



(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 09 December 2003

BALCA Case No.: 2003 - INA - 1
ETA Case No.: P2001-MA-01313082

In the Matter of:

ADACLE CARVALHO CLEANING SERVICE,
Employer,

on behalf of

NILSON PERPETUO,
Alien.

Appearance: John K. Dvorak, Esquire
Boston, Massachusetts

Certifying Officer: Raimundo Lopez
Boston, Massachusetts

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "Bookkeeper."¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

¹ 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 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 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 April 11, 2001, Employer, Adacle Carvalho Cleaning Service, ("Employer") filed an application for labor certification on behalf of the Alien, Nilson Perpetuo ("Alien"), to fill the position of "Bookkeeper." (AF 57). Employer required two years of experience in the job offered.

In a Notice of Findings ("NOF") issued on April 2, 2002, the CO proposed to deny certification pursuant to 20 C.F.R. §656.20(c)(8), based on the finding that the position as described in the application appeared to be open only to the Alien. (AF 44). Rebuttal was needed to support a finding that a bona fide employer/employee relationship and a legitimate job opening existed. Employer was advised to submit any data or information which would support a finding that a bona fide employer/employee relationship, and a legitimate job opening existed. The NOF also cited 20 C.F.R. §656.21(b)(5), which requires that an employer document that its requirements for the job opportunity represent the employer's actual minimum requirements for the job opportunity, and that the employer had not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it was not feasible to hire workers with less training or experience than that required by the employer's job offer. The CO pointed out that the Alien had not possessed the two years of prior experience as a bookkeeper, as was being required of U.S. applicants, prior to his hire by Employer. Employer was directed to amend the ETA 750 to show that the Alien did possess that experience prior to hire.

Employer submitted a rebuttal letter dated April 11, 2002. (AF 33). Attached thereto were a letter from Employer's owner, two letters from Elizabeth Coelho, d/b/a The Clean Team ("Coelho"), a former employer of the Alien, W-2s for the years 1999 and 2000 from Coelho, showing the Alien earned \$14,000.00 in 1999 and \$8,320.00 in 2000, rental statements for Coelho for February 2002, and for the instant Employer for April 2002, on which both Employers had the same address, a 1099-Misc for 2001, showing Employer as the Payer and the Alien as the Recipient and indicating the Alien

received total wages of \$39,000.00, a blank invoice for Employer, and a business card for Coelho. In her letter, Employer's owner stated that the Alien was offered a position with her in January of 2001, and she did not train the Alien to perform bookkeeping duties. He learned this skill while working for Coelho. Coelho submitted two letters, one dated April 10, 2002, indicating employment of the Alien in July of 1997, with no indication of when he left that employ. The second letter, which is undated, indicated that the Alien was employed from July of 1997 through July of 2000. Both employers, in their respective letters, advised the CO of the Federal identification number assigned to their respective companies.

On May 8, 2002, the CO issued a Supplemental NOF. (AF 31-32). The CO once again questioned whether there was a position open to U.S. workers and requested the names and addresses of Employer's corporate officers, their relationship to the Alien, their financial interests, duties, responsibilities and the Articles of Incorporation. The CO found it unclear as to where Employer and Coelho were located. The CO stated after reviewing the Secretary of the Commonwealth's database, neither of the employers' identification numbers appeared to exist as a business located at 145 Meadow Street in Framingham, Massachusetts. A routine cross-check with the Unemployment Insurance Tax Records also revealed that the Employer was not located within the tax database. The CO requested clarification as to why two competitors would be situated at the identical business location, vying for the same clientele and/or employees. Employer was requested to provide each employer's 2001 tax returns, as well as any other related documentation to address the inconsistencies/deficiencies noted. (AF 32).

Employer submitted rebuttal on May 22, 2002. (AF 8-30). Employer pointed out that both employers were not incorporated, being sole proprietorships. It was reiterated that there was no relationship between either business or the Alien other than employer/employee. Federal tax returns for the year 2001 were provided for the former employer, as well as for Employer. With regard to having the same address, Employer pointed out that the greatest concentration of a number of professions rent offices in the same buildings or in close proximity. (AF 8-9).

A Final Determination (“FD”) was issued on July 30, 2002. (AF 6-7). Therein, the CO determined that Employer had failed to address all the issues in the NOF and it had failed to establish that there was a bona fide job opening to which qualified U.S. workers could be referred. The CO noted that the Employer had provided a 1099 to establish that it was a bona fide employer; however, that form was used for independent contractors or as a means of avoiding the payment of unemployment and workers’ compensation taxes. (AF 7, 29). Furthermore, the ETA 750B showed the Alien’s last reported date of employment to be July of 2000, while the 1099 submitted by Employer was for the 2001 tax year. The CO concluded that the Alien had in fact been employed by Employer since 2000, and that a Form 1099 had been used instead of a W-2. This did not constitute a valid employer/employee relationship, and in fact, supported the conclusion that there was no bona fide job opportunity to which qualified U.S. workers could be referred.

On August 28, 2002, Employer filed a Request for Review of Denial of Labor Certification with the Board of Alien Labor Certification Appeals (“Board” or “BALCA”) and the matter was docketed in this Office on October 1, 2002. (AF 1).

DISCUSSION

With its Request for Review, Employer submitted new documentation which was not submitted to the CO. (AF 1-5). This Board will not consider this material, as our review is to be 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); *see also* 20 C.F.R. §656.26(b)(4). 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).

In its Request for Review, Employer argues that the initial NOF failed to state how to rebut the issue raised regarding a bona fide job opening. (AF 1-4). With regard to the issue raised concerning the Alien's prior experience, Employer contends it provided clear and convincing evidence that the Alien did have the requisite experience, in the form of the documentation provided in rebuttal. It is Employer's position that the employer identification numbers of the two employers establish that they are two separate entities. (AF 2).

Employer argues that it could not provide corporate information for either employer because none existed. In response to the question raised regarding the fact that neither employer was listed in the Unemployment Insurance Tax Records, Employer contended that it did not have access or control over this agency and no ability to obtain records or determine the accuracy of those records. (AF 2). Employer did not, however, deny that it was not in the database. It was Employer's contention, however, that (1) it did not need to be a corporation to file for labor certification on behalf of an Alien; (2) the tax returns submitted did not show the Alien to be an investor or owner of the business; (3) it had established two separate entities; and (4) Employer's application was to provide an offer of future full-time employment. (AF 3-4). Therefore the fact that payment in the past had been made on a basis which resulted in a 1099-Misc being issued was irrelevant in this matter. Citing *Shaw's Crab House*, 1987-INA-714 (Sept. 30, 1988)(*en banc*), Employer contends that the use of the 1099 as evidence against it was inappropriate. (AF 4).

In *Shaw's Crab House* it was held that an employer must be advised of the evidence being used against it so that it has an opportunity to rebut that evidence. It did not support the proposition that when an employer offers evidence, the CO must advise if that evidence fails to successfully rebut the NOF, or that the evidence may support a denial of an application, prior to issuing the FD. In this case, Employer was, in effect, advised that the evidence it had submitted in response to the first NOF, including the 1099, was insufficient to rebut the findings rendered. (AF 32). Employer was afforded a second opportunity to rebut the findings when the second NOF was issued. Had

Employer successfully rebutted the issues as raised in the second NOF, the 1099 might have been irrelevant. It failed to do so, however, and there was no error on the part of the CO when he pointed to the 1099 as part of the evidence supporting a finding of the lack of a bona fide job opportunity.

Furthermore, while this Board agrees that the CO's initial NOF was unclear on how to rebut the finding rendered therein regarding a bona fide job opening, Employer never indicated any confusion as to the issues raised therein, nor did it seek clarification of the documentation necessary to successfully rebut the NOF. That a second NOF, which provided more detailed information as to what was being requested as rebuttal was issued, granting Employer an additional opportunity to provide successful rebuttal, renders any error in the first NOF harmless.

Twenty C.F.R. § 656.20(c)(8) requires that an employer show that the job has been and is clearly open to qualified U.S. workers; that is, that a bona fide job opportunity exists. As was stated by the court in *Pasadena Typewriter and Adding Machine Co., Inc. and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AABT (C.D. Cal. 1987), slip op. at 7:

Requiring the job opportunity to be *bona fide* adds no substance to the regulations but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of §656.20(c)(8). Likewise, requiring that the job opportunity be *bona fide* clarifies that a true opening must exist, and not merely the functional equivalent of self-employment.

In the instant case, Employer has submitted a 1099-Misc, indicating that it paid the Alien \$39,000.00 in 2001, not as an employee, but as an independent contractor. (AF 29). Where an employer has listed the Alien as an "independent contractor," but now seeks to hire that same person for a wage/salary, Employer has not established that a bona fide job opportunity exists for other U.S. applicants to apply. *Belha Corp.*, 1988-INA-24 (May 5, 1989)(*en banc*). The facts in this case dictate a similar result. The totality of the

evidence, including the fact that Employer is not listed within the tax databases of the Unemployment Insurance Tax Records, its Schedule C lists no employee wages, and the Alien received payment for services in 2001 via a 1099-Misc all lead to the conclusion that a bona fide job opportunity does not exist. Labor certification was properly denied and the following Order will issue.

ORDER

The Final Determination 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

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.