



Issue Date: 24 November 2003

BALCA Case No. 2002-INA-301
ETA Case No. P2000-CA-09503125/VA

In the Matter of:

C & M TREE SERVICE,
Employer,

on behalf of

GERONIMO ZAPATA,
Alien.

Certifying Officer: Martin Rios
San Francisco, CA

Appearance: Ruben Hernandez, Esq.
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 Geronimo Zapata (“Alien”) filed by C & M Tree Service (“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”) 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.

STATEMENT OF THE CASE

On February 10, 1999, Employer filed an application for labor certification on behalf of the Alien for the position of Supervisor, Spray Lawn & Tree. (AF 13-14).

On May 2, 2002, the CO issued a Notice of Findings (“NOF”) indicating the intent to deny the application on the ground that Employer did not appear to have a job that was truly open to U.S. workers. (AF 9-11). The CO noted that according to the Employment Development Department (EDD), Employer had an inactive tax identification number. Because there was no report of wages paid by Employer, it appeared that there was no actual job open in Employer’s business because the job description included the supervision of eight employees. (AF 10).

Employer was advised that to remedy the deficiency, Employer should supply rebuttal evidence that there was an on-going payroll. Employer was requested to submit the most recent state quarterly payroll tax return, along with the state identification number, the number of current employees and the total amount of wages paid. Alternatively, Employer was requested to provide a persuasive argument as to how the job was truly open to U.S. workers. (AF 10).

On May 25, 2002, Employer submitted its Rebuttal, indicating that it was enclosing the most recent state quarterly payroll return, clearly showing the names of the employees in the payroll. The record does not reflect that a payroll return was attached to the Rebuttal. (AF 6-8).

On July 8, 2002, the CO issued a Final Determination (“FD”) denying certification (AF 4-5). The CO found that although Employer indicated that it was enclosing a copy of the state quarterly payroll return, none was enclosed. Due to Employer’s failure to provide the documentation requested in the NOF, the CO denied the application. (AF 5).

On August 4, 2002, Employer filed its Request for Review and the matter was docketed in this Office on September 17, 2002. (AF 1-2). Employer acknowledged that it made an administrative error by failing to submit a copy of the payroll report. Employer objected to the CO's denial, stated that the CO should have notified Employer that the document was missing, as Employer would have provided it. Employer advised that the documentation would be provided with the brief. (AF 1).

On October 24, 2002, Employer filed its brief, reasserting that it did not mail the payroll returns with its Rebuttal but in a separate envelope. Employer repeated its objection to being subjected to the appellate process when the CO could have notified Employer that the payroll returns were missing. On those grounds, Employer requested that the case be remanded to the CO.

On November 9, 2002, Employer submitted a letterhead with its address to show its correct address, to reaffirm that it was actively pursuing the appeal, and to establish continued sponsorship of the Alien.¹

DISCUSSION

Under 20 C.F.R. § 656.26(b)(1), a request for review shall be in writing and shall clearly identify the particular labor certification determination from which review is sought and shall set forth the particular grounds for the request. It is well established that where the request for review does not set forth specific grounds for review and no brief is filed, the request for review will be dismissed. *North American Printing Ink Co.*, 1988-INA-42 (Mar. 31, 1988) (*en banc*); *Bixby/Jalama Ranch*, 1988-INA-449 (Mar. 14, 1990);

¹ It should be noted that Employer's address as printed on the letterhead is identical to the address from which mail was returned to the Board. The Notice of Docketing, issued September 27, 2002, was returned, forwarding order expired. Pursuant to an order issued by the Board on November 1, 2002, requiring Employer's current mailing address and a statement of intent, Employer submitted the letterhead and statement of intent to pursue the application. As noted, the address submitted by Employer is identical to that on the returned mail.

Rank Enterprises, Inc., 1989-INA-124 (Nov. 13, 1989); *The Little Mermaid Restaurant*, 1988-INA-489 (Sept. 1, 1989).

Although Employer filed a Request for Review and a brief, Employer did not allege in either document a single ground for this Panel to review. In both documents, Employer limited its argument to making a general assertion indicating that although Employer erred by not submitting the documents requested by the CO, the CO should have advised Employer of the error instead of denying the application. However, general statements of disagreement with the CO do not constitute an assignment of error and such a request for review will be dismissed. *GCG Corp.*, 1990-INA-498 (Mar. 11, 1991); *Ajem Thread Rolling*, 1990-INA-412 (May 20, 1991).

Consequently, as Employer failed to state grounds for this Panel to review, we dismiss Employer's Request for Review and affirm the CO's Denial. Accordingly, the following order will enter²:

² If this Panel were to review the issues in this case we would hold as follows:

The employer bears the burden of proving all aspects of the application. 20 C.F.R. § 656.2(b). Twenty C.F.R § 656.25(e) provides that an employer's rebuttal evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted.

In the case at hand, the CO specifically requested copies of Employer's state payroll returns, as those documents would support a finding that Employer had an actual position for a supervisor. Clearly, an Employer without employees has no need for a supervisor, as there would be no workers to supervise. Employer's only requirement was to prove that there was an active payroll. However, Employer did not submit copies of any of its payroll returns. If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Denial of certification is proper when the Employer fails to provide reasonably requested information. *O.K. Liquor*, 1995-INA-7 (Aug. 22, 1996); *China Inn Restaurant*, 1993-INA-496, 497 (Aug. 26, 1994). Where the employer answers the findings in the NOF with general objections, certification is properly denied. *Ramsinh K. Asher*, 1993-INA-347 (Nov. 8, 1994).

As the employer bears the burden of proving that a position is permanent and full-time, certification may be denied if the employer's own evidence is not sufficient. It follows that while the CO's findings may not be based on speculation, undocumented statements of an employer which are inconsistent or illogical are not compelling evidence of entitlement to certification. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*).

Because Employer failed to demonstrate its ability to provide a permanent full-time job and did not produce the quarterly tax return requested by CO in the NOF, we would find that the denial of labor certification was proper.

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.