



Date Issued: June 12, 2003

**BALCA Case No.:** 2002-INA-100  
**ETA Case No.:** P1999-CA-09481075/LA

*In the Matter of:*

**TROPICAL SEAFOOD & MEAT MARKET,**  
*Employer,*

*on behalf of*

**ROBERT LEE,**  
*Alien.*

Appearances: Sanford B. Reback, Esquire

Before: Burke, Chapman and Vittone  
Administrative Law Judges

### **DECISION AND ORDER**

**PER CURIAM.** This case arises from an application for labor certification<sup>1</sup> filed by an Asian seafood and meat retail business for the position of Marketing Manager. (AF 21-22).<sup>2</sup> The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File. ("AF").

### **STATEMENT OF THE CASE**

On January 9, 1998, Employer, Tropical Seafood & Meat Market, filed an application for alien employment certification on behalf of the Alien, Robert Lee, to fill the position of Marketing Manager. The job to be performed was described as follows:

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<sup>1</sup> 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 20 C.F.R. Part 656.

<sup>2</sup>"AF" is an abbreviation for "Appeal File."

The occupant of this position will be responsible for the overall marketing activities of our company, marketing our products to the Asian/Filipino communities and to those communities in Mexico. Will be required to plan our company's marketing strategies Long/short term, analyze market conditions, negotiate contracts with supplies from Asia and in particular the Philippines. This position involves direct telephone orders and negotiations with our sources of supply in the Philippines with follow-up letters of credit, shipping instructions and insurance and documentation. Will be required to meet with our US buyers within the Philippines communities to keep them informed of shipping schedules and when they can expect their orders and also to obtain their preferences as to what future orders they may place.

Minimum requirements for the position were listed as a Bachelors degree in Business and two years experience in the job offered. Rate of pay was listed as \$54,630 per year for a forty hour week.<sup>3</sup> (AF 21,22,24).

Employer received no applicant referrals in response to its recruitment efforts. (AF 40).

An Assessment Notice was issued by the California Employment Development Department on July 17, 1998, requesting additional information and documentation regarding the petitioned position. Specifically, as pertinent to the determination herein, it was noted that the Alien was employed by the petitioning entity on a less than full-time basis and Employer was requested to submit documentation showing that the offered position is indeed for a full-time, permanent position (AF 47-51). In response, Employer, through counsel, stated:

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<sup>3</sup> The salary was initially listed as \$41,800 per year, but was amended in response to a prevailing rate of pay issue raised by the local office. (AF 26,33,46).

The position is now available since business has increased due to a booming economy which your office is well aware of and therefore the Director can no longer perform the marketing manager duties and that of being the director due to this increased business, thus the need to make a job offer to the alien. (AF 30).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on October 19, 2001, proposing to deny labor certification on several bases, including as pertinent herein, the lack of a bona fide full-time job opportunity. Noting that the record reflects that the Alien has been working less than full-time essentially performing the duties described in the job offer, the CO instructed Employer to document the need for a full-time Marketing Manager and how the job opportunity is considered full-time. Employer was instructed to provide evidence of the “increase in business” as asserted by Employer in its 1998 amendment letter. Employer was advised:

This should include the employer’s corporate income tax returns for each business year 1996 through 2000, correspondence and/or orders from employer’s local sources of supply for each business year 1996 through 2000, and any other documentation that will substantiate the employer’s assertions. Gencorp, 87-INA-659.

(AF 15-19).

In Rebuttal, Employer submitted copies of the company tax returns for the years 1995, 1997, 1998 and 1999. Employer did not otherwise address the issue of full-time employment. (AF 7-14).

A Final Determination denying labor certification was issued by the CO on January 8, 2002, based upon a finding that Employer had failed to adequately rebut several of the findings cited in the NOF. With respect to the bona fide full-time job opportunity issue, the CO observed that the Employer did not address the issue of the

need for a full-time Marketing Manager and did not document the increase in business, as required by the NOF. The CO noted that the company tax returns submitted show the business as profitable, but the gross receipts of sales steadily declined each year. In the absence of any other documentation that would substantiate an increase in business, the CO concluded labor certification was appropriately denied. (AF 4-6).

Employer filed a Request for Review by letter dated February 4, 2002, and the matter was referred to and docketed in this Office on March 14, 2002. (AF 1-3). Employer filed a Statement of Position on April 1, 2002.

## **DISCUSSION**

Congress enacted Section 212(a)(14) of the Immigration and Nationality Act of 1952 (as amended by Section 212(a)(5) of the Immigration Act of 1990 and recodified at 8 U.S.C. § 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to “protect the American labor market from an influx of both skilled and unskilled foreign labor.” *Cheung v. District Director, INS*, 641 F.2d 666, 669 (9<sup>th</sup> Cir., 1981); *Wang v. INS*, 602 F.2d 211, 213 (9<sup>th</sup> Cir. 1979).<sup>4</sup> To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Consequently, the burden of proof in the labor certification process is on the Employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. § 656.2(b).

In seeking labor certification, the employer must offer a job that is truly open to U.S. workers. 20 C.F.R. § 656.20(c)(8). According to 20 C.F.R. § 656.3, the term “Employer” means a person, association, firm, or corporation which currently has a location within the United States to which U.S. workers may be referred for employment

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<sup>4</sup> The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien’s entry for permanent employment. See S. Rep No. 748, 89<sup>th</sup> Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Ad. News 3333-3334.

and which proposes to employ a full-time worker at a place within the United States. “Employment” means permanent full-time work by an employee for an employer other than oneself. 20 C.F.R. § 656.50.

As was noted by the CO, at the time this application was in process, Employer had two full-time employees and six part-time employees, one of whom appears to have been the alien beneficiary. As pointed out by the Employment Development Department, and as agreed to by Employer’s attorney in his August 26, 1998 amendment letter, the Alien has been working less than full-time for the Employer, essentially performing the duties described in this job offer. On this basis, Employer was requested to document the need for a full-time Marketing Manager and how the job opportunity is now considered full-time. The Board has previously held that “[w]here an alien has worked part-time for an employer, performing the same duties as listed for the petitioned position, labor certification will be denied unless the employer proves the need for a full-time employee to fill the position.” *King’s Gallery*, 1991-INA-290 (Aug.12, 1992); *see also Howard Hewett*, 1988-INA-371 (June 12, 1989); *Randy Auerback*, 1988-INA-103 (Apr. 7, 1988).

In the NOF, Employer was instructed to provide documentation evidencing an increase in business or change in circumstances to substantiate the new and present need for a full-time employee where the Alien’s work as a part-time employee had previously sufficed. Employer had indicated an increase in business due to the booming economy as justification in its August 25, 1998 letter. The CO requested further documentation to support this claim. The Board has upheld a CO’s request for such documentation as reasonable and that Employer’s failure to document such a change properly resulted in the denial of labor certification. *King’s Gallery, supra* . Such a determination is appropriate here as well.

Although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer’s burden of proof. We find Employer’s bare assertion of “increased business” insufficient proof of

the need for a full-time marketing manager. As was noted by the Board of Alien Labor Certification Appeals in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), “[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer’s last chance to make its case. Thus, it is the employer’s burden at that point to perfect a record that is sufficient to establish that a certification should be issued.” While Employer provided the tax returns requested, such documentation did not support its stated claim of business increase. Employer provided no correspondence or orders from its local sources of supply as requested, nor any other documentation to support its assertion of increased business and hence, the demand for a full-time worker. Thus, we find Employer’s rebuttal non-responsive and unpersuasive on this issue and accordingly determine that labor certification was properly denied.

### **ORDER**

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

Entered at the direction of the panel by:

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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.