



Issue Date: 16 January 2008

BALCA Case No.: 2007-INA-00057
ETA Case No.: P-04265-06575

In the Matter of:

RANKIN LANDSCAPING, INC.,
Employer,

on behalf of

ANDRES GUTIERREZ,
Alien.

Certifying Officer: Barbara J. Shelly
Philadelphia Backlog Elimination Center¹

Appearance: Randall L. Johnson, Esquire
Washington, D.C.
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

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 Groundskeeper. (AF 74).

On January 25, 2006, the CO issued a Notice of Findings “NOF” proposing to deny certification. (AF 70).³ The CO questioned whether the position was a permanent full-time one, stating that there was insufficient information to make a determination as to whether the Alien would in fact perform the duties on a full-time, year-round basis. The CO noted that the work is generally performed at certain seasons or periods of the year and not at other times. The Employer was directed to provide its payroll records for the months of December through March for the prior three years for all workers employed in the position for which labor certification was being sought or similar positions. The CO directed that the records should show the employees by name, the number of hours worked and gross wages paid. The Employer was advised that the records had to establish that the job duties were performed on a continuing basis and that the employees were not financially dependent on obtaining other employment or unemployment compensation during intermittent breaks in the year.

Counsel for the Employer submitted rebuttal by letter dated February 28, 2006. (AF 8). The Employer included payroll registers for the months of December through March for the years 2004 and 2005, and a payroll summary for January through March of

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.

2003. The Employer also submitted the quarterly state report of wages paid to each employee for the quarter ending March 31, 2004, and its quarterly reports for the 2nd, 3rd, and 4th quarters of 2003, and for all four quarters in 2004 and 2005 for the Alien and three other employees.

A Final Determination denying certification was issued on July 27, 2006. (AF 4). The CO found that the records provided did not establish the existence of a full-time position. Specifically, the CO concluded that the records submitted indicated that the period of employment was less than twelve months per year and that the position was performed only during certain seasons of the year. The CO found that the records revealed that during October, November and December, the wages paid were significantly less than in previous quarters. Payroll records for 2004 and 2005 indicated to the CO that most of the employees worked less than thirty hours per week during the winter months.

On August 31, 2006, the Employer filed a request for review of the denial of labor certification. (AF 1). In its Request for Review, the Employer contended that the job opportunity involved full-time work for an entire calendar year, and that the payroll records it provided showed that the wages paid to the Alien in the fourth quarter of the year were not significantly less than in any previous quarter.

This matter was then forwarded to the Board of Alien Labor Certification Appeals (“BALCA” or “Board”), which docketed the case on July 6, 2007, and issued a Notice of Docketing on July 17, 2007. The Employer filed a Statement of Position, which was received by the Board on August 7, 2007. Therein, the Employer reiterated the arguments made in the Request for Review, and contended that the evidence established

³ As Employer successfully rebutted one of the issues raised in the NOF, that issue will not be detailed herein.

that the Alien was paid at a similar rate during the winter as he was during the remainder of the year. The CO did not file an appellate brief or statement of position.

DISCUSSION

An employer bears the burden of proving that a position is permanent and full-time. Failure to do so warrants a denial of labor certification. *Bijan Azadi & Assoc.*, 1994-INA-382 (Oct. 4, 1995). In *Vito Volpe Landscaping*, 1991-INA-300, (Sept. 29, 1993)(*en banc*), the Board denied certification for a landscaping position where the job duties could only be performed ten months during the year, finding that the position fell into the definition of seasonal rather than permanent, full-time employment. This same issue was revisited in *Crawford & Sons*, 2001-INA-121 (Jan. 9, 2004) (*en banc*), and the same conclusion reached.

In the instant case, the records establish that the Alien had not been paid on a full-time year round basis in the years preceding the CO's review of the labor certification application. A payroll summary for the Alien establishes that he earned \$1,291.50 for the period from January through March of 2003. In the second quarter of 2003, he earned \$6,145.14, in the third quarter he earned \$6,263.14 and in the fourth quarter he earned \$4,855.70. Clearly, the first quarter of 2003 did not involve full-time employment.

Similarly, in two of the quarters in 2004, the Alien earned over \$6,000.00, while in two others, he earned significantly less. A Master List for 2004 showed that the Alien worked a total of 1554 regular hours and 136 overtime hours by December 12, 2004. At 40 hours per week, this would be full-time work for less than 39 weeks. In the first quarter of 2005, he earned \$2,946.10, in the second quarter he earned \$5,812.06, in the third quarter he earned \$4,561.89 and in the fourth quarter he earned \$1,440.00, once again demonstrating less than full-time employment.

In summary, the record clearly establishes that the Alien had been working less than twelve months of the year in full-time employment. Therefore, we must find that the position at issue constitutes seasonal and temporary employment under 20 C.F.R. Part 655. Because the Employer failed to provide compelling justification that the position involves permanent, full-time employment and that these activities could be performed on a year-round basis, the position cannot be certified as a permanent position.

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

PAMELA LAKES WOOD, Administrative Law Judge, concurring.

I concur in the result based upon the clear precedent of *Vito Volpe Landscaping*, 1991-INA-300 (Sept. 29, 1993)(en banc). However, for the reasons stated in my dissent in *Crawford & Sons*, 2001-INA-121 (Jan. 9, 2004)(en banc), I continue to believe that *Vito Volpe* was wrongly decided.

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.