



Issue Date: 16 January 2008

BALCA Case No.: 2007-INA-00272

ETA Case No.: D-05115-70452

In the Matter of:

SOUTH VALLEY DRYWALL INC.,

Employer,

on behalf of

LUCIO PEREZ HIELO,

Alien.

Appearance: Margaret S. Choi, Esquire
Denver, Colorado
For the Employer and the Alien

Certifying Officer: Jenny Elser
Dallas Backlog Elimination Center¹

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

¹ 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.”).²

STATEMENT OF THE CASE

On April 30, 2001, the Employer filed an application for labor certification to enable the Alien to fill the position of Residential Drywall Finisher. (AF 40).

In a Notice of Findings ("NOF") dated January 4, 2007, the CO observed that the Employer had filed five labor certification applications for drywall finishers, and that it was unclear whether it had bona fide openings for five drywall finishers engaged in permanent, full-time employment. (AF 23-28). Thus, the CO directed the Employer to provide proof that it was offering bona-fide, permanent, full-time employment. The NOF indicated that the Employer could rebut the citation by providing documentation in the form of a weekly and monthly work schedule for the job offered; a copy of the Employer’s Federal income tax returns for the past three years; a copy of the Employer’s quarterly Federal withholding tax reports for the past three years for the work location; copies of the Employer’s last four quarterly state unemployment insurance reports; copies of the Alien’s W-2 forms for all years he had been employed by the Employer; and payroll reports for the entire period that the Alien had been employed by the Employer showing the hours he worked and the rate of pay. In this regard, the CO also directed the Employer to establish its ability to pay the wages offered. The CO stated that “[e]vidence may include a lease agreement, payroll records, tax returns or other records documenting the financial soundness of the business.” (AF 28).³

² 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.

³ The NOF also raised an issue concerning the prevailing wage. On rebuttal, the Employer submitted an amended ETA 750A indicating willingness to pay the wage specified in the NOF, and the CO did not address the issue of prevailing wage in the Final Determination. Accordingly, we find that the prevailing wage rate is not in issue on appeal.

The Employer submitted rebuttal on March 14, 2007. (AF 9-15). The documentation supplied by the Employer consisted of:

- A letter signed by the Employer's president in which he stated that as of March 11, 2007, the Employer had 380 active employees, and that it had the ability to pay the proffered wage to the Alien. (AF 11);
- A printout from the Employer's website stating that the Employer had been in business since 1976, that it has residential and commercial divisions, and that it maintains a showroom. (AF 12);
- An amended ETA 750, showing a work schedule of 40 hours a week, from 8:00 am to 4:30 pm. (AF 13-14).

In a cover letter, the Employer's attorney stated that the Employer had been in business for more than 30 years and had almost 400 employees. The attorney argued that "[u]nder C.F.R. § 204.5 (3) (g) (2) [sic], the company with 100 or more employees is exempted from submitting Federal Tax Return for the immigration purpose." (AF 9). The attorney stated that because the Employer is always in need of new employees, it filed over 10 labor certification applications during 2001, with "almost" all of them having been approved. (AF 9).

In a Final Determination dated June 13, 2007, the CO denied certification because the Employer had not provided any of the requested state or federal tax documents, a work schedule for the job being offered, or payroll reports. (AF 6-7).

The Employer requested BALCA review in a letter dated July 15, 2007, and received by the Dallas BEC on August 9, 2007.⁴ BALCA docketed the appeal on

⁴ Under the pre-PERM regulation at 20 C.F.R. § 656.26(b)(1), a request for BALCA review must be mailed by certified mail to the CO who denied the application within 35 calendar days of the date of the

September 17, 2007, and issued a Notice of Docketing on September 20, 2007. The Employer filed a brief on October 9, 2007. It argued that the work schedule was provided in the amended ETA Form 750, and that it was not required to provide tax returns to establish ability to pay the prevailing wage under 8 C.F.R. § 204.5(g)(2) because it was a company with over 100 employees, and the Employer's president provided a statement attesting to its ability to pay the proffered wage. The Employer also argued that even if its documentation was deficient, ability to pay is not an issue to be determined at the labor certification stage, but rather when the I-140 petition is filed with the United States Citizenship and Immigration Service ("USCIS").

The CO did not file an appellate brief.

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

Final Determination. Because the Appeal File did not include any documentation of the postmark of the Employer's request for review, and the CO did not challenge the timeliness of the request for BALCA review, we draw the inference that the appeal was timely filed, even though the CO did not receive the appeal letter until August 9, 2007.

produce a relevant and reasonably obtainable document requested by the CO is grounds for the denial of certification. *Gencorp, supra*.

In the instant case, the only documentation that the CO specified in the NOF that the Employer supplied on rebuttal was a statement of the hourly schedule for the position as shown on the amended ETA Form 750. The Employer did not submit copies of its Federal income tax returns, its quarterly Federal withholding tax reports, its quarterly state unemployment insurance reports, the Alien's W-2 forms, or payroll reports relating the Alien's work for the Employer. Such documents were specifically requested by the CO, were relevant, and were not shown to be difficult to obtain.

The Employer's principal argument on appeal is that that the USCIS regulation at 8 C.F.R. § 204.5(g)(2) exempted it from having to provide documentation on the ability to pay issue based on the company's president's letter. The panel in *Richardo Sanchez*, 2001-INA-96 (Sept. 28, 2001), found little merit in a similar argument made in that case. We concur. The cited regulation is a USCIS regulation and not a DOL regulation.⁵ As noted above, the applicable DOL regulation requires an employer to clearly establish sufficiency of funds to pay the proffered wage. 20 C.F.R. § 656.20(c)(1). The Board's decisions uniformly require an employer to provide documents reasonably requested by the CO. Moreover, the cited USCIS regulation applies only to the question of ability to pay, whereas the CO in this case requested documentation on both ability to pay and bona fide job opportunity citations.

The Employer also argued that ability to pay the proffered wage is an issue that only the USCIS can determine. The Employer, however, cited no authority to support this argument. In *Saritejdiam Inc.*, 1989-INA-87 (Dec. 21, 1989), the panel held that the fact that the Immigration and Naturalization Service had the authority to review an alien's

⁵ Even if this USCIS regulation was applicable to labor certification proceedings before DOL, it does not establish that the Employer was exempted from providing the requested documentation. The regulation says only that the Director may accept a statement from a financial officer of the prospective employer establishing ability to pay the proffered wage. Thus, it only provides the adjudicator the discretion to accept a statement; it does not provide a petitioning employer with an entitlement to a finding of ability to pay upon submission of a statement. Moreover, in the instant case, it is not clear that the statement from the Employer's president is the equivalent of a statement from a financial officer of the Employer.

qualifications did not infringe on the Labor Department's substantive authority over the labor certification process or its ability to examine an alien's qualifications when necessary. Similarly, we find that the existence of a USCIS regulation regarding an assessment of an employer's ability to pay the proffered wage does not circumscribe the Department of Labor's authority to investigate the issue under 20 C.F.R. § 656.20(c)(1).

The Employer's alternative argument on appeal is that the documentation it supplied on rebuttal was sufficient to establish ability to pay and the existence of a bona fide job opportunity. Although the Employer supplied a letter from its president stating that the Employer had 380 active employees and that it had the ability to pay the proffered wage to the Alien, the letter is not supported by any details or by any substantiating documentation. The Board has long held that a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

The Employer also supplied a web page which stated that the Employer has been in business since 1979, that it had both residential and commercial divisions, and that it had a show room. Assuming that this information is true, merely being in business for a long time does not establish current ability to pay, or the bona fides of a job opportunity. *See, e.g., Fremarc Designs*, 2005-INA-204 Mar. 21, 2006)(per curiam) (merely asserting that the petitioning company has been in business for a long time is not adequate justification for not providing a meaningful response to the ability to pay issue raised by the CO). The instant applications were for residential drywall finishers. Thus, the fact that the Employer has both commercial and residential divisions only potentially raises additional questions about the scope of the residential work performed. The fact that the Employer has a showroom adds little material information.

Finally, the Employer arguably complied with the CO's request for a work schedule when it submitted an amended ETA Form 750A. The amended Form, however, does not provide significant, concrete rebuttal to the CO's concern that the Employer may not be able to offer permanent, full-time bona fide employment for drywall finishers. It

is essentially a promise to provide full-time employment in the future. The much more critical information would have been the tax records, unemployment insurance records, and the Alien's payroll reports, which might have credibly verified that the Employer had enough full-time work to offer employees and that it has the financial resources to pay the proffered salary. Since the Employer did not submit this documentation we draw the inference that such documentation would not support a finding that the Employer was actually offering permanent, full-time employment for drywall finishers. *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc), slip op. at n.23 and surrounding text (permissibility of drawing adverse inference from failure to provide requested documentation).

In sum, the documentation supplied by the Employer on rebuttal was of minimal evidentiary value, and was not adequate to substitute for the kind of meaningful documentation that was enumerated in the NOF.

Based on the foregoing, we find that the CO properly denied 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 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. 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, NW Suite 400
Washington, DC 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.