



Issue Date: 16 January 2008

BALCA Case No.: 2007-INA-00034
ETA Case No.: D-04295-18482

In the Matter of:

FACTOR'S ROW, LLC,
Employer,

on behalf of

FAHIMEH FEIZI,¹
Alien.

Certifying Officer: Jenny Elser
Dallas Backlog Elimination Center²

Appearance: Brenda J. De Armas-Ricci, Esquire
New Orleans, Louisiana
For the Employer and the Alien

Before: **Chapman, Wood 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

¹ The Employer originally filed its labor certification in 2001 on behalf of Faezeh Hossein Khanli Khaneghah. However, on September 6, 2006, the Employer notified the Certifying Officer that it would need to change its sponsorship to a new Alien, Ms. Fahimeh Feizi. (AF 46, 56).

² The Backlog Elimination Centers closed effective December 21, 2007. All further correspondence to the Certifying Officer about this application should be directed to the Chicago Processing Center.

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 (“C.F.R.”).³

STATEMENT OF THE CASE

On April 26, 2001, the Employer, Factor’s Row, LLC, filed an application for labor certification to enable the Alien to fill the position of “Coordinator” which the CO found to be that of “Manager, Export.” (AF 404). The Employer listed the nature of its business as “real estate, restaurant, stations, import/export, etc.” and described the job duties as:

Coordination of all aspects of affiliate companies. Marketing, sales, financial records, personnel records, problems, purchasing, etc. Liason [sic] between affiliate, parent, clients, etc. Responsible for orders, bill of lading, customs, etc. for import/export company. Responsible for coordination of orders, shipping, purchases, invoices, etc.

(AF 404). The only job requirement was two years of experience in the job offered. An advertisement for “coordinator” was placed in the “Help-Wanted – Clerical” section of The Times Picayne. (AF 398). The Employer rejected sixty one U.S. applicants. Twenty seven of the applicants were rejected for not having the requisite experience. (See AF 382-397).

On December 23, 2005, the CO issued a Notice of Findings (“NOF”) proposing to deny certification. (AF 78). The CO questioned the nature of the Employer’s business, indicating that it was presumed that the stations listed meant gasoline service stations,

³ 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

and noting that there was no indication as to what the “etc.” referred. The CO presumed the position involved additional business activities, in excess of the four listed. The job description also utilized “etc.” several times, with no explanation, and the CO found it reasonable to assume that there were even more job duties, in excess of those listed. The CO found that the number and types of duties to be performed in the job and the number and types of business activities in which the Employer was engaged represented a combination of duties that was not normal in the U.S. labor market. *See* 20 C.F.R. § 656.21(b)(2)(ii). The Employer was advised it could rebut this finding by (1) documenting that workers were normally employed for the combination of duties in the area of intended employment; (2) submitting evidence that the combination of duties arose from a business necessity; or (3) revising the duties or deleting the combination of duties. The latter would require that the Employer amend the Application for Alien Employment Certification and indicate its willingness to re-recruit.

By letter dated March 1, 2006, counsel for the Employer indicated the Employer’s willingness to re-write the job description and re-advertise. (AF 73). In a subsequent letter, counsel for the Employer indicated that it was changing the Alien for whom the application was being submitted, the new Alien being Fahimeh Feizi. (AF 56). The Employer amended the ETA 750 Part A to delete the “etc.” in the section of the form relating to the nature of the Employer’s business activity and to revise the job description to include (1) acting as liaison between affiliate, parent, and clients; (2) being responsible for coordination of orders, shipping, purchases, invoices, bill of lading, and custom documents; and (3) the overseeing of personnel records, purchasing documents, and finance records. (AF 51).

A second NOF was issued on December 22, 2006.⁴ The CO stated that despite checking various databases and telephone directories, the Employer's existence could not be verified; therefore the CO could not determine that a bona fide job existed. The Employer was advised that it could rebut this finding by providing (1) a copy of the most recent business tax return filed with the Internal Revenue Service; (2) copies of the last four quarterly reports filed with the State for unemployment insurance and its State account number; (3) a list of each employee in the company, showing the job title of each employee and the annual wage of each employee; and (4) any documents, such as Yellow Pages listings, web sites or company advertisements for the Employer's product and/or service which would document the Employer's existence. The Employer was further advised that it needed to show that it had sufficient funds available to pay the wage or salary offered and that it would be able to place the Alien on the payroll on or before the date of the Alien's proposed entrance into the United States. The CO stated that evidence to be submitted could include payroll records, tax returns or other records documenting the financial soundness of the Employer. Finally, the CO noted that the Employer was seeking to substitute the current Alien. Since there had been excessive changes and amendments made to the Application as originally filed, the Employer was advised that if it wished to continue the application process, it needed to submit two new additional ETA 750 Parts A and B forms with original signatures, by the Employer and the substituted Alien.

The Employer filed its rebuttal to the second NOF by letter dated January 25, 2007. (AF 25). Included were bank records and financial records in reference to Factor's Row, which the Employer's attorney contended was a holding/sister company that oversaw the other investments and companies as well as owning property outright. According to the Employer, it needed a "coordinator" to insure the continued growth of investments. The Employer included a print-out of a website search of corporate names

⁴ The second NOF is not contained in the Appeal File; however, a copy was provided by counsel for the Employer with her Statement of the Case.

from the Louisiana Secretary of State's Commercial Division, which showed the Employer as an active corporation. Also included was the unaudited Statement of Financial Condition for Hossein and Nazafarine Talebloo, which listed Hossein Talebloo as a 50% owner of the Employer, which had assets of over \$7 million. It further stated that Factor's Row (an office building located in New Orleans valued at over \$5 million) was the principal asset of Factor's Row, LLC. (AF 31). Mr. Talebloo's other listed business ventures included oriental rugs, properties, real estate, restaurants, bars, a convenience store, and antiques. The Employer also submitted its bank statements for October and November of 2006 and the newly revised ETA 750, as requested.

A Final Determination was issued on February 15, 2007. (AF 21). The CO found that the existence of the Employer could not be verified and therefore the issue of whether a bona fide job existed had not been resolved. As the Employer had failed to submit any of the documentation requested, and the evidence submitted was insufficient to rebut the deficiencies outlined in the NOF, labor certification was denied.

On March 13, 2007, the Employer filed a Request for Review. (AF 1). In its request for review, the Employer argued that the documentation it submitted clearly showed the ability of the Employer to pay the proffered wage. The Employer also contended that the CO claimed the evidence was never received and argued that the documents were received and labor certification should be granted.⁵

This matter was docketed by the Board of Alien Labor Certification Appeals on June 7, 2007, and a Notice of Docketing was issued on June 21, 2007.

⁵ The Employer read the Final Determination as meaning that the CO denied receiving the Employer's rebuttal. However, we find that what the CO was saying in the Final Determination was that the Employer failed to submit any of the documentation requested in the NOF, not that the Employer did not submit rebuttal at all. Thus, there is no issue on appeal regarding failure to submit a timely rebuttal.

The Employer filed a “Statement of the Case,” which was received by the Board on July 17, 2007. In this filing, the Employer reiterated its argument that the CO had claimed that the Employer did not send in documentation in response to the NOF, but that the documents submitted clearly showed the Employer’s corporate existence and its solvency. The Employer argued that since the NOF was sent post-Hurricane Katrina, limited data was available at the time of the rebuttal on the physical location of the corporation, the corporate office having been destroyed. Attached to the Statement of the Case was the Employer’s 2006 partnership tax return.

DISCUSSION

An application for labor certification must clearly show that the employer has enough funds available to pay the wage or salary offered to the alien. 20 C.F.R. § 656.20(c)(1). Moreover, the labor certification regulations require that the employer offer a *bona fide* job opportunity. 20 C.F.R. § 656.20(c)(8); *Bulk Farms v. Martin*, 963 F.2d 1286, 1288 (9th Cir. 1992); *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*). The Board applies a totality of the circumstances test to determine whether a job is clearly open to U.S. workers. *Modular Container Systems, supra*. If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). Thus, a CO may make reasonable requests for information showing the ability to pay the wage offered, *Ranchito Coletero*, 2002-INA-105 (Jan. 8, 2004) (*en banc*); *The Whislars*, 1990-INA-569 (Jan. 31, 1992), and that the employer is offering a *bona fide* job opportunity. *Elain Bunzel*, 1997-INA-481 (Mar. 3, 1999) (*en banc*); *Umrani Aquatic Ltd.*, 2006-INA-51 (Apr. 24, 2007). An employer’s failure to produce a relevant and reasonably obtainable document requested by the CO is grounds for the denial of certification. *Gencorp, supra*.

Upon review of the Appeal File, we find the Employer's application to be incomplete, equivocal, and inherently implausible. The nature of the Employer's business and the nature of the job being offered were never precisely defined. Although the CO categorized the job as export manager, it is not clear that import/export is what Factor's Row is about, or that this was the proper job classification.⁶ Some of the evidence strongly suggests that its principal business activity is rental of commercial office space.⁷ The Employer's attorney, however, characterized the business as a holding company, or "sister" company which manages other companies in which the principals of Factor's Row have ownership participation. (AF 25). This ambiguity makes it difficult to assess the credibility of the Employer's response to the NOF.⁸

In order to try to get some clarity about the resolution of this matter, we focus on what the Employer actually provided in rebuttal,⁹ and whether it adequately addressed the

⁶ As noted above, the CO concluded that the job involved an unduly restrictive combination of duties. This issue was never resolved because when the second NOF was issued, the entire focus of the application turned to whether the Employer was offering a bona fide job opportunity and had sufficient funds to pay the proffered salary. Even with the revised ETA 750A, however, the nature of the Employer's business ("Real Estate, Restaurant, Station") and the job offered ("coordinator") remains ambiguous. (See AF 44). Similarly, the duties stated on the revised ETA 750A are so wide ranging (business liaison, shipping coordinator, personnel manager, acquisitions manager, finance manager) that the position still appears to potentially encompass an unduly restrictive combination of duties. *Id.* We do not decide the combination of duties issue because the Final Determination was based solely on the bona fide job opportunity and ability to pay the proffered salary issues.

⁷ The letterhead of the letters sent to the U.S. applicants characterizes Factor's Row LLC as "an historic CBD office building." (AF 110-381). See also Appendix 8 to the Employer's Brief, IRS Form 1065, which lists the Employer's principal business as rental of commercial offices. This tax return, however, was not in the record upon which the CO denied certification. See n.9, *infra*, regarding post-rebuttal evidence.

⁸ Moreover, it strains credulity to believe that a holding company managing the investment activities of multi-million dollar sister companies as suggested by the Employer's attorney's argument and the Accountant's Compilation Report would entrust a "coordinator" with the extensive management responsibilities stated in the job description and only pay that employee about \$35,000 a year. See *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) (inherent implausibility is a factor to consider when analyzing a bona fide job opportunity case).

⁹ As noted above, the Employer submitted its 2006 federal tax return with its appellate brief. The Board, however, does not have the authority to consider additional evidence submitted in conjunction with a request for review or appellate brief. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en*

issues raised in the second NOF. In the instant case, the CO reasonably requested information and specific documentation in the form of copies of the company's most recent business tax return, the last four quarterly state unemployment insurance reports, a list of each employee in the company with the job title of each employee and the annual wage of each employee, and any other documents showing the Employer's product and/or service which would document the Employer's existence. The rebuttal submission, however, did not include any tax records or state unemployment insurance reports, or employee rosters. Rather, it consisted of a web page showing that the Louisiana Secretary of State listed it as an active corporation as of January 25, 2007 (AF 26), an "Accountant's Compilation Report" on the financial condition of several principals of Factor's Row LLC which suggest that Factor's Row is a viable business interest (AF 28-35),¹⁰ and bank statements for Factor's Row showing that in October and November of 2006 it had cash in savings and checking accounts in amounts exceeding a million dollars. (AF 36- 39). We find that this evidence establishes that Factor's Row was, in fact, a solvent business at the time of the rebuttal. However, what this documentation did not show was the nature of the Employer's engagement of employees. In fact, there is nothing in this documentation or anywhere in the Appeal File showing whether or not Factor's Row has any employees. Thus, the documentation submitted in rebuttal does not establish whether or not it is offering bona fide, full-time employment in the position for which labor certification is sought. *Compare Koam Poultry Technical Service*, 1990-INA-596 (July 17, 1992) (employer failed to document that it was an "employer" within the meaning of the Act as it did not document that it withheld taxes, social security or other unemployment insurance for its workers). In contrast, the documentation it did not submit – tax records, unemployment insurance reports and

banc). Even if we could consider the tax return, we note that it shows that no salaries or wages were paid during the tax year. See Appendix 8 to the Employer's Brief, IRS Form 8825, Line 13. Thus, it does not substantiate that Factor's Row actually has employees.

¹⁰ This report was based on the representations of the clients, and not an independent audit or review. (AF 28).

employment rosters – might have confirmed the bona fides of the Employer’s job offer. Since the Employer did not submit this documentation we draw the inference that such documentation would not support a finding that the Employer actually has an employee position of “coordinator.” *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc), slip op. at n.23 and surrounding text (“A CO would be justified in drawing an adverse inference from such a lack of willingness to produce supporting documentation that would not support the employer's case.”).

In its appellate brief, the Employer argued that Hurricane Katrina made it difficult to produce proof of the physical location of the Employer because its corporate office space had been destroyed by the hurricane. This argument, being raised for the first time in the appellate brief was not timely presented. Moreover, the Employer did not claim that its business records were destroyed, and damage to its office space does not, standing alone, excuse its failure to document the bona fides of the “coordinator” position.

Based upon the Employer's failure to provide the documentation reasonably requested by the CO in her effort to determine whether permanent full-time employment, as required by 20 C.F.R. §§656.3 and 656.20(c)(8), was being offered in this matter, we find that certification was properly denied.

ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

JOHN M. VITTONI, Chief Administrative Law Judge, joining and concurring.

I join in the per curiam decision. I add several observations about this appeal.

First, in review of the Appeal File, it was unclear to me why some of the U.S. applicants were not considered qualified, while the Aliens were. Several of the U.S. applicants had many years of professional experience in fields such as property management (Gray), engineering project management (Worley), warehouse management (Marchmont), accounting (Caruso), administrative management (Elus), and hospital administration (Campbell). In contrast, Ms. Feizi's experience was "Assistant to the President" in a trading and oriental rugs company, whose duties included "organizer, public relations ALL OFFICE DUTIES" from 1990 to 2006. (AF 47) Mr. Hoosein's experience was as a Teller at a gas station from September 2000 to April 2001, a Tourist from August 1999 to August 2000, a logistics coordinator at an oil and gas refinery from June 1998 to June 1999, an import/export coordinator from October 1996 to June 1998, and from August 1982 to April 1985. (AF 406-408).

Second, in this decision, the panel referred to Factor's Row as the "Employer" because it is a standard way to refer to the entity that petitions for permanent alien labor certification. Based on the record before the panel, however, I would characterize the Factor's Row only as a putative employer. It might be a holding company. It is equally plausible that it is only a business structure for the collection of rents. Based on the record presented, I could not determine whether Factor's Row would directly employ the Alien or whether some other business entity would be the actual employer.

Finally, I observe that the job duties as specified by the Employer appear not to describe a mere, low-level coordinator, but to be more that of a General Manager, Comptroller, CFO, or some combination of those positions.

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, N.W.
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.