

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 July 2003

BALCA Case No. 2002-INA 120
ETA Case No. P1999-CA-09457362/LA

In the Matter of:

IDEAL EMPLOYEE MANAGMENT, INC.,
Employer,

on behalf of

SAUL FIERRO,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Felipe Insalata
For Employer

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

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Saul Fierro (“Alien”) filed by Ideal Employment Management, Inc. (“Employer”) pursuant to section 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 the 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.

STATEMENT OF THE CASE

On October 24, 1997, Employer filed an application for labor certification on behalf of the Alien for the position of Maintenance Repair, Building. (AF 61-62).

On August 14, 2001, the CO issued a Notice of Finding (NOF) indicating his intent to deny the application on the ground that it did not appear that a job opening existed in Employer's business. Consequently, there was no job to refer U.S. workers to, which was a violation of 20 C.F.R. § 656.20 (c)(8). The CO noted that based on the nature of Employer's business, providing Human Resources Management Services, it was questionable that the Employer had a need for a full time employee to maintain and repair buildings. As a remedy, the CO advised Employer to document that it had an on-going business that required the maintenance of buildings, plumbing systems, and electrical fixtures. In addition, the Employer should demonstrate that an unfilled job opening existed. (AF 57-59).

In its Rebuttal dated October 2, 2001, Employer stated that the Alien was simultaneously employed by Employer, a professional employer organization, and Williams Records Management. The Employer asserted that the Alien provides the building maintenance to a 300,000 square feet facility that Williams Records Management occupies. The Employer indicated that it was responsible for all the administrative issues, such as producing payroll checks, accounting for payroll taxes, workers' compensation and all related government reports. The Employer added that Williams Record Management is in charge of the other aspects of employment, such as establishing job duties, work schedules, dress codes and similar issues. The Employer attached a copy of the agreement between the Employer and Williams Records Management in support of its assertions.¹ Additionally, the Employer submitted copies of bills and receipts to demonstrate its need for a building repair and maintenance employee. (AF 9-56)

¹ The agreement between the Employer and Williams Record Management states that the Employer will handle all the payroll administration matters, including the payment of payroll from Employer's payroll account. Williams Records Management is in charge of the recruiting and hiring of new employees, but new employees must agree to become employees of both Employer and Williams Records Management. Additionally, Williams Records Management is in charge of the termination of the employees. However, if Williams Records Management fails to comply with its obligations under the agreement, the Employer has the right to terminate *all* the employees. The

On November 14, 2001, The CO issued a Final Determination (FD) denying certification. (AF 7-8). The CO noted that the Employer was advised in the NOF that if the Rebuttal was not signed by the Employer, the Rebuttal would be construed as non-responsive. The CO found that the Rebuttal did not satisfy 20 C.F.R. § 656.25(d)(1) because the Rebuttal was signed by a client of the Employer and not by the Employer. Consequently, the CO stated that he had no alternative but to find the Rebuttal to be non-responsive, and therefore was required to deny the labor certification for Employer's failure to rebut the NOF.

On December 7, 2001, Employer filed its Request for Review, detailing the relationship between the Employer and Williams Record Management. The Employer reasserted that it is responsible for all the administrative issues of employment, including the payment of the employees' salaries. Williams Records Management, on the other hand, is in charge of the operations aspects of the employment. The Employer added that the ETA 750 A was signed by Gerald Reynolds, former vice-president of both the Employer and Williams Record Management. Mr. Reynolds retired on September 7, 1999. Consequently, the Rebuttal was signed instead by Mr. Douglas Williams, who is the president of the Employer and also the president of Williams Records Management, and as such, has the authority to sign the Rebuttal. Since the Rebuttal was signed by the Employer and should have been construed as responsive, Employer requested reversal of the denial. (AF 1-3).

On April 3, 2002, Employer submitted a Brief in which it detailed the agreement between the Employer and Williams Record Management, again indicating Employer's responsibilities for the payroll administration and Williams Record Management's responsibilities for the administration of the day to day work routine. The Employer insisted that the individual who signed the labor certification application was no longer with the company, and consequently was no longer authorized to sign any documents on behalf of the company. Instead, the Rebuttal was signed by Mr. Douglas Williams, who is president of both the Employer and Williams Record Management. The Employer argued that since Mr. Williams was authorized to sign on behalf of

agreement between the two parties entitles the Employer to a fee for the human resources administration services and payroll salary expenses. The agreement can be terminated with a 30-day notice. (AF 21-28).

the Employer, the Rebuttal satisfied 20 C.F.R. § 656.25(d)(1). Additionally, the Employer cited *Environmental Maintenance Co.*, 2000-INA-72 (May 31, 2001) in support of its position that since the Employer's counsel also signed the Rebuttal, 20 C.F.R. § 656.25(d)(1) was also satisfied by the signature of the attorney. On those grounds, the Employer requested reversal of the denial.

DISCUSSION

The CO in the NOF found Employer's labor application deficient because the position of Maintenance Repairer, Building did not seem consistent with the nature of Employer's business. To cure the deficiency, the CO required the Employer to document that a position for a Maintenance Repairer, Building existed in its business. The Employer submitted its Rebuttal, but it was signed by an individual that did not appear to have authority to do so. Consequently, the CO rejected the Rebuttal as non-responsive, without addressing the Employer's rebuttal argument or the rebuttal evidence submitted. In the Request for Review, the Employer indicated that the person who signed the Rebuttal was the president of the Employer. In its brief, the Employer added that the Rebuttal was also signed by the attorney representing the Employer. Therefore, the Employer asserted, as the Employer and Employer's counsel signed the Rebuttal, the CO erred in finding the Rebuttal non-responsive.

Although the Employer submitted substantial documentation with its Rebuttal, the CO gives no indication in his Final Determination that he ever looked at this evidence. The Board has held that a CO is required to discuss an Employer's relevant rebuttal evidence in a Final Determination and failure to do so may result in the NOF being deemed to be successfully rebutted and not an issue before the Board, *Barbara Harris*, 1988-INA-392 (Apr 5, 1989), the case being remanded for reconsideration, *Scientific Research Associates*, 1989-INA-32 (Feb. 9, 1992) or, where the employer's argument and evidence is persuasive, the denial being reversed and the labor certification being granted, *Quincy School Community Council*, 1988-INA-81 (Feb. 21, 1989) (*en banc*).

As noted above, the CO interpreted 20 C.F.R. § 656.25(d)(1) to mandate the Employer, and only the Employer, to sign the Rebuttal.² However, as the Employer correctly pointed out, the Board in *Environmental Maintenance Co.*, 2000-INA-72 (May 31, 2001), held that the signature of an employer's counsel is evidence that the Rebuttal was properly signed by the employer through counsel. In *La Roma Pizza*, 1993-INA-229 (April 8, 1994), the CO similarly denied the application because the Rebuttal was not signed by the employer. There, the Board held that the employer's counsel represents the employer in the labor certification and is entitled to present argument and evidence on the employer's behalf in response to the NOF. Accordingly, the Board in *La Roma Pizza* reversed the CO's finding and granted the labor certification.

In the present case, although the CO erred in denying the application on the grounds he stated in the FD, we note that the CO in the NOF indicated an apparently valid deficiency. Like the CO, we question the need for a Maintenance Repairer, Building in the type of business of the Employer. In accordance with Employer's advertisement, found at AF 67, the Employer is a service provider. The service that the Employer provides is the management of all administrative functions that revolve around human resources. Therefore, unless the Employer owns or manages buildings, it does not seem reasonable that the Employer, a human resources management business, needs a full time building repair and maintenance employee.

In reviewing the Rebuttal, we are unconvinced that the Employer has such a need. The legal agreement found at AF 21-28, simply obligates the Employer to take charge of the administrative aspects of its clients' payroll. The other rebuttal documents supplied by the Employer are bills and receipts that are addressed to Employer's clients. However, the Employer does not adequately explain why bills addressed to third parties are evidence that it needs a building maintenance employee. The burden of proof, in the twofold sense of production and persuasion, is on the employer. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*). In applications for alien employment certification, the employer bears the burden of proving all aspects of the application, 20 C.F.R. § 656.2(b).

² We note that the Employer, in the Request for Review, provided a plausible explanation to why there was a different signature in the Rebuttal. The appropriate response would have been to request documents that tested if the signature was from the president of the Employer, and not just disregard Employer's allegations.

Since we agree that there is a valid concern in the CO's NOF, and as the evidence presented by the Employer is not persuasive, we will remand this case to the CO for further review.³ On remand, the CO should provide the Employer an opportunity to supplement its Rebuttal so it addresses the issues raised by this decision. The Employer should use that opportunity to document and clarify if it is a service provider of payroll administration or an employee leasing organization. The Employer must also make a legal argument in support of a finding that its organization satisfies the definition of employer in accordance with 20 C.F.R § 656.3.

ORDER

For the reasons stated above, the Certification Officer's denial of the labor certification is **VACATED** and this case is hereby **REMANDED** to the CO for actions consistent with this Decision.

A

JOHN M. VITTON
Chief Administrative Law Judge
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

³ In order to explain the Alien's simultaneous employment by the Employer and Williams Record Management, the Employer should document and explain who has actual control of the Alien, who is liable to compensate the Alien for the work he performs, and whether the Alien's salary is reflected as an expense in Employer's income tax return. Employer's accounting records and income tax returns would help document the response. The Employer must keep in mind that it is its burden to prove its case. 20 C.F.R. § 656.2(b).

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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.