

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 September 2004

BALCA Case No.: 2003-INA-296
ETA Case No.: P2002-NJ-02487577

In the Matter of:

SCOTT AVENUE BUILDERS,
Employer,

on behalf of

SANDRO PEREIRA DA SILVA,
Alien.

Certifying Officer: Dolores Dehaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONI
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from Scott Avenue Builders' ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. Permanent 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 Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and 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 March 14, 2001, the Employer filed an application for labor certification on behalf of Alien, seeking to fill the position of Truss Carpenter. The Employer required three years of experience. (AF 3-11).

On March 6, 2003, the CO issued a Notice of Findings (“NOF”) proposing to deny labor certification. (AF 54-60). Citing 20 C.F.R. § 656.3, the CO instructed that an employer is defined as “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.” (AF 57). The CO explained that employment is defined as “full-time permanent work by an employee for an employer other than oneself.” Noting that the Employer had no identification number listed in the state unemployment insurance system, the CO requested an explanation. The CO also required the Employer to “[f]urnish copies of W-2 or 1099-MISC forms as evidence,” and to provide evidence of the number of its employees, their duties, and the nature of their employment. Finally, the CO requested copies of the Employer’s tax returns from the previous three years.

The Employer filed a rebuttal on May 6, 2003. (AF 61-96). The Employer explained that it had no identification number with the unemployment insurance agency because its employees did not have social security numbers. (AF 95). The Employer also stated that it “enclosed all the other documents that you have requested.” (AF 94). Those documents included a list of its employees from 2001 through the present, tax returns for 2000-2002, and 1099-MISC forms for its 2002 workers. (AF 62-93).

The CO issued a Final Determination (“FD”) denying labor certification on June 12, 2003, finding that the Employer failed to document the existence of an employer-employee relationship. (AF 97). The CO noted that the Employer did not submit W-2s for his workers from the years 2001 and 2002, and instead submitted 1099-MISC forms. The CO reasoned that the 1099s indicated that the Employer’s workers were not

employees. Accordingly, the CO found that there was no employer-employee relationship, in violation of 20 C.F.R. § 656.30.

On July 17, 2003, the Employer requested review of the denial and the matter was docketed by the Board on September 30, 2003. (AF 99-109).

DISCUSSION

In its Request for Review, the Employer made new arguments not previously submitted to the CO. (AF 1-5). The Board cannot consider this material, as our review is based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c). Thus, evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Furthermore, where an argument made after the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

Under 20 C.F.R. § 656.3, an employer is defined as “a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States.” Twenty C.F.R. § 656.3 defines employment as “permanent full-time work by an employee for an employer other than oneself.” In this case, the CO found that the Employer violated 20 C.F.R. § 656.3 by failing to adequately document the existence of an employer-employee relationship. The CO reasoned that the 1099-MISC forms submitted by the Employer were evidence that the Alien was not an employee. However, because we find that the NOF did not provide the Employer with adequate notice, as discussed below, we remand this case to the CO for further fact finding, consideration, and determination, pursuant to 20 C.F.R. § 656.27(c)(3).

The NOF must give notice which is adequate to provide the employer with an opportunity to rebut or cure any alleged defects. *Downey Orthopedic Medical Group*, 1987-INA-674 (March 16, 1988)(*en banc*). In order to provide adequate notice, the CO must identify the section or subsection allegedly violated and the nature of the violation, inform the employer of the evidence supporting the challenge, and provide instructions for rebutting and curing the violation. *Miaofu Cao*, 1994-INA-53 (March 145, 1996)(*en banc*). A summary of the applicable regulations alone does not bring an employer's attention to the nature of the alleged violation. *University of Utah*, 1987-INA-702 (May 9, 1988)(*en banc*).

Although the CO cited to the regulations defining "employer" and "employment," the NOF did not adequately explain the nature of the alleged violation. The CO merely required the Employer to clarify why it had no identification number listed in the state unemployment insurance system and then requested that the Employer submit "as evidence" either W-2 forms or 1099-MISC forms. The Employer followed the CO's instructions for rebutting the alleged violation, providing copies of 1099-MISC forms, submitting all other requested documentation, and offering an explanation as to why it had no identification number listed at the state unemployment insurance agency. The CO then relied on the 1099-MISC forms as evidence that the Alien is not an employee and that the Employer therefore failed to establish the existence of an employer-employee relationship. Thus, it only became clear in the FD that the CO was challenging the status of the Employer's workers and was relying on the 1099-MISC forms as evidence that those workers were not employees. Under the circumstances, the CO should have issued a second NOF, allowing the Employer to rebut its finding that no employer-employee relationship existed and to explain its use of 1099-MISC forms, rather than W-2s.

We note that the applicable regulations do not state that an independent contractor may not be considered an employee for the purposes of 20 C.F.R. § 656.30, and we have declined to so hold. See *Koam Poultry Technical Service*, 1990-INA-596 (July 17, 1992). However, an employer who seeks to have a contract employee certified must tread a narrow path. Only under the most "unique circumstances" have we held that an

independent contractor and contracting employer qualify for labor certification. *See Emily Walder*, 2003-INA-134 (June 18, 2004). Moreover, labor certification will not be granted when unlawful terms or conditions of employment exist. 20 C.F.R. § 656.20(c)(7). Thus, an employer who deliberately misclassifies an employee in order to avoid the legal obligations attendant to its status as an employer (i.e., payment of payroll taxes, etc.) will not be granted labor certification. *See, e.g., Bijan Azadi*, 1994-INA-95 (Oct. 4, 1995). We have held that no *bona fide* job opportunity exists where an employer initially classifies an alien as an independent contractor and later seeks to hire the alien as an employee. *Adacle Carvalho Cleaning Service*, 2003-INA-1 (Dec. 9, 2003) (*cf. American Chick Sexing Assn.*, 1989-INA-320 (March 12, 1991) (*aff'd en banc*) (holding that an employer may refashion its employment relationship from contractor to direct employer by using a different corporate entity). Thus, labor certification will rarely be granted when an alien's status as an independent contractor is at issue. On remand, the Employer should present evidence to demonstrate that this is a bona fide job opportunity that is not contrary to federal, state, or local law.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and the matter is **REMANDED** for further consideration and findings in accordance with this Decision and Order.

For the Panel by:

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JOHN M. VITTON
Chief Administrative Law Judge

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, NW
Suite 400 North
Washington, DC 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.