



**Issue Date: 16 January 2008**

**BALCA Case No.: 2007-INA-00066**  
ETA Case No.: D-05210-59547

*In the Matter of:*

**PR CONSULTANTS, INC.,**  
*Employer,*

*on behalf of*

**KIRAN KUMAR TENNETI,**  
*Alien.*

Certifying Officer: Jenny Elser  
Dallas Backlog Elimination Center<sup>1</sup>

Appearance: Rani Emandi, Esquire  
New York, New York  
*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 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

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<sup>1</sup> 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.

the Code of Federal Regulations (“C.F.R.”).<sup>2</sup>

## **STATEMENT OF THE CASE**

On March 17, 2005, the Employer – a software development and consulting services business – filed an application for labor certification on behalf of the Alien for the position of “Software Engineer.” (AF 59). The Employer requested a Reduction in Recruitment (“RIR”). (AF 63). In support of its RIR request, the Employer provided documentation showing that it had advertised for the position in the Wyoming Tribune-Eagle. (AF 63-67).

On February 6, 2007, the CO issued a Notice of Findings (“NOF”) proposing to deny certification. (AF 45-51). The CO found that the Employer’s wage offer of \$60,000 was below the 2004 Occupational Employment Statistics (“OES”) Wage Survey wage rate for a Level Two computer software engineer in Cheyenne. The OES wage rate was \$98,344.

The CO also raised a concern in the NOF that the Employer had set up the Cheyenne branch, not as an actual place of work, but solely for the purpose of obtaining labor certification. The CO noted that the Employer was a New Jersey company and was not registered as a Wyoming employer. The CO stated that a Wyoming Department of Labor official went to the location stated on the ETA 750A as the place where the Alien would work, and found a small office with no signage indicating the business name. Moreover, the state official looked through a window, and saw only a bare office with one bare desk and one bare bookcase. A receptionist from a nearby office told the state

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<sup>2</sup> 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.

official that a woman came by once a week for a few minutes. The state official then called the phone number given on the ETA 750A and spoke with a woman who said that she was the owner of the company, that she never hired any employees, that she did all of her work from home, and that she only went to the office periodically to check phone messages. The CO, therefore, directed the Employer to document that the job offered was bona fide and was permanent and full-time work. The CO specified documentation that she would require in the rebuttal submission, such as consulting contracts, a copy of an executed lease and proof of lease payments, a work schedule for the offered job, copies of the past three years of Federal income tax returns, copies of the past three years of Federal withholding tax reports for the work location, copies of the last four quarterly reports for state unemployment insurance, a copy of the Alien's W-2 forms while working for the Employer, and payroll reports showing details of the hours worked by the Alien and rate of pay.

The CO also questioned whether the job opportunity listed the Employer's actual minimum requirements for the job because the job requirements listed in the ETA 750A were different from those listed in the advertisements in the Wyoming Tribune-Eagle.

Finally, the CO noted that the Employer had rejected five U.S. applicants, stating only that they did not have the relevant experience and skills for the job offered. The CO found the reasons for the rejection not to be specific or lawfully job-related, being incomplete and general. The CO directed the Employer to document its reasons for rejecting the applications with evidence beyond its own statements, such as resumes, letters from applicants rejecting the job opportunity, and so forth.

The Employer's attorney submitted rebuttal on February 27, 2007. (AF 13-44). The Employer agreed to raise the salary and amended the job description to match the advertisement. It provided copies of its Certificate of Incorporation in the State of Wyoming, its New Jersey business license, a Wyoming "Consent to Appointment by

Registered Agent” form, quarterly Wyoming unemployment insurance/workers’ compensation summary reports along with employee wage listings, the petitioner’s W-2s relating to the Cheyenne location, and the lease for the Cheyenne location. The rebuttal did not address the reasons for rejection of the U.S. applicants.

The CO issued a Final Determination denying certification on May 10, 2007. (AF 8-12). The CO noted that the Employer had increased the wage offer, but faulted the Employer for not documenting sufficient funds or ability to pay the amended wage. In regard to the bona fide job opportunity issue, the CO indicated that she had checked the Wyoming Secretary of State’s Office webpage, and found that the Employer’s business status had been revoked as of May 31, 2006 because of delinquent taxes. (*See* AF 44). The CO also observed that the Employer did not submit, as directed in the NOF, a consulting contract, a work schedule, Federal income tax returns, Federal withholding reports for the work location, or payroll reports. The CO noted that the unemployment insurance reports submitted by the Employer showed only one employee, who was not the Alien.<sup>3</sup> The CO also noted that the Employer had not submitted the Alien’s W-2s, but only W-2s for the single Cheyenne employee. Because the Employer had not addressed the issue of its reasons for rejecting the U.S. applicants, the CO found that it had failed to provide lawful, job-related reasons for rejection of the applicants. The CO did not address the “actual minimum requirements” issue. In summary, the CO wrote:

Based on the rebuttal documentation submitted, it is clear PR Consultants has no permanent bona fide job opening and no bona fide job site at 1603 Capitol Avenue, Ste. 314, Cheyenne, WY. Based on the number of employees (zero to one – [<sup>4</sup>]) shown on the Wyoming State Unemployment Reports for 2004, 2005, and 2006 in Cheyenne, WY, at no time were more than one employee actually performing and conducting

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<sup>3</sup> This employee was paid from about \$10,000 to about \$16,000 a year. (AF 36-38).

<sup>4</sup> The CO named the employee at this point; we have redacted this name because it is not relevant to the disposition of this appeal.

work at the Cheyenne location. The Cheyenne job site was a virtual location used to file labor certifications where the test for U.S. worker availability in the technology field would be slim to none. The job offer is clearly not open to U.S. workers and there was no actual job site to which U.S. workers could be referred, considered or hired.

(AF 12).

On June 7, 2007, the Employer filed a Request for Review through its attorney. (AF 1-7). The Employer stated that it is a bona fide entity, but did not further explain why it believed that the Final Determination was in error. The Employer indicated that it attached to Request for Review a copy of “the basic agreement executed by the employer with its clients which indicates the terms & conditions of the consulting services...” and a copy of “the weekly and monthly work schedule for the job offered....” The Appeal File, however, contains neither of these documents. Rather, it contains an Employment Contract between the Employer and the Alien.

The Board docketed the appeal on August 6, 2007, and issued a Notice of Docketing on August 16, 2007. Neither the Employer nor the CO filed briefs on appeal.

## **DISCUSSION**

Section 656.20(c)(8) of the Department’s labor certification regulations requires that the employer offer a bona fide job opportunity. *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 burden of proving that the employer is offering a bona fide job opportunity, and that it is offering full-time employment, is on the employer. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (en banc); 20 C.F.R. § 656.2(b). Furthermore, an employer must provide directly relevant and reasonable documentation sought by the CO. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). Failure to do

so warrants denial of labor certification. *Elain Bunzel*, 1997-INA-481 (March 3, 1999) (*en banc*).

In *eBusiness Applications Solutions, Inc.*, 2005-INA-87 (Dec. 6, 2006), this panel addressed the issue of whether a computer services company is offering a bona fide job opportunity where it creates a "virtual office" to which workers would be nominally assigned, even though neither their homes nor their work sites would necessarily be close to that office. We held that "[t]he fact that the 'new economy' frequently includes jobs without fixed work sites does not mandate that the Department of Labor accept a fictionalized location for a job offering as the basis for a labor certification application." One of the central concerns in such an application is whether the test of the labor market for a virtual office has any real connection to the available pool of applicants.

In the instant case, the CO was appropriately concerned when she was presented with an application from a New Jersey company applying for labor certification in Wyoming with no apparent connection to Wyoming other than leased office space that appeared to be rarely used. Thus, the CO reasonably directed the Employer to supply specific documentation to establish that it was offering a bona fide job opportunity for permanent, full-time employee in Cheyenne, Wyoming.

Although the Employer supplied some documentation with its rebuttal, as the CO noted in the Final Determination it did not supply such reasonably requested records as service contracts, tax returns, and payroll records. The documentation the Employer did provide only showed that it employed a single employee in Wyoming, who was being paid only a fraction of the prevailing wage for the job purportedly being offered in the labor certification application and whose duties were not identified. It also documented that the Employer rented a small leased space in Cheyenne. The documentation in no way shows that the Employer actually had any work for the Alien to perform in Wyoming. In fact, the record contains no evidence whatsoever of what computer service

work the Alien performed or would perform anywhere in the country.<sup>5</sup> We observe that, at least as of May 10, 2005, the Alien lived in Edison, New Jersey. (AF 61).

Based upon 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 the CO properly found that the Employer failed to establish that it was offering a bona fide job opportunity.<sup>6</sup>

This case was before the CO in the posture of an RIR request. In *Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003), this panel held that where the CO denies a request for reduction in recruitment, the proper procedure is to remand the case to the State Workforce Agency ("SWA") for regular labor certification processing. However, in *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004), we also held that an employer who is not able to establish that it can offer a bona fide job opportunity has presented an application that is so fundamentally flawed that it would serve no purpose to remand the case for regular processing. In such a case, the CO may deny the application outright rather than remand for regular processing, even if the

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<sup>5</sup> The copy of the employment contract supplied with the request for review was not in the record upon which the CO denied the application, and accordingly is outside the record that can be considered by the Board. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*). Even if this document was in the record, it does not establish that the Alien ever worked in Wyoming or ever would work in Wyoming.

<sup>6</sup> The CO made a couple of errors in the Final Determination. First, she rejected the Employer's rebuttal on the prevailing wage issue on the ground that the Employer had not established the ability to pay the amended wage. However, ability to pay was not raised as an issue in the NOF. Accordingly, we do not affirm the CO on this issue.

Second, the CO referenced a web page from the Wyoming Secretary of State's office showing that the Employer's Wyoming business registration had been inactivated based on delinquent payment of taxes. This was new evidence on which the CO could not rely without first giving the Employer an opportunity to respond through issuance of a supplementary NOF. Accordingly, we do not affirm this aspect of the Final Determination. However, the Employer's failure to provide most of the documentation requested by the CO in NOF, or to provide other credible evidence showing that it was offering a bona fide job opportunity in Cheyenne, Wyoming, renders the Secretary of State's webpage superfluous.

case was presented in a RIR posture.<sup>7</sup> Because we affirm the CO's finding that the Employer failed to establish a bona fide job opportunity, a remand for supervised recruitment is not warranted.

Accordingly, 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:

**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 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

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<sup>7</sup> We also affirm the CO's finding that the Employer failed to provide any rebuttal regarding the issue of whether the Employer provided sufficiently specific job-related reasons for rejecting five U.S. applicants. *See* 20 C.F.R. § 656.21(j)(1)(ii) (requiring the recruitment report to state the reasons for rejecting applicants "with specificity"). Because this case arose in the context of a RIR request, such a deficiency may not have been fatal to the applicant but might only have resulted in remand for supervised recruitment under *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003). We do not reach this issue, however, because we find that the Employer's failure to establish a bona fide job opportunity obviates a *Compaq Computer* remand.

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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.