

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 27 August 2003**

**BALCA Case No.:** 2002-INA-230  
**ETA Case No.:** P2000-CA-094987390/ML

*In the Matter of:*

**KIDDIE RIDE AMUSEMENT CO.,**  
*Employer,*

*on behalf of*

**RUBEN ELISEO SERRANO,**  
*Alien.*

Appearance: Leonard Stitz, Esquire  
Santa Ana, California

Certifying Officer: Martin Rios  
San Francisco, California

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 Supervisor, Rides.<sup>1</sup> The CO denied the application and the employer requested review pursuant to 20 C.F.R. §656.26.

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<sup>1</sup> 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 20, 1997, Kiddie Ride Amusement Co. ("Employer") filed an application for labor certification to enable Ruben Eliseo Serrano ("Alien") to fill the position of "Supervisor, Rides." (AF 47). The position required eight years of schooling and two years of experience in the job offered. The rate of pay was \$18.58 per hour.

On January 24, 2002, the CO issued a Notice of Findings ("NOF"), proposing to deny certification. (AF 41). The CO found that Employer had no employees and had not registered for employer taxes, raising a question as to whether it had a current job opening and/or could provide permanent, full-time employment to which U.S. workers could be referred. The CO directed that rebuttal needed to establish Employer's ability to provide permanent full-time employment at the terms and conditions stated on the ETA 750A. The CO also directed that rebuttal needed to include a copy of Employer's business license and state and federal income and business tax returns. The CO also found the two years of supervisory experience to be restrictive, pointing out that Employer had no employees to supervise. Employer could amend the restrictive requirement or justify the requirement based on business necessity. Finally, the CO noted that the Alien did not have the requisite two years of experience in the job. Employer needed to submit an amendment to ETA 750B which reflected that the Alien did possess the necessary experience or amend the requirement.

Employer submitted rebuttal on April 4, 2002. (AF 4). Attached thereto were a payroll register; an amendment to the ETA 750; a letter of recommendation for the Alien from Mision Elim Internacional; a business license for Kiddie Ride Amusement Co. from the city of Torrance issued on January 7, 2002, listing the company as "warehouse and storage;" and a business license from the city of Huntington Park issued on December 1, 2001, listing the business as "coin operated children's rides." There was also a business license for Anthony M. Campanella from the city of Gardena, and a U.S. Corporation Income Tax Return for 1999 for Campanella HMFIC. Employer indicated it was attempting to obtain verification of the Alien's supervisory experience, which had been obtained in

El Salvador.

The CO issued the Final Determination (“FD”) on April 30, 2002. (AF 02). Therein, the CO found that Employer had submitted a tax return for an unknown company, HMFIC, not the employer listed on the ETA 750A, which tax return showed a \$12,000.00 loss and wages paid in the amount of \$12,000.00. The CO further noted that the business license was not filed until after the NOF was sent to the Employer, and showed Employer to be operating as a “warehouse and storage” facility. The documentation showed no employee who was paid more than \$11.00 per hour. The CO concluded that Employer had failed to provide convincing evidence that it had an ongoing business which was able to clearly provide a job opportunity to which a U.S. worker could be referred.

With regard to the restrictive requirement, the CO found that while Employer’s rebuttal indicated there were six people on the payroll, up until the NOF was issued, there were no employees for this position to supervise. Therefore, the petition, as submitted in 1997, did not accurately reflect the business at that time, and the supervisory experience requirement was excessive. Finally, the CO determined that the evidence continued to fail to show that the Alien had two years of supervisory experience, and therefore, U.S. workers could not be expected to have this amount of experience either.

On May 21, 2002, Employer filed a Request for Review with the Board of Alien Labor Certification Appeals (“BALCA” or “Board”). (AF 1).

## **DISCUSSION**

Subsequent to its Request for Review, Employer has submitted its “Statement of Position.” Employer contends that it submitted a business license showing that it operated children’s rides, that it has proven that a supervisory position exists, and that the Alien has the qualifications at issue. Employer points to the documentation from Mision Elim Internacional as proof thereof.

With regard to the issue of whether Employer is able to offer permanent full-time employment, the CO has accurately summarized the financial situation. As evidenced by the only tax return submitted, and assuming that this tax return is for the instant employer, it reveals that Employer operated at a net loss in 1999. Despite this fact, Employer claims to be able to pay the employee an annual salary at the rate of \$18.58 per hour.

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 an 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. When asked to submit federal and state tax returns, Employer chose to submit only one federal tax return for 1999, which showed a net operating loss of \$12,014.00, for a company named "HMFIC." There is no tax return for the named corporate Employer.

While Employer did provide a business license showing it to be the operator of children's rides, it did not establish, through tax returns or other documentation, its ability to pay the wage offered. Moreover, the existence of that license does not explain the fact that there was a second business license for the same Employer, listing its business as a warehouse and storage facility.

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. The only tax return submitted, for an employer named HMFIC, reveals negative income for the year, obviously indicating an inability to pay the salary offered in the ETA 750. The payroll register also does not assist Employer in establishing an ability to pay the salary at issue. In sum, 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. The remaining issues need not be addressed, 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 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 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.