



Issue Date: 16 June 2004

BALCA Case No.: 2003-INA-157
ETA Case No.: P2001-CA-09509834/VA

In the Matter of:

F.G. LANDSCAPE, INC.,
Employer,

on behalf of

GERARDO GUILLEN,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Luis Sabroso, Esquire
Anaheim, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. F.G. Landscape, Inc. (“the Employer”) filed an application for labor certification¹ on behalf of Gerardo Guillen (“the Alien”) on June 14, 2000. (AF 19).² The Employer seeks to employ the Alien as a gardener/landscaper (DOT Code: 408.161-

¹ Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656.

² In this decision, AF is an abbreviation for Appeal File.

010).³ This decision is based on the record upon which the Certifying Officer (“CO”) denied certification and the Employer's request for review, as contained in the Appeal File, and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

In the application, the Employer described the duties of the position as planning, preparing and planting lawns and landscape maintenance of private and business residences. The Employer required no advanced education but required two years of experience. (AF 19).

In the Notice of Findings (“NOF”), issued May 30, 2001, the CO found that the Employer did not demonstrate a good faith effort to contact two U.S. applicants in a timely manner. (AF 14-17). Specifically, a return receipt showed Applicant #1 received a letter scheduling an interview on December 4, 2000. This was more than fourteen days after the Employer received the applicant’s resume on October 16, 2000 and therefore, the CO considered this contact untimely. In addition, the CO noted that the Employer appeared to violate 20 CFR § 767.20(b)(3)(i) because the attorney/agent, rather than the Employer, prepared and signed the letter to the U.S. applicants, notifying them of the scheduled interviews. The CO concluded that the Employer did not document job-related reasons for the rejection of U.S. workers, in violation of 20 CFR § 767.21(b)(6). The CO instructed the Employer to submit rebuttal giving specific details of the Employer’s efforts to contact and interview the applicants in a timely manner. The CO requested that the Employer document how the applicants were recruited in good faith and rejected solely for lawful, job-related reasons. (AF 16-17).

In its rebuttal, dated November 25, 2002, the Employer stated that the U.S. applicants were contacted in a timely manner. (AF 7-13). The Employer indicated that the applicants were contacted by telephone, as well as by letter; however, telephone records were not available because the Employer did not know he needed to save them.

³ In this decision, DOT is an abbreviation for the Dictionary of Occupational Titles.

The Employer referred to return receipt records, which proved the applicants received the appointment letters, but the receipt records were not included in the rebuttal. (AF 7-8). The Employer noted that he made the telephone calls and he intended to interview the applicants at the job site; the attorney only sent out the interview letters due to the Employer's work load. (AF 8). The Employer then reiterated that the two U.S. applicants were rejected because they did not appear for the interview appointments. (AF 8-9).

The CO issued the Final Determination ("FD") on January 15, 2003, denying certification. (AF 5-6). The CO stated that the Employer failed to provide specific documentation regarding the alleged phone calls. The CO found that the Employer failed to timely contact Applicant #1 and as such, had not demonstrated lawful rejection of this applicant. (AF 6).

By letter dated February 18, 2003, the Employer requested review, contending that the U.S. applicants had been contacted as required by the EDD request. (AF 1-4). The Employer also argued that the CO had not contacted the US applicants to justify the denial or support the decision. (AF 1).

The case was docketed by the Board on May 13, 2003, and the Employer filed an additional brief in support of its appeal. Along with the brief, the Employer submitted the receipts for the certified letters to U.S. applicants, showing the postmark date. These receipts indicate that the letters to Applicants #1 and #2 were mailed on October 27, 2000 and scheduled appointments for November 11, 2000. The Employer noted that Applicant #2 signed and claimed his certified letter on October 30, 2000; however, Applicant #1 did not sign and claim his certified letter until December 2, 2000. The Employer did not know why Applicant #1 delayed picking up his letter. The Employer argues that the receipt with the postmark of October 27, 2000 clearly demonstrates that the Employer acted in good faith in his contact efforts.

DISCUSSION

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability. It is the employer who bears the burden of proving that all regulatory requirements have been satisfied, and this burden of proof must be met before the application for labor certification can be approved. 20 C.F.R. § 656.2(b).

Twenty C.F.R. § 656.25(e) provides that the employer's rebuttal evidence must rebut all of the findings of the NOF, and that all findings not rebutted shall be deemed admitted. On this basis, the Board has repeatedly held that a CO's finding which is not addressed in rebuttal is deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). The employer must provide directly relevant and reasonably obtainable documentation that is requested by the CO. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Evidence submitted with request for review that belatedly addressed other deficiencies will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *Integrated Business Solutions, Inc.*, 1994-INA-209 (June 22, 1995).

The only issue raised in the FD was the Employer's failure to contact Applicant #1 in a timely manner. The CO noted that the letter scheduling an appointment with Applicant #1 for November 13, 2000 was not received by the applicant until December 4, 2000. This was more than fourteen days after the Employer received the applicant's resume. As noted above, along with the brief submitted before this Board, the Employer submitted for the first time a copy of the postmark receipt for the interview letter sent to Applicant #1, indicating it was mailed on October 27, 2000.

The Employer, however, failed to provide this documentation to the CO on rebuttal. This documentation was directly relevant to the issue of whether the Employer

used good faith efforts to contact and consider this applicant, a potentially qualified U.S. worker. The Employer did not indicate any reason why he failed to submit this documentation to the CO and did not indicate that it had been omitted from the rebuttal due to a clerical error. An employer's failure to provide documentation reasonably requested by the CO will result in a denial of labor certification. *Gencorp, supra*. Further, evidence submitted for the first time with the brief on appeal will not be considered by the Board. *Capriccio's Restaurant, supra*.

In the light of the foregoing, we find that the CO properly determined that the Employer had not established that he put forth an adequate, good faith effort to timely contact Applicant #1 and therefore, the CO properly denied certification.

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 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, N.W., 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 ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.