

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Date issued: May 20, 2003

BALCA Case No.: 2002-INA-148
ETA Case No.: P2000-NJ-02445769

In the Matter of:

JUMA CONSTRUCTION COMPANY, INC.,
Employer,

on behalf of

JOSE CARLOS,
Alien.

Certifying Officer: Dolores Dehaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of finish carpenter.¹ The CO denied the application and the employer requested review pursuant to 20 C.F.R. §656.26.

¹ Permanent alien labor certification 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. We base our decision 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. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On October 31, 1997, Juma Construction Company, Inc. ("Employer") filed an application for labor certification to enable Jose Carlos ("Alien") to fill the position of "Finish Carpenter." (AF 7). The position required no education, and three years of experience in the job offered. The basic salary was \$25.00 per hour.

On October 27, 2001, the CO issued a Notice of Findings ("NOF"), proposing to deny certification based on (1) the rejection of U.S. applicants without adequate documentation that they were, in fact, contacted and were not qualified, willing or available at the time of initial consideration and referral;² and (2) the issue of whether the Employer was able to offer full-time permanent work. On the latter issue, the CO further found that there was no listing for Employer in the local telephone book, the telephone number provided in the ETA 750 for the Employer being a residential telephone listing. Employer was directed to document that his business was operational and could offer full-time employment by furnishing the company's federal income tax returns for the last three years. Employer was further directed to indicate the number of employees it had, their job duties and whether they were full-time or part-time, year-round or seasonal workers. Employer needed to produce the W-2 or 1099-MISC forms for its employees. Finally, Employer was directed to clarify the name of his company and correct the ETA 750, with regard to its telephone number and street address, given the discrepancies found therein.

Employer submitted rebuttal on November 30, 2001. (AF 155). Attached thereto were the company's tax returns for the last three years, information concerning its employees, W-2 forms and 1099-MISC forms.

A Supplemental NOF was issued on December 13, 2001. (AF 164) Therein, the CO found

²As this finding, as well as the issue of Employer's address and telephone, discussed below, were successfully rebutted, they will not be detailed herein.

that Employer had successfully rebutted all issues save that of whether he could guarantee full-time employment of an employee. The CO pointed out that the salary of the employee would be \$52,000 per year, yet Employer's tax returns showed a negative income for 1998, no income in 1999 and a negative income in 2000. This raised a question regarding Employer's ability to pay the salary herein. Additionally, none of the W-2 forms submitted for 1998, 1999 and 2000 included the Alien, who apparently had not been an employee, and therefore his wages would be in addition to those already being paid by Employer. The CO noted that Employer had failed to furnish any information regarding the duties of the employees or the specifics of their employment, as requested. Employer was directed to state the job duties of each employee and any non-employees for 1998, 1999 and 2000, also including whether they were full-time or part-time, year-round or seasonal employees. The CO questioned why none of the employees earned the amount being offered the Alien. Employer was requested to explain this discrepancy, given that Employer's specialization was carpentry, and presumably some of the employees were carpenters.

Employer submitted its rebuttal on January 17, 2002. (AF 191) Employer explained that, "like everybody else," if it has money left over it shows a loss "as to not to have to pay in." Employer claimed it was able to pay all employees, having made a gross of \$232,723.00, "and after all losses still had assets free and clear of \$29,339.00, and profit to waste if I choose in goods of \$25,870.00 this totals \$55,213.00 which is over what alien needs to be paid." Employer also pointed out that most of its carpenters no longer worked for the company, leaving Employer even more money for salaries. Employer explained that the position at issue herein paid more than he had paid other carpenters because it was a "finish carpenter," not just a regular carpenter, the latter not having the advanced experience a finish carpenter has. Employer attached bank statements for the year 2001 to its rebuttal, as well as a listing of employees past and present and their positions.

The CO issued the Final Determination ("FD") on February 6, 2002. (AF 01). Therein, the CO found that while the Employer claimed to be able to pay the salary at issue, relying upon the assets being held free and clear in the amount of \$29,339 and profit of \$25,870.00, these assets, as

taken from the 1998 tax return, represented cash of \$4,364, loans to stockholders of \$2,877 and building and other depreciable assets less accumulated depreciation. The profit was actually the cost of goods sold and was taken from Schedule A of the return and represented purchases. The CO pointed out that these were not monies available to pay the salary offered. Reviewing the list of employees, the CO determined that none of those listed were working for Employer now, and that they were paid in cash and Employer did not report it. The Alien had worked three of the four years, and only on some jobs as needed. A review of the bank statements for 2001 established that the company had a starting balance of \$17,438.76, total deposits of \$54,482.00, and total withdrawals of \$38,210.56. The ending balance was \$33,567.20. This did not support Employer's contention that it had sufficient funds to pay the salary in question as well as other costs. The CO noted that there was no evidence that Employer had sufficient contracts to support the employment at issue. Finding no evidence to establish that Employer could guarantee full-time permanent employment, the application was denied.

Employer filed a Request for Review with the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). (AF 203) Therein, Employer questioned the fairness of pointing to a lack of contracts in the FD when the CO never asked for that documentation in the NOF. Employer stated it was submitting new evidence with its request for review.

DISCUSSION

Subsequent to its Request for Review, Employer has submitted its "Statements of Grounds for Appeal," including additional evidence. Section 656.26(b)(4) provides that the request for administrative-judicial review "shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." This Board is strictly an appellate body; our decision must be based only on the record on which the CO reached a decision, and on arguments submitted in any brief or position statement by the parties. Evidence first submitted before the Board may not be considered. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992).

Therefore, the additional evidence submitted by Employer after the Final Determination was issued shall not be considered herein.

The issue in this case is whether Employer is able to offer permanent full-time employment. The CO has accurately summarized Employer's financial situation, as evidenced by the tax returns and other documentation provided by Employer in response to the NOFs which were issued. That documentation does not rebut the finding that it cannot pay the wage being offered.

An employer bears the burden of proving that a position is permanent and full-time. Where the CO directs the employer to show same and the employer fails to do so, certification is properly denied. *Bijan Azadi & Assoc.*, 1994-INA-382 (Oct. 4, 1995). Thus, no bona fide job opportunity exists when Employer's tax records indicate an inability to pay an employee's wages and the records show a decrease in gross sales in recent years. *Fred's Allaf Jewelers*, 1994-INA-620 (Aug. 15, 1996). Such is the case here. Employer's financial documents fail to establish the ability to pay the wage being offered, and its records regarding employment of the Alien as well as others indicates an inability to provide a permanent, full-time position. Employer contends that the Final Determination mentions contracts to support the Alien's employment, yet none were ever requested in the NOF. The fact that the CO did not specifically raise this in the NOF is harmless error. Employer was fully apprised of the alleged defects and given the opportunity to rebut or cure same. *Downey Orthopedic Medical Group*, 1987-INA-674 (Mar. 16, 1988)(*en banc*). Employer was afforded the opportunity to document the ability to pay the wage offered and to otherwise document that it could guarantee permanent full-time employment. It failed to do so. There is no evidence to support a finding that Employer is able to provide an employee with the salary being offered. Accordingly, labor certification was properly denied and the following Order will issue.

ORDER

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

Entered at the direction of the panel:

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 unless within twenty 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.