



Issue Date: 18 August 2004

BALCA Case No.: 2003-INA-223
ETA Case No.: P1999-CA-09474722/AT

In the Matter of:

R.E. DRYWALL CONTRACTING, INC.,
Employer,

on behalf of

LUIS PELAYO,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Luis A. Morillo, Representative
Norwalk, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by a construction company for the position of Drywall Applicator. (AF 46-47).² The following 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 (“AF”), and any written arguments. 20 C.F.R. § 656.27(c).

¹ Alien labor certification is governed by § 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 January 2, 1998, the Employer, R.E. Drywall Contracting, filed an application for alien employment certification on behalf of the Alien, Luis Alonso Pelayo, to fill the position of Drywall Applicator. Minimum requirements for the position were listed as three years of experience in the job offered. (AF 46-47).

A Notice of Findings (“NOF”) was issued by the CO on August 29, 2001, proposing to deny labor certification based upon the finding of a non-existent job opening and citing a requirement that recruitment through a Labor Union was required. (AF 42-44). Citing 20 C.F.R. § 656.21(b)(4), the CO concluded the petitioned occupation was one where unions may be able to refer workers, and instructed the Employer that to cure this deficiency, he must document that Local Union 440, Drywall Lathers, is unable, or unwilling to refer U.S. workers who are willing, able, qualified and/or available for the petitioned position. Specifically, the Employer was instructed that “contact with the labor union is required even though the local Employment Service office may have indicated otherwise at some earlier stage of the processing.” The CO directed the Employer to include “a copy of the letter, a signed statement providing specific information about responding applicants, and documentation of mailing the letter and the receipt of the letter by the Local Union.” (AF 44).

In response to the NOF, the Employer stated that he is always trying to recruit U.S. workers and did not know that he could recruit through the labor union, but now that he had been advised he could “bargain and agreement with the union, will take this into consideration, but, as you could see that I needed a permanent worker and the offered was done when he started working for us, since, at the time there were no other US workers available to do the job, I therefore I hired Mr. Pelayo.” (*sic*). (AF 12-41).

A Final Determination (“FD”) denying labor certification was issued by the CO on October 5, 2001, based upon a finding that the Employer had failed to comply with the corrective action described in the NOF, to recruit and/or document that recruitment was

conducted through a local labor union. As this deficiency was not remedied, labor certification was denied.³ (AF 10-11).

The Employer filed a Request for Review by letter dated May 29, 2003, and the matter was docketed in this Office on July 1, 2003. (AF 1-7).

DISCUSSION

In the NOF, pursuant to 20 C.F.R. § 656.21(b)(4), the Employer was advised that the occupation for which the Employer was petitioning for labor certification was one where it appeared that labor unions may be able to refer able, willing, qualified and available workers and that the appropriate labor union local in the area must be notified by letter that the job is available. The NOF further prescribed the necessary corrective action in order to rebut the deficiency, specifically that the Employer was to contact the Local Union 440, Drywall Lathers, to determine availability of U.S. workers. The Employer failed to do so in rebuttal.

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). As was noted by the Board 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.” The Employer failed to do so in the instant case, and labor certification was properly denied.

³ Upon researching the labor application, it was discovered that the application had been denied on October 5, 2001; however, the FD was erroneously issued to Jean-Pierre Karnos, then deceased, so that the Employer had no way of knowing that the labor certification had been denied. In order to afford the Employer fair and reasonable due process, the Notice of Denial was reissued on May 8, 2003 to afford the Employer appeal rights should he wish to pursue redress through the Board of Alien Labor Certification Appeals. (AF 8-9).

Moreover, 20 C.F.R. § 656.24(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.” Twenty C.F.R. § 656.27(c) provides that the Board “shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made, the request for review, and any Statements of Position or legal briefs submitted.” Evidence first submitted with the request for review will not be considered by the Board. *Capriccio’s Restaurant*, 1990-INA-480 (Jan. 7, 1992); *Kepler International Corp*, 1990-INA-191 (May 20, 1991); *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991). With the Request for Review, the Employer submitted documentation of contact of Lathers Local Union No. 440-L. However, as this evidence was submitted following the denial determination, this evidence is not considered upon review and we conclude that labor certification was properly denied.

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 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.