



Issue Date: 10 September 2003

BALCA Case No.: 2002-INA-217
ETA Case No.: P2000-NJ-02447874

In the Matter of:

DEEGAN CONTRACTING INC.,
Employer,

on behalf of

EDNILSO ANDRADE,
Alien.

Certifying Officer: Delores DeHaan
New York, NY

Appearance: Brian Deegan
Deegan Contracting, Co.
*Pro Se*¹

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM: This case arises from an application for labor certification² filed by a construction company for the position of Finish Carpenter. (AF 6-7).³ The following

¹ On August 1, 2003, an Order of Suspension was issued in this appeal disqualifying Employer's counsel, Dulce Cuco, from the representation of clients before the United States Department of Labor, Office of Administrative Law Judges and the United States Department of Labor, Board of Alien Labor Certification Appeals, for ten years because of conduct not related to this appeal. Employer and Alien were provided 30 days to obtain new counsel.

² 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.

³ "AF" is an abbreviation for "Appeal File".

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 ("AF").

STATEMENT OF THE CASE

On December 17, 1997, Employer, Deegan Contracting, Inc., filed an application for alien employment certification on behalf of the Alien, Ednilso Andrade, to fill the position of Finish Carpenter. The duties of the job to be performed were described as follows:

Uses all tools pertaining to carpentry. Works independently measuring, cutting, nailing, to build framing and finishing touches for roofing, siding alterations additions, custom homes, cabinets. Uses a roater, wafer machine, drill press, for all types of shapes, and wood. Operates an industrial table saw, electric plane, jointer. Supervises one carpenter helper. Works with formica and counter tops, plywood. Constructs and erects all types of structures.

Minimum requirements for the position were listed as three years experience in the job offered. (AF 6-7).

Employer received one applicant referral in response to its recruitment efforts. Employer stated that this applicant was not hired because the applicant was unavailable. (AF 20-21).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on January 2, 2002, questioning the nature of Employer's business and instructing Employer to document that it can guarantee permanent full-time employment for the petitioned position. Noting that Employer is listed in phone directories and advertises exclusively as a "Roofing Contractor," the CO observed there was no indication the company does any carpentry or alterations or builds any additions, custom homes, cabinets or any other

structures as described under the duties shown in item 13 of the ETA-750A. The CO instructed Employer to document how it can guarantee permanent full-time employment for a finish carpenter. The CO advised:

Such documentation must include a listing of his workers for 1998, 1999, 2000 and 2001. The list must show the number of workers for each of these years, their job duties, whether employee or non-employee, full-time or part-time, year-round or seasonal. Workers' W-2 and 1099-MISC forms, whichever are applicable, must also be furnished for each of those years. He must also submit company's Federal Income Tax returns for 1998, 1999 and 2000.

Employer was also instructed to furnish copies of contracts or other documentation as evidence to show that the company performs the duties shown on ETA-750A. (AF 32-34).

In Rebuttal, Employer acknowledged that it specializes in roofing and stated that building and framing refers to roofing and siding alterations which requires carpentry work. Employer deleted its references to custom homes, cabinets and working with formica and counter tops, stating that it has not had any jobs since 2000 requiring those duties. Employer also submitted copies of Federal tax returns and a Quarter Wage Summary for the quarter ending December 31, 2001, QTD Wages and W2's filed magnetically. (AF 35-82).

A Final Determination denying labor certification was issued by the CO on March 8, 2002, based upon a finding that Employer had failed to submit sufficient documentation to support that the petitioned position of Finish Carpenter is in fact a full-time permanent position. Citing the financial documentation submitted, the CO found Employer's rebuttal lacking in that it had failed to include any information on job duties, full- or part-time, etc. as outlined in the NOF, and thus concluded it was insufficient to

demonstrate that Employer is able to guarantee permanent full-time employment for an employee as a carpenter, performing the duties as shown on the ETA-750A. (AF 83-84).

Employer filed a Request for Review by letter dated April 10, 2002, and submitted further documentation regarding its business. (AF 85-110). The matter was referred to and docketed in this Office on July 2, 2002. (AF 1-7). Employer filed an Appellant's Brief/Statement of Position on July 22, 2002.

DISCUSSION

The burden of proof in the labor certification process is on the employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. § 656.2(b). Moreover, as was noted by the Board of Alien Labor Certification Appeals in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), “[u]nder the regulatory scheme of 20 C.F.R. Part 656, rebuttal following the NOF is the employer’s last chance to make its case. Thus, it is the employer’s burden at that point to perfect a record that is sufficient to establish that a certification should be issued.”

In the instant case, Employer failed to adequately address the issues raised by the CO in the NOF, and accordingly, labor certification was properly denied. In the NOF, the CO was specific in her request for rebuttal documentation, having identified both the documentation and what it needed to show. The CO’s request was reasonable in that Employer had described its business as “construction” and had petitioned for a “Finish Carpenter” -- yet all of its phone listings and advertising showed it to be a roofing company. Thus, the CO had requested specific documentation that Employer could guarantee permanent full-time work for a finish carpenter. While Employer submitted several of the financial documents requested, it failed to furnish any of the specific information requested such as the number of workers, their job duties, and their employment status as full-time/part-time, year-round/seasonal, etc. While it is noted that Employer submitted this information in its Request for Review, rebuttal evidence first

submitted with the request for review, after issuance of the Final Determination, is not part of the record and cannot be considered on appeal pursuant to 20 C.F.R. § 656.27(c). *Memorial Granite*, 1994-INA-66 (Dec. 23, 1994); *Arthur Walters*, 1994-INA-7 (Nov. 30, 1994); *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *Kelper International Corp.*, 1990-INA-191 (May 20, 1991); *Fifteenth Street Garage*, 1990-INA-52 (Nov. 21, 1990); *University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988). Given Employer's failure to produce the documentation requested, and Employer's failure to submit alternative adequate documentation, we conclude that labor certification was properly denied.

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

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.