



Issue Date: 05 September 2003

BALCA Case No.: 2002-INA-170
ETA Case No.: P2000-CA-09489413/JS

In the Matter of:

MOMART CLEANERS,
Employer

on behalf of

OSCAR MIGUEL RODRIGUEZ,
Alien.



Certifying Officer: Martin Rios
San Francisco, California

Appearance: Gloria Lara,
Santa Ana, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by a dry cleaner for the position of Garment Fitter and Alterations. (AF 26).² The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File.

¹ 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 20 C.F.R. Part 656.

² "AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

An application for Alien Employment Certification was filed on behalf of Oscar Miguel Rodriguez (“Alien”) by Momart Cleaners (“Employer”) on January 15, 1998 for the position of Garment Fitter. (AF 26). The job requirements were an 8th grade education, two years of experience in the job offered, and a resume or letter of qualifications. By a Notice of Findings dated October 25, 2001, the CO notified Employer of his intention to deny certification under 20 C.F.R. §§ 656.3 and 656.20(c)(8). (AF 22). The only issue raised by the CO was whether “a current job opening exists to which U.S. workers can be referred, or whether there is a current existing business operated by the employer.” (AF 23). Specifically, the CO wrote:

The application Form ETA750 B indicates that the beneficiary of the application, Mr. Oscar Miguel S. Rodriguez, has been in the job since May, 1990. However, the California Employment Development Department is unable to find that the employer has reported wages paid to Mr. Rodriguez. If the worker who does garment fitting and alterations on a full-time basis is not paid wages, [a] question arises as to whether the beneficiary is actually an owner, or whether the position does not exist as an employee position.

(AF 23). The CO directed Employer to show that there is a job for a full-time garment fitter and alterations workers and that the job is truly open to any qualified U.S. worker. The CO directed Employer to show how the Alien had been paid and to document it with tax records. The CO indicated that if Employer could not document reported wages, it should provide persuasive argument as to how the employee position is truly open to U.S. workers at prevailing wages. Finally, the CO directed that if the Alien was not paid wages as an employee, Employer should disclose whether the Alien was an owner or family member and list the names and positions of all owners and their relationship to the Alien. If there was such a relationship, Employer was to show how the job was open to any qualified U.S. worker.

By letter dated November 24, 2001, Employer offered a rebuttal stating that the position is open to qualified U.S. workers. (AF 13). The letter related that Mr. Rodriguez had been hired by Employer for a three month period from December 1997 through February 1998 as a temporary employee, and was therefore “not on payroll.” (AF 13). Employer stated that Mr. Rodriguez was self-employed after that time. (AF 13). Employer also submitted an amendment to the ETA-750B further explaining Mr. Rodriguez’s qualifications. (AF 15-17).

By a Final Determination (“FD”) dated January 3, 2002, Employer was notified by the CO that the employment certification had been denied. (AF 8). The CO found that Employer “did not appear to have paid reported wages to the alien” thus raising the question whether the job was truly open to U.S. workers. (AF 9). The CO observed that Employer was provided the opportunity to submit argument as to how the job was truly open to U.S. workers if no documentation of the payment of wages could be provided. (AF 9). Additionally, the CO found that Employer failed to offer any explanation of the significant change to Mr. Rodriguez’s work history or why Mr. Rodriguez was not paid wages for the three months that he was employed by Employer. (AF 9). The CO noted that the ETA 750 is a sworn statement, and that there was not a sufficient explanation for the differences in the statements made therein about the Alien’s experience and the story now given in rebuttal. The CO was further troubled by the fact that Employer completely ignored the CO’s request that Employer state whether any relationship exists between Employer and Alien. (AF 9). Thus, Employer failed to show that the job was truly open to U.S. workers. (AF 9).

Employer requested administrative review of the denial of certification by letter dated February 4, 2002. (AF 3). In the request, Employer explained that the initial work experience listed on the application was an error that was not apparent to Employer until called to its attention by the Notice of Findings. Employer went on to explain that the Alien was employed as a garment fitter in Mexico for eleven years. After arriving in

California, the Alien trained two times a week with Employer at no cost to Employer so that he could learn how to use Employer's machinery. (AF 3).

Employer has also stated in the request for review that there exists no relationship between Employer and the Alien. (AF 4). Employer further explained that the Alien, Mr. Rodriguez, has been working out of his home since February 1998. (AF 4). In conclusion, Employer stated that there are no U.S. workers "interested in the position being offered [evidenced by no referrals from the Los Angeles Times and an internal job posting] and that the Alien surpasses the standard of experience required for the granting of a Labor Certification." (AF 4).

DISCUSSION

The requirement that a *bona fide* job opportunity exist arise out of 20 C.F.R. §656.20(c)(8). An employer is required to attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." *Id.* The employer has the burden of providing clear evidence that a valid employment relationship exists and that a valid employment 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. *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987)(*en banc*); *State of California Dept. of Consumer Affairs*, 1994-INA-396 (July 18, 1995). Certification has been denied on the grounds that no *bona fide* job opportunity existed where the employer failed to provide documentation requested by the CO. *Britt's Antique Importers/Exporters*, 1990-INA-276 (Dec. 17, 1990); *Tedmar's Oak Factory*, 1989-INA-62 (Feb. 26, 1990); *Rainbow Imports, Inc.*, 1988-INA-289 (Oct. 27, 1988). Where the employer fails to document that there is a true, full-time job opening that is available to U.S. applicants, and where the qualifications appear to be tailored to the alien's credentials, certification is properly denied. *Eli's Times, Inc.*, 1994-INA-404 (Jan. 25, 1996); *Dr. Lalita Reddy*, 1994-INA-172 (July 25, 1995).

In the instant case, the alien's qualifications were listed on the ETA-750B to include working for the Employer from May 1990 through "PRST." (AF 29). That

document was later amended and Employer explained that the Alien worked for it from December 1997 through February 1998 only twice a week. (AF 13). During this time, the Alien was not paid because he was a temporary employee and therefore “not on payroll.” (AF 13).

Employer’s failure to provide adequate explanation of the failure to pay Mr. Rodriguez wages raises a serious doubt as to whether the garment fitter/alterations job was truly open to U.S. workers. Although Employer’s rebuttal retreats from the experience shown for the Alien on the ETA 750B, it does not answer the question of why the CO should find that the job is clearly open to U.S. workers when Employer’s past practice was to not pay wages. Moreover, although the NOF invited Employer to produce argument to show why the position was a full time, permanent one, clearly open to U.S. workers, Employer did not avail itself of that opportunity. We therefore find that Employer’s failure to provide documentation adequately explaining the failure to pay the alien’s wages does not rebut the CO’s finding that no *bona fide* job opportunity existed with Employer. Thus, CO’s denial of certification was appropriate.³

ORDER

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

³ Evidence first submitted with the request for review will not be considered by the Board. *University of Texas at San Antonio*, 198 -INA-71 (May 9, 1988). Thus, we have not considered the factual assertions made by Employer in its request for review.

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 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.