



Issue Date: 08 September 2004

BALCA Case No.: 2003-INA-244
ETA Case No.: P2001-CA-09510433/JS

In the Matter of:

JOE'S AUTO BODY,
Employer,

on behalf of

ASATUR ASATRYAN,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Richard David Rogen, Esquire
Sherman Oaks, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Joe's Auto Body ("the Employer") filed an application for labor certification¹ on behalf of Asatur Asatryan ("the Alien") on December 5, 2000. (AF 104).² The Employer seeks to employ the Alien as an auto body repairer. This 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. 20 C.F.R. § 656.27(c).

¹ Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² In this decision, AF is an abbreviation for Appeal File.

STATEMENT OF THE CASE

In its application, the Employer described the duties of the position as ability to work with fiberglass, responsibility for repair of damaged vehicles and trucks, including making necessary repairs and painting completed vehicles. The Employer required two years of experience in the job offered. (AF 104).

In the Notice of Findings (“NOF”), issued February 13, 2003, the CO found three deficiencies in the application.³ The CO found that there is a question whether a current job opening exists to which US workers can be referred, or whether there is a current existing business operated by the Employer. The CO noted that the Employer submitted his individual Form 1040, Schedule C (2001) which showed a profit of \$78,754 from the business after expenses. The tax return, however, did not show any expenses related to a payment either to contractors for work performed or payment of wages. The CO stated that the Employer filed his business taxes under his own social security number, which confirms that there are no employees reported under any employer identification number.

The CO stated that because neither employee nor contract labor expenses were shown on the tax return and because the Alien has been employer’s associate since 1998, it appears that the Alien is an independently employed auto body repairer in association with the petitioner. The CO concluded that the employee position was only being created for the labor certification application. The CO stated that the Employer could submit rebuttal that explains persuasively how the job is truly open to U.S. workers. Specifically, the CO requested 1099 forms for each year that the Alien was not considered an employee and the Employer paid non-employee compensation. In addition, the CO directed the Employer to explain the lack of any record of payment to an employee or independent contractor on the Employer’s tax return. Finally, the CO stated that the rebuttal should show if the Alien also filed a tax return and if so, provide a copy.

³ The CO noted this was a supplemental NOF to allow the Employer an opportunity to correct deficiencies which arose as a result of the rebuttal to the initial NOF. The Employer’s rebuttal to the both NOFs is included at AF 7 – 91; the original NOF was not in the AF.

Further, the CO found that if the position was, in fact, an employee position, the fact that the Alien had been in the job for more than four years without the payment of wages and without reporting of wages raised questions as to whether the terms and conditions are in violation of federal or state employment tax laws. The CO noted that both the federal government and state government require that employers report wages paid to all employees, regardless of the worker's visa status since even out of status workers are entitled to have their social security wages reported. On rebuttal, the CO stated that the Employer should provide documentation showing that the Employer had submitted amendments for both federal and state payroll tax returns back to the quarter when the Alien was hired and acknowledging the amounts paid to the Alien as wages.

The third deficiency noted by the CO was the adverse effect on the working conditions for U.S. workers caused by the fact the Employer did not record payment of wages to the Alien. Under this circumstance, where the terms or conditions of work are discouraging, the CO may be unable to determine the availability of able, willing, and qualified U.S. workers. On rebuttal, the CO stated that the Employer should show how the terms of employment that include no reporting of wages do not create an adverse effect on the wages and/or working conditions of U.S. workers who are similarly employed. (AF 95-97).

The Employer submitted rebuttal on January 29, 2003 and April 24, 2003. The material submitted on April 24, 2003 in response to the supplemental NOF included the Employer's statement that the Alien was compensated in cash in 1998, 1999 and 2000 and that the amounts could not be documented. The Employer stated that the Alien was paid as an independent contractor on the advice of his former attorney and the Employer stated that the Alien recently filed tax returns on the money received as an independent contractor. Copies of the alien's tax forms for 2000, 2001, and 2002 were submitted. The Employer also argued that a representative of the EDD stated that the California tax identification number could not be activated until withholding for an employee is instituted. Finally, the Employer submitted some copies of bank statements to support the fact that paying the employees' salary will not impact his individual income.

The CO issued a Final Determination (“FD”) on May 12, 2003, denying certification. (AF 5-6). The CO noted that if the job was legitimately an independent contractor position, labor certification would not be applicable. Additional statements by the Employer indicated to the CO that the creation of the job was contingent upon labor certification at some unknown future date. Thus, the CO could not find that the job was truly open to US workers. In addition, the CO stated that based upon the Employer’s presentation of the job opportunity as a position for an employee, the Employer failed to show how there are no unlawful terms or conditions of employment present because no wages are or have been reported. (AF 5-6).

On May 23, 2003, the Employer requested review, arguing that the CO erred in incorrectly determining that the Employer did not have an active California Employer Tax account because the state of California will deactivate such account until actual wages are paid. In addition, the Employer argued that the Alien was hired as an independent contractor and as a result, no unlawful terms were present.

The case was docketed in this Office on July 29, 2003, and the Employer filed an additional brief in support of its appeal. The Employer reiterated many of his arguments, claiming that the California Employer Tax account could not be opened until an employee was hired. In addition, he argued that the Alien’s tax forms clarified that the Alien worked as an independent contractor. The Employer also stated that he conducted a good faith recruitment effort, but could not find a worker to fill the position.

DISCUSSION

In *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*), the Board stated that the "employer has the burden of providing clear evidence that a valid employment relationship exists, and that a *bona fide* job opportunity is available to domestic workers, and that the Employer has, in good faith, sought to fill the position with a U.S. worker."

The Employer's documentation in this matter raises serious questions about whether a valid employment relationship exists.

The Employer argues that the Alien has been working for the Employer as an independent contractor, as recommended by the Employer's legal counsel. The Employer has not submitted any 1099 forms to show that the Alien was paid as an independent contractor. The Employer has not even submitted copies of checks for the years when the Alien was paid by means other than cash. The Employer argues that from 1998 through 2000, the Alien was paid in cash, and the Employer could not document exactly the amount of money the Alien received. The Employer did not submit any copies of accounting records or any other documents from his business to support this assertion. In addition, the Alien's tax forms indicate that he received "business income" in 2001 and 2002, however, they do not establish the source of the business income. Thus, these records do not establish that the Alien's income came from work performed for the Employer or from work performed as a self-employed auto repairer.

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*). An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is ground for the denial of certification, *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991).

The Employer's failure to submit documentation requested by the CO in the NOF and Supplemental NOF regarding payments made to the Alien establishes that the Employer has failed to provide directly relevant and reasonable obtainable documentation requested by the CO and, therefore, labor certification must be denied. *See Gencorp, supra*.

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 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.