



Issue Date: 06 July 2004

BALCA Case No.: 2003-INA-196
ETA Case No.: P2002-CT-01323155

In the Matter of:

ROSE LANDSCAPING,
Employer,

on behalf of

LUCAS PEREIRA,
Alien.

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

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 landscaping business for the position of Landscaper. (AF 23-24).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 written arguments of the parties. 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 April 30, 2001, the Employer, Rose Landscaping, filed an application for alien employment certification on behalf of the Alien, Lucas Pereira, to fill the position of Landscaper. The job duties included landscaping and gardening in the summer and shoveling snow and spreading salt in the winter. Minimum requirements for the position were listed as two years experience in the job offered. (AF 23-24). The Employer received no applicant referrals in response to its recruitment efforts. (AF 17).

A Notice of Findings (“NOF”) was issued by the Certifying Officer (“CO”) on August 23, 2003, challenging the full-time (year-round) nature of the Employer’s job opportunity in the area of intended employment. The CO questioned whether the duties described would occupy forty hours of work for a Landscaper during the late autumn and winter months, particularly in light of the possible severity of New England winters. The CO instructed the Employer to submit convincing documentation that demonstrated that the petitioned position of Landscaper is a year-round, full-time position. Such documentation was to include, but was not limited to, “payroll records which clearly show that the employer has paid or is currently paying other Landscaper on a year-round basis,” as well as duties that the worker would perform during the winter months, showing full-time employment of no less than twenty-five hours per week. (AF 8-9).

In Rebuttal, the Employer submitted a one page letter stating that the Alien’s employment during the winter was essential to the Employer. The Employer further noted that during the winter, the Alien performed such tasks as “tree work, fence installations, snowplowing, lot clearing, firewood delivery and more.” The Employer stated that the Alien was an important part of the Employer’s team and that the CO could call the Employer if he had further questions. (AF 7).

A Final Determination (“FD”) denying labor certification was issued by the CO on November 1, 2002, based upon a finding that the Employer had failed to establish the job opportunity was a permanent full-time, year-round position. Noting that the

Employer completely disregarded the documentation recommendations in the NOF, the CO found the Employer's rebuttal statement insufficient to establish that the position of Landscape Gardener was a permanent full-time, year-round job. (AF 5-6).

The Employer filed a Request for Review by letter dated December 3, 2002, and again on April 7, 2003. (AF 1-4). The matter was docketed in this Office on May 19, 2003. On June 30, 2003, the Employer submitted a written statement prepared by its accountant listing the payroll disbursement amounts for the winter months and a 1099 for 2002.

DISCUSSION

In the labor certification process, pursuant to 20 C.F.R. § 656.3 Definitions, "Employment" means permanent full-time work by an employee for an employer other than oneself. 20 C.F.R. § 656.50. The employer bears the burden of proving that a position is permanent and full-time. If the employer's own evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full-time, the employer must provide it. *Rajwinder Kaur Mann*, 1995-INA-328 (Feb. 6, 1997); *Collectors International, Ltd.*, 1989-INA-133 (Dec. 14, 1989). 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 the instant case, the Employer seeks labor certification for the position of Landscape Gardener. With respect to labor certification for a landscaping position, the Board in *Vito Volpe Landscaping*, 1991-INA-300, *et al* (Sept. 29, 1993)(*en banc*)³ has held that:

³ The Board in *Crawford & Sons*, 2001-INA-121 (Jan. 9, 2004)(*en banc*) declined to overrule or modify this decision.

although these landscaping jobs may be considered “full-time” during ten months of the year, and the need for these jobs occurs year after year, they cannot be considered permanent employment, as they are temporary jobs that are exclusively performed during the warmer growing seasons of the year, and from their nature, may not be continuous or carried on throughout the year.

Thus, citing the seasonal nature of the position, and noting the severity of the New England winters, the CO advised the Employer of the necessity to submit “convincing documentation” demonstrating that “the occupation of Landscaper is a year-round, full-time position in East Dennis, Massachusetts.” The Employer was instructed as to what that documentation must specifically include.

In response, the Employer elected to ignore the CO’s specific documentation requests and simply presented a statement to the effect the Alien was essential to its business and listed the various other projects conducted throughout the winter months. 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. Additional documentation is encouraged to bolster written assertions. The presence of such documentation influences the weight given to the employer’s assertions. *Marion Graham*, 1988-INA-102 (Mar. 14, 1990)(*en banc*). Moreover, where a document has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the document, if requested by the CO must be produced. *Gencorp, supra*.

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.” The Employer failed to provide the requested documentation, and thus, 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.