U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 11 January 2006

BALCA Case No.: 2004-INA-86
ETA Case No.: P2003-NJ-02490251

In the Matter of:

NIVEK PAINTING, INC.,
Employer,

on behalf of

SEBASTIAO DA SILVA,
Alien.

Appearance: Cassandre C. Lamarre, Esquire
Newark, New Jersey
For the Employer

Certifying Officer: Dolores Dehaan
New York, New York

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 its application for labor certification. 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.[1] We base our decision on the record upon which the CO denied certification and

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

the 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 April 30, 2001, the Employer, Nivek Painting, Inc., filed an application for labor certification to enable the Alien, Sebastiao Da Silva, to fill the position of "Faux Finisher Artist," which was classified by the Job Service as "Painter." (AF 16, 32). The job duties for the position, as stated on the application, are as follows:

> Spackles, does popcorn and spray painting and quality control. Specializes and operates the following machinery Graco 5900- 3500 PSI, Graco Hopper-3500 PSI, Titan Sprayer-440-2500 PSI. Uses for faux finishing, Zolertone painting and spray painting pressurized pot sparayer [sic] popcorn texture graw machine, spackel [sic] knives 12 inch, 6 inch. Supervises one faux finisher artist helper.

(AF 16, 32). The stated requirement is 3 years of experience in the job offered. (AF 16, 32). The application was submitted under the reduction in recruitment ("RIR") process. (AF 1, 18).

On October 22, 2003, the CO issued a Notice of Findings ("NOF"), in which she denied the Employer's request for RIR processing and proposed to deny certification outright on the grounds that the Employer had not established that a *bona fide* Employer-Employee relationship exists. *See* 20 C.F.R. §656.3. After the CO granted the Employer's extension request (AF 27), the Employer submitted its rebuttal on December 31, 2003 (AF 26-63). The CO found the rebuttal to be unpersuasive and issued a Final Determination dated January 27, 2004 denying certification on the above-stated grounds. (AF 64-65). On or about February 13, 2004, "Norbert Delgado" and "Sebastiao Da Silva," who are each identified as "Owner," sent a letter "To Chief Administrative Law Judge," together with other documents. (AF 66-73). The foregoing correspondence was treated as a Request for Administrative Judicial Review, and this matter was forwarded to the Board of Alien Labor Certification Appeals. On March 19, 2004, we issued a Notice of Docketing and Order Requiring Statement of Position or Legal Brief. On or about March 25, 2004, the Employer's counsel filed a response, together with additional documentation.

DISCUSSION

In the NOF, the CO stated in pertinent part:

> Pursuant to 20 CFR 656.3 DEFINITIONS, "employer" means a person, association firm or corporation which currently has a location within the United States to which U.S. workers may be referred for employment. Mail issued May 1, 2003 and addressed to the employer at the same address shown on the 7-50A form in this case was returned by the Postal Service "moved, left no address Unable to forward." Employer must furnish his current address or document why his mail was returned as undeliverable at the Iselin address.
>
> Pursuant to 20 CFR 656.3 DEFINITIONS, "employment" means permanent full-time work by an employee for an employer other than oneself. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.
>
> There is no listing for Employer's FEIN, or for the company name, in the New Jersey Unemployment Insurance (UI) computer system.
>
> Employer must document that it is currently operational, its current address and furnish the number of workers it has had in 2001, 2002, and currently, their names, job duties, whether full- or part-time, employee or non-employee. For workers who are painters, specify the kinds of painting each does. Submit copies of W-2 or 1099-MISC forms, whichever are applicable, for 2001 and 2002. If he claims to have employees, he must document why there is no current active listing for the company in the State UI system. If there is such a listing, furnish the name and number under which it is listed. Employer must also furnish copies of his Federal Income Tax returns for 2001 and 2002. He must document how he can guarantee permanent full-time employment performing the duties shown in item 13 of the ETA 7-50A form, which consists solely of popcorn, spray painting and faux finishing. Furnish copies of contracts for 2001, 2002 and currently as evidence. How many of his painters perform solely these duties? Does each perform them on a full-time permanent (2080 hours per year) basis?

(AF 24).

The Employer's rebuttal consisted of a letter by "Norbert Delgado, Owner" (AF 63), an Employees' List (AF 62), Statement of Accounts (AF 61), Shut Off Notice from PSE&G (AF

60), Employer's Federal tax returns for 2000, 2001, and 2002 (AF 33-59), and an amended ETA 750A form (AF 29-32). Those documents establish that Nivek Painting, Inc. is an "Employer" within the meaning of 20 C.F.R. § 656.3, and the CO found that the "Employer" issue was satisfactorily rebutted. (AF 64). However, the CO denied certification on other grounds, stating:

> While employer claims to have employees, he has not documented why there is no record of his FEIN or his company in the State UI system, as instructed in the NOF. We note that none of the three returns show any expenses for Salaries and Wages (item 8) or Cost of Labor (Schedule A, item 13). With reference to item 19 Other Deductions (attach schedule), all three returns include an amount and refer to attached statements. However, only one of the three returns includes these attachments. The tax return of 2001 includes Statement 3 which shows an expense of $56,435 for Subcontractors. None of the returns show any data for Tax and Payments (items 22-27). One tax return (2000) shows the Business Ordinary Income (#21) as income on the owner's personal Federal Tax Return. The tax return of 2002-Schedule K shows business income is the shareholder's share; the shareholder is the owner….
>
> The employer has not satisfactorily documented that an employer-employee relationship exists with any of his workers and has not documented that such a relationship would exist with the alien. He has not furnished the documentation (W-2 or 1099-MISC forms) requested in the NOF or explained why there is no record of his company in the UI system. He has also not documented that he can guarantee permanent full-time employment performing the job duties shown on the 7-50A form. He has not furnished any contracts. While rebuttal states his firm does specialty painting, it is not limited to solely this kind of painting. We also note that, according to this "employee" list, he currently employs a Decorative Painter full-time.
>
> Based on the above, the application is denied.

(AF 64). For the following reasons, we agree with the CO.

The Board has consistently held that a petitioning employer must provide directly relevant and reasonably obtainable documentation requested by a CO. *See e.g. Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*); *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991); *Bob's Chevron*, 1993-INA-498 (May 31, 1994).

In the NOF, the CO requested relevant information in order to ascertain whether there is a *bona fide* full-time job opportunity available for the position of "Faux Finisher Artist." Among the items reasonably requested were: W-2 or 1099 MISC forms of the Employer's current employees and copies of contracts for 2001, 2002, and 2003, which establish that the Employer can guarantee full-time employment for the person performing the duties described on the ETA 750A form, Item 13. (AF 24). However, the Employer's rebuttal letter states, in pertinent part, that he cannot send W-2 information, "because they are not my information to give and my employees do not want to show them." (AF 63). Furthermore, the Employer stated that he does not have any work contract strictly for the specific painting techniques cited in the ETA 750A. Moreover, while referring to contracts involving general painting and carpentry work, the Employer failed to provide such contracts with its rebuttal. (AF 63). Accordingly, we find that the Employer's rebuttal was nonresponsive and/or inadequate to the CO's reasonable requests for documentation.

We decline to consider the new evidence submitted by the Employer with its review request, (AF 71-73), and with the Employer's Brief, because such evidence should have been provided with the Employer's rebuttal prior to the issuance of the Final Determination. The provisions of Section 656.24(b)(4), which requires the development of evidence before certifying officers, "is an expression of the importance for labor certification matters to be timely developed before certifying officers who have the resources to best determine the facts surrounding the application." *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). Accordingly, the regulations preclude consideration of evidence which was not "within the record upon which the denial of labor certification was based." 20 C.F.R. § 656.24(b)(4); *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989)(*en banc*).[2]

[2] Even if the additional evidence had been timely filed, it would still not adequately address the CO's reasonable concerns that there is no full-time, permanent job opportunity available. The belatedly submitted evidence consists of the following: cursory written statements (which are neither notarized nor under oath) by Wellington Jacober (AF 71) and Anselino Ferreira (AF 72), that Employer pays them weekly in cash. The latter says that he is "not legal at this moment, but my wife is doing a process for me." Furthermore, Mr. Ferreira states that he is currently performing the duties described in the ETA 750A form. (AF 72). In addition, the Employer's counsel submitted a document entitled "Proposal," dated June 2, 2002. However, the "Proposal" does not specify any of the duties set forth in the ETA 750A form. Moreover, there is no indication that the Proposal was ever approved.

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Since *Compaq Computer, Corp.,* however, this panel recognized that a remand is not required in those circumstances where the application is so fundamentally flawed that a remand would be pointless, such as here when a finding of a lack of a *bona fide* job opportunity exists. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

Based on the foregoing, we find that the Employer has failed to demonstrate that a *bona fide* job opportunity exists. Accordingly, we find that the CO properly denied labor 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 of 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.