

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Date issued:**           **June 5, 2003**

**BALCA Case No.**   **2002-INA-180**  
ETA Case No.        P1999-NJ-02420717

*In the Matter of:*

**DAMAP CONSTRUCTION, INC.,**  
*Employer,*

*on behalf of*

**ALBERTO DUARTE,**  
*Alien.*

Certifying Officer:   Dolores Dehaan  
New York, NY

Appearance:         Central Migration, Inc.  
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 Alberto Duarte (“Alien”) filed by DAMAP Construction, 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 November 20, 1996, Employer filed an application for labor certification on behalf of the Alien for the position of Finish Carpenter. (AF 1-2).

On September 6, 2001, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on the ground that it appeared that there was no identifiable employer, as defined by 20 C.F.R. § 656.3. (AF 149-150). The CO noted that the Employer was not listed in the Elizabeth, New Jersey telephone directory. To correct the deficiency, the Employer was asked to provide the articles of incorporation and income tax returns. Additionally, the Employer was required to provide forms W-2 or 1099 for the previous three years and to document how it could guarantee full time permanent employment to the Alien.

In its Rebuttal dated September 17, 2001, (AF 152), the Employer asserted that its location was in Linden, New Jersey and consequently it was not listed in the Elizabeth, New Jersey telephone directory. The Employer asserted that it specializes in new construction, although it would also do other types of construction. Employer also asserted that it employs eight individuals and has more work than it can perform. The Employer provided forms W-2 and 1099, as well as income tax returns. The Employer alleged that as reflected in the income tax return, Employer was more than able to pay all its employees' full time salaries.

On November 2, 2001, the CO issued a Second Notice of Finding (SNOF). The CO noted that although the Employer's business card describes the business as "General Mason," it has more Finish Carpenters than mason related workers. Consequently, the CO did not see how the Employer could guarantee full time employment to the Alien as a Finish Carpenter. The CO also noted that the list of employees did not include Carpenter Helpers who are supposed to be supervised by the Finish Carpenter. Additionally, the

CO noted that the Alien's salary for the years 1998 to 2000 was about half of the prevailing wage<sup>1</sup> of \$52,000<sup>2</sup> per year.

The CO questioned if the discrepancy in the salary was because the Alien worked part-time or because he was not being paid \$25.00 an hour. To remedy the deficiency, the Employer was asked to document the Alien's hourly wage. Additionally, the Employer was asked to clarify its type of business, since a General Mason does not normally employ Finish Carpenters, much less have four out of the seven employees as Finish Carpenters. The Employer was required to furnish copies of contracts and billings for its work for the years 2000 and 2001 to document its type of business. (AF 153-154).

On December 7, 2001, Employer submitted its Rebuttal to the SNOF. (AF 197-198). The Employer noted that its business card also stated "masonry & brickwork construction & repairs, large and small jobs." That sentence means that the Employer works on new construction of townhouses, condominiums, houses and small buildings.

However, the Employer asked that its business card not be used against it as it is over three years old and most of its business is acquired through word of mouth. Employer asserted that it employs four Finish Carpenters because they do most of the work. The Finish Carpenters work from the frame of the building to the exterior and the interior. There is work for the Finish Carpenters from the time the construction starts to the time the keys are handed to the owner. The reason no Carpenter Helpers are listed as employees is that the Masons work as Carpenter Helpers when they run out of work, or outside contractors are used to fill those positions.

Employer also asserted that the Alien is paid \$26.50 an hour, which is above the prevailing wage, although only \$17.00 an hour is paid by check. The reason the Alien is

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<sup>1</sup> The Alien's salary for the year 1998 was \$24,755, for the year 1999 \$26,426 and for the year 2000 \$26, 213.

<sup>2</sup> The prevailing wage was determined to be \$25.00 an hour, *i.e.*, based on a 40 hour week for 52 weeks, a yearly salary of \$52,000.

paid in that manner is to reduce the workmen's compensation insurance expense, as the premium is based on the amount reflected in the form W-2. The Alien, due to his undocumented status, could not collect workmen's compensation or state disability; therefore, it does not make sense to pay for insurance the Alien could not benefit from. However, the Employer guarantees and promises to continue to pay the Alien \$26.50 an hour plus increase his salary as he deserves for the excellent worker that he is. The Employer added that he could not wait for the Alien's application to be approved so its books could reflect him as legal. The Employer also attached contracts to demonstrate that its business is one of general construction, and it works on everything in building and masonry.

On January 16, 2002, the CO issued a Final Determination (FD) denying certification. (AF 205-206). The CO found that the Employer had properly documented in its first Rebuttal that it was an Employer as defined in 20 C.F.R. § 656.3. Therefore, Employer cured the deficiency noted in the NOF. The issue remaining was the Alien's salary. The CO noted that for the last three years, the Alien and the other three Finish Carpenters working for the Employer earned less than the prevailing wage of \$52,000 a year. Although the Employer asserted that the salary cash payments made to the Finished Carpenters increased their reported salaries to the prevailing wage, a review of the form 1099 did not support the allegation. As the Employer's reason for a partial salary payment in cash is to reduce the worker's compensation insurance, the CO stated that she believed that the Employer would not change that practice. Consequently, the CO found that the documents submitted by the Employer did not support a finding that the Employer could guarantee full time permanent employment to the Alien. Therefore, the CO denied the Employer's application.

The Appeal File from 237 to 240 reflects an undated document titled Request for Review. In its Request for Review the Employer noted that the sole reason indicated by the CO for denying the case was that in accordance with the contracts and form W-2 submitted, the Employer did not satisfactorily document that it could guarantee full time permanent employment to the Alien. The Employer alleged that the CO's conclusion

was wrong as its income tax return for the year 2000 reflects that it had an income of almost two million dollars, and had labor expenses of \$684,185. Therefore, it is clear that Employer could pay the salary of the Alien and the salary of a few additional individuals.

The Employer added that the Alien's W-2 does not prove that it could not guarantee full time work. All that the W-2 shows is that the Employer did not pay the Alien all of his salary by check. The Employer indicated that in the year 2001 its income was over two million dollars, but the tax return was not yet available. Further, the Alien's W-2 was issued to reflect the salary in the income tax return. However, the Employer's understanding is that undocumented aliens could not be included in the payroll.

On June 5, 2002, Employer submitted a document titled Statement of Position. In its Statement of Position the Employer spoke highly of the Alien and reasserted that it had the financial capability to pay for the Alien's salary, as well as for a few additional Finish Carpenters. In support of its position, the Employer submitted bank statements that reflected its positive financial condition. The Employer also reasserted that a W-2 that reflects only a partial amount of what that employee is paid does not indicate that Employer is unable to pay for the Alien's full time salary. Employer requested the reversal of the CO's denial.

## **DISCUSSION**

If a CO does not grant certification, a Notice of Findings must be issued which states the specific grounds for issuing the Notice of Findings. 20 C.F.R § 656.25(c). The Notice of Findings must give notice which is adequate to provide the employer an opportunity to rebut or cure the alleged defects. *Downey Orthopedic Medical Group*, 1987-INA-674 (Mar. 16, 1988) (*en banc*); *US Spring*, 1991-INA-269 (Oct. 5, 1992).

Additionally, the CO must, in the Notice of Findings and Final Determination, identify which sections or subsections of the regulations allegedly have been violated and

must state with specificity how the employer violated that section or subsection. *Flemah, Inc.*, 1988-INA-62 (Feb. 21, 1989) (*en banc*). Under limited circumstances, an extremely confusing Notice of Findings constitutes sufficient grounds to reverse the Final Determination as the employer is placed on wholly inadequate notice of possible regulatory violations. *The Kroenke Group*, 1990-INA-318 (July 12, 1991); *Belle Mayer*, 1989-INA-332 (Sept. 5, 1990). Although the CO's perceived deficiency was clearly conveyed in the SNOF and FD, the regulations allegedly violated were not noted. Therefore the CO provided no guidance for the Employer to cure the deficiency and did not allow Employer to properly respond to the CO's concern.

The CO in the FD found that the Alien was not paid the prevailing wage and that failure to pay the prevailing wage during the application period in itself demonstrated the Employer's inability to provide full time employment to the Alien. This finding was based on the CO's erroneous conclusion that the Employer is under the obligation to pay the prevailing wage *ab initio* of the application process. However, failure to pay the prevailing wage at the time the application is sought is not a basis for denial. *The Kroenke Group*, 1990-INA-318 (July 12, 1991).

The CO notes that the alien is being paid \$ 26,213.60 per year, which is about half the prevailing wage. The salary of \$ 52,000.00<sup>3</sup> per year, as listed in the job offer for a Finish Carpenter is unchallenged by the CO. Therefore, it is not relevant that the alien is currently paid \$ 26,213.60 per year. *The Kroenke Group, supra*.

In reviewing the Appeal File, we determine that the record does not support the CO's finding that the Employer is unable to provide full time and permanent employment to the Alien. The Employer has well documented that it has the financial ability to pay the Alien's salary. The CO's finding that the Employer cannot provide full time employment is not supported by facts and is based solely on the CO's expectation that the Employer will not pay the prevailing wage. Such a basis may not be used as grounds for

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<sup>3</sup> The prevailing wage was determined to be \$25.00 an hour and the job offer was advertised with a salary of \$25.00 an hour. (See footnote # 2).

denial of the application. Consequently, since the CO did not challenge the alien's qualifications or the rejection of U.S. applicants in her Final Determination, there is no basis for affirmance of denial or for remand. *Barbara Harris*, 1988-INA-32 (April 5, 1989); *DEP Corporation*, 1995-INA-171 (Mar. 13, 1997).

We admonish the Employer that its circumvention of the workmen's compensation insurance, however practical, is contrary to law. In accordance with 20 C.F.R. § 656.20(c)(7), the job opportunity's terms, conditions and occupational environment can not be contrary to Federal, State or local law. Therefore, it is imperative that the Alien's salary reflect the prevailing wage, or higher, immediately after the issuance of this decision. Further, the Employer is put on notice that Employer's failure to comply with that condition could cause the Employer to be prosecuted for perjury pursuant to 28 U.S.C. 1746 in accordance with 20 C.F.R. § 656.20(c)(9). Before granting the certification, we are asking the CO to require the Employer to present an Employment contract reflecting a salary meeting or exceeding the prevailing wage. Additionally, the CO shall require the Employer to initial and date sections 23(b)<sup>4</sup> and 23(g)<sup>5</sup> of the original Application for Alien Employment Certification and sign, again, the declaration found in section 24<sup>6</sup>.

For the above stated reasons the following order will enter:

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<sup>4</sup> Section 23(b) of the Application for Alien Employment Certification is where Employer certifies that it will pay the prevailing wage.

<sup>5</sup> In section 23(g) of the Application for Alien Employment Certification the Employer asserts that the terms and condition of employment are not contrary to law.

<sup>6</sup> Section 24 of the Application for Alien Employment Certification is where the Employer declares under penalty of perjury that the assertions in the application are true.

## **ORDER**

The Certifying Officer's denial of labor certification is **REVERSED**, and the matter **REMANDED** for granting of certification as instructed above.

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**JOHN M. VITTON**  
Chief Administrative Law Judge

**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.