

U.S. Department of Labor



Board of Alien Labor Certification Appeals
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Issue Date: 08 July 2004

BALCA CASE NO.: 2003-INA-138

ETA Case No.: P2002-NV-09520307/IW

In the Matter of:

FISH CREEK RANCH, LLC,
Employer,

on behalf of

REFUGIO GONZALEZ MESA,
Alien.

Appearance: Luther K. Wise, Managing Member, Fish Creek Ranch, LLC
Las Vegas, Nevada
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Refugio Gonzalez Mesa (“the Alien”) filed by Fish Creek Ranch, LLC (“the Employer”) pursuant to § 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 the Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 25, 2001, the Employer filed an application for labor certification on behalf of the Alien for the position of General Ranch Hand and Equipment Operator. (AF 42-45).

On December 6, 2002, the CO issued a Notice of Findings ("NOF") indicating intent to deny the application on the grounds that the Employer's advertisement was in violation of 20 C.F.R. § 656.21(g) and failed to provide adequate notice of the opportunity in violation of 20 C.F.R § 656.21(g)(1)(i) & (ii). (AF 58-61). The CO noted that 20 C.F.R § 656.21(g)(1)-(9) provides the requirements for the proper advertisement of a job opportunity for labor certification. The regulations require that the advertisement must provide such specificity that U.S. workers can determine whether they are willing, qualified, able and available for the job opportunity. The CO highlighted that the Employer's application for labor certification did not require experience as a general farm hand and equipment operator, while the Employer's advertisement in the Elko Daily Free Press listed minimum qualified experience in flood irrigation, pivot maintenance, swather operations, round baler operations, tractor and cat operations, ranch mechanics and machinery maintenance. In the Lahotan Valley News, the advertisement listed required experience in farming, haying, handyman, irrigation, excavator and backhoe operator. To correct the deficiency, the Employer was advised that it must re-advertise the job opportunity so it would reflect that there was no experience required in correlation with the application that was filed.

The CO also noted that in accordance with 20 C.F.R. § 656.21(g)(1)(i)&(ii), notice of the job opportunity had to be provided to the bargaining representative and it should also be posted in a conspicuous facility at the place of employment. As the Employer failed to provide such notice, it was in violation of 20 C.F.R. §

656.21(g)(1)(i)&(ii). To remedy the deficiency, the Employer was advised to provide proper notice in accordance with the regulations for ten consecutive days. (AF 16-18).

With its Rebuttal dated December 31, 2002, the Employer enclosed two copies of the notice to be posted in the Employer's establishment. (AF 51-56). The Employer noted that there was no bargaining representative for the position, consequently none was notified. Additionally, the Employer enclosed two copies of employment advertisements to be placed by the Employment Service, which would be placed in the newspapers once the Employer was advised by the state agency to do so. The Employer added that it had been unsuccessful in hiring individuals for the position and that the Alien had been a reliable and trustworthy employee. (AF 51-52).

On January 13, 2003, the CO issued a Final Determination ("FD") denying certification. (AF 47-49). The CO noted that the Employer, in its amended advertising, continued to make reference to a specific work experience in flood irrigation, pivot maintenance, machinery maintenance, farming, haying, excavator and backhoe operations. As the application did not indicate an experience requirement, the Employer continued to be in violation of 20 C.F.R § 656. (AF 48).

The Employer wrote a letter dated January 30, 2003 that was construed by the CO as a Request for Reconsideration. In the letter, the Employer asserted that the individuals that applied for the position were either felons or drug addicts and that the Alien was the only person who was capable of training inexperienced ranch hands. (AF 2).

On January 30, 2003, the Employer also submitted its Request for Review. In its Request for Review, the Employer indicated that the CO's request that it hire individuals without experience was not possible. The Employer required that someone with experience supervise the trainees, and the Alien was the only person it hired in the last six years who had the ability to do the job. The Employer added that it had never hired a more honest employee. (AF 5-6).

On February 6, 2003, the CO denied the Request for Reconsideration because it addressed issues that could have been addressed in the Rebuttal. The matter was docketed in this Office on April 10, 2003 and the record does not reflect that a brief was filed.

DISCUSSION

Under 20 C.F.R. § 656.26(b)(1), a request for review shall be in writing and shall clearly identify the particular labor certification determination from which review is sought and shall set forth the particular grounds for the request. Where the request for review does not set forth specific grounds for review and no brief is filed, the request for review will be dismissed. *North American Printing Ink Co.*, 1988-INA-42 (Mar. 31, 1988)(*en banc*); *Bixby/Jalama Ranch*, 1988-INA-449 (Mar. 14, 1990); *Rank Enterprises, Inc.*, 1989-INA-124 (Nov. 13, 1989); *The Little Mermaid Restaurant*, 1988-INA-489 (Sept. 1, 1989).

The Employer did not file a brief, and in its Request for Review, it did not allege a single ground for this Panel to review. The Employer limited its Request for Review to asserting that the CO's request that the position be advertised without an experience requirement was not possible, as the Alien was the only person capable of training new workers. However, general statements of disagreement with the CO do not constitute an assignment of error and such a request for review will be dismissed. *GCG Corp.*, 1990-INA-498; *Ajem Thread Rolling*, 1990-INA-412 (May 20, 1991).

Consequently, for the above stated reasons we dismiss the Employer's Request for Review and affirm the CO's denial. Accordingly, the following order will enter¹:

¹ We note that another ground for affirming the CO's denial is the Employer's failure to comply with the CO's request that the job advertisement be consistent with the labor certification application. The burden of proof, in the twofold sense of production and persuasion, is on the employer. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). The employer bears the burden in labor certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). As the CO noted, the Employer, on the ETA 750A, required no experience for the job opportunity. However, experience was required for the job as advertised. This inconsistency could have been easily remedied by complying with

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

the CO's advice in the NOF. Unfortunately, the Employer failed to do so. An 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*). Accordingly, the Employer wasted the opportunity to cure the deficiency in the Rebuttal and provided another ground for affirming the CO's denial.