



Issue Date: 08 September 2003

BALCA Case No.: 2002-INA-191
ETA Case No.: P1999-CA-09448178/ML

In the Matter of:

ANASTASI DEVELOPMENT CORP.,
Employer

on behalf of

RODOLFO LEPEZ-MALDONADO,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Sandra L. Cannon, Esquire
Los Angeles, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by Anastasi Development Corp (“Employer”) on behalf of Rodolfo Lepez-Maldonado (“Alien”), for the position of Landscaper. (AF 126).² 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.

¹ 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.

² “AF” is an abbreviation for “Appeal File”.

STATEMENT OF THE CASE

On September 25, 1997, Employer applied for alien labor certification on behalf of the Alien to fill the position of “Landscaper.” Employer described the job duties as follows:

Maintains grounds and landscape of private residential housing tracks, apartments and commercial parks. Plants new lawns and repairs established lawns. Cuts, seeds, and fertilizes same. Plants and cultivates plants, shrubs and seasonal flowers using gardening tools and power operated equipment. Installs, repairs and insures that sprinklers are working. Mows and trims lawns using power mower. Cleans grounds using rakes, brooms, and hoses. Trims shrubs and cultivates gardens. May dig trenches or holes in soil for planting or for sprinkler pipes.

(AF 77). The wage offered was \$13.50 per hour for a forty-hour week, without overtime provisions. Two years of experience in the job offered were required. *Id.* Special requirements for the position were the ability to climb up to 30 feet for the purpose of trimming trees. *Id.*

The CO issued a Notice of Findings (“NOF”) on July 6, 2001. (AF 73). The NOF stated the CO’s intention to deny the application because of, *inter alia*, the lack of a specific reason for rejecting applicant Crow, a United States worker. In Employer’s Rebuttal, filed on August 9, 2001, it asserted that applicant Crow was rejected because he currently owned a landscaping business.

In a Final Determination, dated October 3, 2001, the CO denied certification, stating that Employer’s rebuttal evidence did not adequately address the issues raised in the NOF. (AF 43-44). Employer requested reconsideration of the FD, which was denied. (AF 2-6).

DISCUSSION

Employer stated in its response to the NOF that it did not interview applicant Crow because his resume reflected that he had his own landscaping business. (AF 53-54). Employer states that this would pose a conflict of interest because Crow would be its direct competitor. We have held that an employer's mere assertion of a conflict of interest arising from a U.S. applicant's employment with a competitor does not constitute a lawful basis for rejection. See *Papalera del Plata, Inc.*, 1990-INA-53 (Dec. 20, 1990), *aff'd* (Jan. 31, 1992) (per curiam). Stating that it is guarding against Crow siphoning off clients from its business, Employer cites to our decision in *Matter of Royal Peddler*, 1987-INA-679 (Feb. 5, 1988) in support of its position. There, we stated that an importer would be justified in not hiring a person who intended to pursue his/her own import/export business while employed with the importer due to conflicts of interest. However, that case is distinguishable from the present one because the business of the Employer is real estate development,³ and it is simply hiring a landscaper to maintain its own grounds. Applicant Crow's resume indicated that he had a long-standing landscaping business. (AF 56). Since Employer does not indicate it is expanding into the landscaping business, there would be no direct conflict.

Additionally, Employer asserts that it had safety concerns regarding Crow's ability to work eight-hours per day and also pursue his business full time. (AF 53). The Employer indicates that working "sixteen hours a day around heavy machinery or climbing 30 feet high to prune trees" would pose an unnecessary safety hazard. *Id.* The Board has held that this sort of safety concern is a lawful, job-related reason for rejecting an applicant. See *Production Tool Corporation of Wisconsin*, 1988-INA-210 (Nov. 9, 1989). However, that case is distinguishable from the instant one because there the company spoke with the applicant and he repeatedly stated his intention to work full time at both jobs. *Id.* In this case, Employer never contacted applicant Crow in order to discover his intentions. In order to meet its burden, an employer is required to investigate

³ See Company Profile at AF 110, "The company builds custom homes, condominiums and apartment complexes in Southern California."

the suitability of a seemingly qualified applicant. *See Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (*en banc*).

Because Employer failed to investigate Crow's application, we do not know whether he intended to pursue his business full time (or at all). Without this information, we cannot determine whether Employer's safety concerns were justified. Accordingly, Employer failed to prove that it had a lawful, job-related reason for rejecting applicant Crow.

ORDER

In light of the foregoing, the Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

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.