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Issue Date: 13 September 2004

BALCA Case Nos.: 2003-INA-276
2003-INA-277
ETA Case Nos.: P2002-CA-09527489/JS
P2002-CA-09527488/JS

In the Matter of:

EASTLAKE POOLS & LANDSCAPE INC.,
Employer,

on behalf of

JOSÉ GUADALUPE GARCIA,

and

DOMINGO GARCIA,
Aliens.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Gregory J. Boulton, Esquire
Los Angeles, California
For the Employer and the Aliens

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from two applications for labor certification¹ filed by Eastlake Pools & Landscape Inc. (“the Employer”) on behalf of José Guadalupe Garcia

¹ Alien labor certification is governed by § 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.

and Domingo Garcia (“the Alien”) for the positions of Tree Trimmer and Pruner. (AF 81-84). The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification and the Employer’s request for review, as contained in the Appeal File (“AF”), and any written arguments. 20 C.F.R. § 656.27(c). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.²

STATEMENT OF THE CASE

On August 12, 2002 the Employer filed an application for alien employment certification on behalf of the Alien for the position of Tree Trimmer and Pruner. (AF 81-84). The ETA 750B stated that the Alien was currently self-employed in the same type of work as that sought for labor certification.

On December 30, 2002, the CO issued a Notice of Findings (“NOF”) proposing to deny certification on the basis that the job opportunity did not actually exist, as the Employer did not appear to be currently operating an existing business, in violation of 20 C.F.R. § 656.20(c)(8), which requires that the job opportunity be open to any qualified U.S. worker. (AF 76-79). The Employer did not have an active California tax identification number, which meant the Employer did not have any current employees. There was also a question raised as to whether the positions available were for employees or independent contractors.

On March 8, 2003, after being granted an extension of time by the CO, the Employer filed a rebuttal to the NOF. (AF 30-75). The Employer’s rebuttal included several letters from the Alien’s clients documenting his self-employment, as well as the Employer’s tax returns. There was also a letter from American Employers Group (“AEG”) which stated that the Employer is a client of AEG, a third party, and AEG

² In this decision, “the Alien” refers specifically to José Guadalupe Garcia and references to the Appeal File (“AF”) refer to BALCA 2003-INA-276 as representative of the Appeal File in both cases. A virtually identical application was filed for both aliens and the issues raised and dealt with by the CO in both cases are identical.

assumes “all payroll liability” for the Employer vis-à-vis their contract relationship. (AF 37).

On April 1, 2003, the CO issued a Supplemental NOF (“SNOF”) again proposing to deny labor certification. (AF 26-29). The SNOF found that the Employer was in continued violation of 20 C.F.R. § 656.20(c)(8). The Employer’s tax forms showed that no wages were paid to any employees, while \$131,744 was paid to subcontractors. The CO argued that the fact that AEG assumes “all payroll liability” for the Employer indicated that AEG is the legal employer and the Employer appeared to be a subcontractor. The CO noted that for purposes of labor certification, the petitioner must be the legal employer. The holder of the tax identification number (and related tax liabilities), in this case AEG, is normally considered the employer. The CO found that the Employer did not appear to meet the definition of an employer who can offer labor certification sponsorship under 20 C.F.R. § 656.3.

On May 5, 2003, the Employer filed a rebuttal to the SNOF in which it indicated that it intended to hire the Alien “regardless of any present relationship with [AEG]” and “without regard to past payment practices.” (AF 20-25).

On May 9, 2003, the CO issued a Second Supplemental NOF (“SSNOF”) proposing to deny certification on the basis that it appeared that the two positions were created solely for the purpose of labor certification. (AF 17-19). The terms of employment the Employer offered the Alien were different than the terms offered other applicants who did not have pending labor certification applications. Therefore, the jobs were not available to U.S. workers. The Employer was asked to show that the Employer’s payroll account was activated for employees and whether the other workers would be considered employees (as opposed to subcontractors).

On June 11, 2003, the Employer filed a rebuttal to the SSNOF in which it stated that “the terms and conditions offered in the instant matter are no different than those offered to the labeled ‘subcontractors.’” (AF 11-16). The Employer further stated that its

intention to hire the Alien “in no way precludes the maintenance of an additional contracted workforce.” The Employer concluded by stating that “without directing precedent which precludes the hiring of regular ‘employees’ with ‘subcontractors,’ or cited authority and relevant facts which logically draw a conclusion that the at-issue position is being solely ‘created for two labor certification applications,’ the requested ‘corrective action’ is left unaddressed beyond this statement.”

On June 17, 2003, the CO issued a Final Determination (“FD”) denying certification. (AF 8-10). The Employer was given the opportunity to delineate any differences between the employee labor certification positions and the subcontractor positions. The Employer failed to provide any evidence that the labor certification positions are truly open to U.S. workers, despite being asked to provide documentation that the labor certification jobs were not created solely for that purpose. The Employer was asked to activate its payroll account for employees in order for the state workforce agency to commence the Employer’s recruitment, but it failed to do so. The CO found that this adds to the appearance that the proposed positions were created solely for the purpose of alien labor certification.

On July 21, 2003, the Employer filed a Request for Review and the matter was docketed in this Office on August 12, 2003. (AF 1A-6). The Employer’s Request for Review stated that the CO “erred in finding that the at-issue job was not truly open to U.S. workers.”³ This was reiterated in the Employer’s Statement of Position submitted on September 18, 2003.

DISCUSSION

Twenty C.F.R. § 656.20(c)(8) requires an employer to attest that the “job opportunity has been and is clearly open to any qualified U.S. worker.” 20 C.F.R. §

³ Although the Employer arguably failed to state the grounds for appeal in its Request for Review, the Employer timely filed its brief. Since the timely filing of a brief cures any error arising from the failure to state grounds for appeal in the Request for Review, this matter will be considered on the merits. *Malone & Associates*, 1990-INA-360 (July 16, 1991) (*en banc*).

656.20(c)(8). The job opportunity must be bona fide, which means the job must truly exist and not merely exist on paper. There must be a true opening and not merely the functional equivalent of self-employment. *Bulk Farms v. Martin*, 963 F.2d 1286, 1288 (9th Cir. 1992); *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*). Whether a job opportunity is bona fide is gauged by a “totality of the circumstances” test. *Modular Container Systems, Inc.*, *supra*.

“When applying the totality of the circumstances test, it may be helpful to think first in terms of the factual circumstances surrounding the application, and second, what those circumstances have to say about the bona fides of the position.” *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). The factual circumstances in this case reveal the Employer’s intention to hire the Aliens as its only two employees, with all other workers as subcontractors. This indicates that the position is possibly being used to promote immigration.

The purpose of the totality of the circumstances test is to determine the credibility of the position based on the factual circumstances. This analysis focuses on such factors as “what reasons are present for believing or doubting the employer’s veracity or the accuracy of the employer’s assertions; and whether the employer’s statements are supported by independent verification.” *Carlos Uy III*, *supra*.

The fact that the Aliens would be the only two workers classified as employees while all other workers are classified as subcontractors is, at a minimum, suspicious. The Employer did not present any evidence to delineate the difference in duties between the Alien employees and U.S. subcontractors. The Employer did not provide any documentation to prove that the positions were not created solely for the purpose of labor certification. Furthermore, despite being asked to do so by the CO, the Employer chose not to activate its payroll account for employees, which is a necessary prerequisite to the state workforce agency commencing the Employer’s recruitment.

In *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*), the Board held that the “employer has the burden of providing clear evidence that a valid employment relationship exists, and that a bona fide 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.” In light of the totality of the circumstances, the Employer has failed to meet its burden of providing clear evidence of a bona fide job opportunity.

Where the employer fails to provide documentation reasonably requested by the CO and fails to adequately document that a current job opening exists, certification is properly denied on the ground that no bona fide job opportunity exists. *Aerial Topographic Maps*, 1994-INA-627 (Aug. 15, 1996); *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). As such, labor certification was properly denied.

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 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.