



Issue Date: 20 August 2003

BALCA Case No. 2002-INA-254
ETA Case No. P2000-MA-01294344

In the Matter of:

RAMESH IZEDIAN,
Employer,

on behalf of

GHOLAMREZA HAMIDZADEH,
Alien.



Certifying Officer: Raimundo Lopez
Boston, MA

Appearance: Robert Gaynor
For Employer

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Gholamreza Hamidzadeh (“Alien”) filed by Ramesh Izedian (“Employer”) pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A) (the “Act”) and Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). The Certifying Officer (“CO”) of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and Employer’s request for review, as contained in the Appeal File (“AF”) and any written arguments of the parties.

STATEMENT OF THE CASE

On May 11, 1998, Employer filed an application for labor certification on behalf of the Alien, for the position of High End Finish Carpenter. (AF 125-126).

On June 19, 2000, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on the ground that it did not appear that the Employer had a bona fide job opportunity. The CO noted that upon calling the telephone number listed in the labor employment application, he reached a dentist's office. As it was unlikely that a dentist would require the services of a full time Finish Carpenter, the CO requested documentation demonstrating that the Employer required the services of a Finish Carpenter. The CO asserted that the application would not be certified until documentation was provided by the Employer proving that a bona fide job opening was available for the occupation. (AF 116-117).

In his Rebuttal dated July 11, 2000, the Employer stated that he was a full time dentist and also a developer who had been developing buildings in Boston for the past five years. The Employer added that the construction projects are done under the corporae name of Izad Developing and Izad Trustee Ltd. The Employer submitted articles of incorporation and tax returns to demonstrate his ability to pay for the position's salary, and noted that part of his income was derived from his multimillion dollar real estate developments. (AF 106-115).

On April 13, 2001, the CO issued a Second Notice of Findings (SNOF). The CO noted that pursuant to 20 C.F.R. § 656.20(c)(8) a bona fide job opening must exist to which qualified U.S. workers could be referred. Accordingly, as the Employer is a dentist, neither he nor his dental firm could petition for a High End Finish Carpenter, as neither has a need for a carpenter and consequently cannot offer a bona fide job opportunity. The CO added that since the Employer, as an individual, is attempting to hire the Alien, the Employer had to demonstrate that Izad Developing by itself had the financial ability to pay the Alien's wages and was able to provide a bona fide job

opportunity. The Employer was also required to provide documentary evidence that there was enough work to employ the Alien on a full time basis. (AF 64-65).

On May 4, 2001, the Employer in his Rebuttal to the SNOF asserted that it was the Employer as an individual and not as a dentist that was offering the position. The Employer noted that involvement in real estate was not unique to him and he should not be discriminated against for being a dentist. The Employer asserted that he had been developing real estate for seventeen years and provided a list of buildings developed by Izad Developing. Employer concluded that the list by itself demonstrated that Izad Developing was a viable corporation with a bright future ahead. The Employer added that the revenue derived from either his dental practice or his developing company was sufficient to pay for the Alien's salary. (AF 6-9).

On December 7, 2001, the CO issued his Final Determination denying the application. The CO found that the Employer did not demonstrate a need for a High End Finish Carpenter. The CO noted that such a position may be bona fide for a company which engages in a high enough volume of development to need a full-time individual who only does high end finish work, but the Employer could not claim such a need. The CO also found that the Employer provided substantial documentation that he is able to pay the Alien's salary, but ability to pay does not establish a need or a bona fide job opportunity. The CO also noted that Employer's company, Izad Developing, had only developed eleven properties in a seventeen year period and as the Finish Carpenter is only involved in the final aspects of the construction, it did not seem to have enough work for a full time Finish Carpenter. Additionally, in accordance with Employer's tax return it appeared that Employer's real estate ventures were rental properties, which typically would not have a need for a Finish Carpenter. For those reasons, the CO found that the Employer did not demonstrate that he had a bona fide job offer. Consequently, the labor application was denied. (AF 4-5).

On January 7, 2002, Employer filed his Request for Review. (AF 1-3). The Employer alleged that the CO erred in his denial as the CO had no evidentiary basis for

the conclusion reached. Employer argued that he did have the ability to hire a Finish Carpenter. Additionally, Employer argued that the CO raised issues in the Final Determination that were not raised in the NOF.

On August 26, 2002, the Employer submitted a brief in support of his appeal. The Employer asserted that he had demonstrated that he had a bona fide job opportunity, as evidenced by his statement in his Rebuttal to the NOF. The Employer noted that in his Rebuttal, he stated under penalty of perjury that he needed a full time Finish Carpenter to work in his multimillion dollar real estate development activity. The Employer also objected to the CO raising issues for the first time in the FD that had not been raised before. The Employer highlighted the CO's statements indicating that it did not appear that the number of buildings owned by Employer justified a need for a full time Finish Carpenter and that it appeared that the buildings were rental properties which in general need a maintenance person and not a Finish Carpenter. The Employer argued that he did not have an opportunity to respond to such assertions. The Employer also argued that the CO erred in not addressing his timely submission of the Rebuttal. Additionally, the CO failed to provide Employer the opportunity to argue that the position would be needed in the future as his real estate business was clearly expanding. For those reasons the Employer asserted that the CO's denial should be reversed and the case remanded to the CO for further review.

DISCUSSION

In the instant case, the CO made a factual finding that the Employer had not established that he needed a permanent full-time High End Finish Carpenter under the terms and conditions stated on the ETA 750 A.

Under 20 C.F.R. § 656.3, "Employment" means permanent full time work by an employee for an employer other than oneself. An employer bears the burden of proving that the position is permanent and full-time, and if an employer fails to meet this burden, certification may be denied. *Mr. and Mrs. Stanley Tee*, 1994-INA-10 (June 27, 1995).

Where an employer fails to demonstrate the volume of work necessary to support a full-time employee, it fails to establish full-time employment. *Tousi Rugs*, 1992-INA-374 (Sept. 29, 1993). As the employer bears the burden of proving that a position is permanent and full time, certification may be denied if the employer's own evidence is not sufficient. It follows that while the CO's findings may not be based on speculation, undocumented statements of an employer which are inconsistent or illogical are not compelling evidence of entitlement to certification. *Gerata Systems America, Inc.*, 1988 INA 344 (Dec. 16, 1988) (*en banc*).

The CO in the NOF required the Employer to document that a bona fide job opening existed for a High End Finish Carpenter. In the SNOF the CO also requested evidence demonstrating that the Employer had enough work to employ a Finish Carpenter on a full time basis. The Employer never addressed the question of his need for a Finish Carpenter. Additionally, the Employer did not provide a single piece of evidence that demonstrated the volume of work that a Finish Carpenter would be expected to tackle in Employer's business. Further, the Employer did not provide any information that would justify his need for a Finish Carpenter. The Employer made undocumented assertions as to his ownership of buildings and presumably based on those assertions, the CO was expected to conclude that the Employer had a need for a Finish Carpenter. The documentation provided by Employer, incorporation documents and income tax statements, only served to demonstrate a financial ability to pay for the position's salary. However, as the CO correctly noted, financial ability to pay a salary does not demonstrate the existence of a *bona fide* job opportunity.

Although a written assertion constitutes documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Employer's last opportunity to supplement the factual issues of the case is in the Rebuttal. 20 C.F.R. § 656.24. Therefore, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). Employer was provided two

opportunities, in NOF and SNOF, to demonstrate that he in fact had a need for a Finish Carpenter. The Employer, however, wasted those opportunities by limiting his Rebuttals to general statements as to his need for the Alien's work.

As the Employer never provided specific details about the amount of work to be performed by the Alien, nor did he provide any specific details about the reasons for his need for a full time Finish Carpenter, and since Employer's general assertions, without more, are insufficient to demonstrate that he had a bona fide job opportunity, we find that the Employer did not meet his burden of proof in respect to demonstrating that an actual job existed to which U.S. workers could be referred.

Consequently, as the record supports the CO's findings and for the above stated reasons, we affirm the CO's denial.¹

ORDER

The CO's denial of labor certification in this matter 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 of Labor 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

¹ Since the above stated grounds are sufficient to affirm the CO's decision we will not address the other issues raised by the Employer in his brief.

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, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.