

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 September 2003

BALCA Case No. 2002-INA 242
ETA Case No. P2000-CA-09499454/JS

In the Matter of:

CALIFORNIA ENVIRONMENTAL ENGINEERING

Employer,

on behalf of

MEGRDIJ AMIRKHANIAN

Alien.

Certifying Officer: Martin Rios
San Francisco, CA

Appearance: Vartkes Yeghiayan
For Employer

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

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Megrdivj Amirkhanian (“Alien”) filed by California Environmental Engineering (“Employer”) pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the “Act”) and Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). The Certifying Officer (“CO”) of the United States Department of Labor denied the application, and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based 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 of the parties.

On August 10, 1998, Employer filed an application for labor certification on behalf of the Alien for the position of Diesel Mechanic. (AF 38-39). The job duties included knowledge of engine installation and overhauling. Four years of experience in the job offered were required.

On February 27, 2002, the CO issued a Notice of Finding (NOF) in which he noted that Employer was a smog testing shop, and Employer was petitioning for a full time Diesel Mechanic. Because smog testing shops do not generally hire Diesel Mechanics to overhaul and install engines, the CO questioned if the job was being created for the Alien. Thus, Employer was advised to document its need for a full time Diesel Mechanic. The CO also noted that a car repair facility, named AMG USA INC, was located in the same premises as Employer. (AF 32-26). The CO expressly directed Employer to document whether the petitioning Employer, California Environmental Engineering, has been performing engine overhaul and installation, show that it is the petitioning Employer and not AMG USA Inc. that performs such work, and – if the petitioning Employer does not perform engine overhauling and installation – explain in detail what circumstances caused the need for a Diesel Mechanic.

In a rebuttal letter dated March 25, 2002, Employer stated in pertinent part:

California Environmental Engineering is an automotive emission [facility]- testing capabilities for passenger cars, trucks, motorcycles and stand-alone engines, etc. The company is a multi-faceted business. It does testing for the State of California, Air Resources Board, major manufacturers and the State of California. Employer had to either test the vehicles provided or provide the state with loaner vehicles from employer's fleet. Employer has employed numerous drivers over the past several years to facilitate the delivery of these vehicles to the participants and the pick up of their vehicles. Most of the layoffs and downsizing the company has experienced were [related] to these types of contracts and employer's need for fewer drivers as the contracts ended. The portion of employer's business that does independent testing on

both complete vehicles and stand-alone engines is actually growing, not downsizing. AMG USA INC. is also owned by the same employer George Gemayel. ...

(AF 10-12).

On April 30, 2002, the CO issued a Final Determination (FD) denying certification. (AF 3-5). The CO noted that the NOF questioned Employer's need for a Diesel Mechanic to install and overhaul engines and required Employer to indicate if it ever hired a Diesel Mechanic or to justify the creation of the position. The CO found that Employer's rebuttal did not address its need for a Diesel Mechanic. Employer limited itself to explaining that the owner of California Environmental Engineering, Employer, was the same owner of an auto repair shop, AMG USA INC, located in the same premises as the petitioner. However, as this was a different entity, and Employer failed to show that it had a need for a Diesel Mechanic, the CO found that Employer did not demonstrate that it had a job opening for a Diesel Mechanic that was truly open for a qualified US worker, in violation of 20 C.F.R. § 656.20(c)(8).

Employer filed a Request for Review dated May 21, 2002 which essentially repeats the arguments made in the rebuttal letter. (AF 1-2).

DISCUSSION

Section 656.20(c)(8) of the Department's labor certification regulations requires that the employer offer a *bona fide* job opportunity. *Bulk Farms v. Martin*, 963 F.2d 1286, 1288 (9th Cir. 1992); *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*). Whether a job opportunity is *bona fide* is gauged by a "totality of the circumstances" test. *Modular Container Systems, Inc.*, *supra*.

In the instant case, the CO questioned whether an emission testing facility has a *bona fide* job opening for a diesel mechanic whose job duties allegedly include overhaul and installation of engines. The CO asked Employer to explain whether the petitioning Employer is the facility that

needs a diesel mechanic or whether the employee would be working for another employer at the same location. If the petitioning Employer does purport to need a diesel mechanic, the CO directed Employer to provide detailed information on why an emissions testing facility needs a full-time diesel mechanic.

Employer's rebuttal is non-responsive to this issue. It explains that the same person owns both the petitioning Employer and the other business at the location, but does not explain for whom the employee would work nor why emissions testing would require engine overhaul or installation.

Because Employer did not answer the CO's reasonable questions about the *bona fides* of the job offered, we will affirm the denial of labor certification.

ORDER

The CO's denial of labor certification in this matter 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 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.