was based it cannot be considered by the Board. See, 656.26(b)(4), 656.27(c); 24 Hour Fuel Corp, 90-INA-589 (Aug. 31, 1992) Evidence first submitted with a Request for Review will not be considered. La Prairie Mining, Ltd., 95-INA-11 (April 4, 1997).

As indicated, Employer's rebuttal failed to provide the information requested by the CO in the NOF on the issue of whether Employer had sufficient funds to guarantee the salary of the Alien. It is well settled that an employer's failure to provide documentation reasonably requested by the CO will result in a denial of labor certification. Eli's Trims, Inc., 94-INA-404 (Jan. 25, 1996) and cases cited therein.

In the light of the foregoing, it is clear that the CO properly denied certification.

#### Order

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

For the Panel

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Donald B. Jarvis

Administrative Law Judge