



Issue Date: 25 September 2003

BALCA Case No.: 2003-INA-78
ETA Case No.: P2000-CA-095507342/ML

In the Matter of:

LIN J. JU,
Employer,

on behalf of

JOSE GOMEZ-ASUNCION,
Alien.

Appearance: Felipe Aguirre for Employer and Alien
Maywood, CA

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by Lin J. Ju (“Employer”), a real estate property manager, on behalf of Jose Gomez-Asuncion (“Alien”), for the position of Carpenter. (AF 117). This 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”). 20 C.F.R. § 656.27(c).

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.

STATEMENT OF THE CASE

On August 17, 2000, Employer filed an application for alien employment certification on behalf of the Alien, Jose Gomez-Asuncion, to fill the position of Carpenter. (AF 117-118). The job duties are described as construction and repairs, including work on doors, windows, stairs and locks. Two years experience in the position was required. (AF 117).

The CO issued a Notice of Findings (“NOF”) dated July 30, 2002, questioning whether Employer had a current job opening, operated an on-going business, and/or could provide permanent, full-time employment to which U.S. workers could be referred. (AF 113-115). The CO requested copies of Employer’s business license and state and federal business income tax returns. (AF 114).

Employer filed a Rebuttal to the NOF on August 31, 2002, arguing that he had a functioning business and the ability to provide permanent, full-time employment to a U.S. worker at the terms and conditions stated on the ETA 750A. (AF 68-69). Employer submitted a copy of a City of Huntington Beach business license and his 2001 federal income tax returns including supplemental income and loss forms. (AF 70-112). Employer asserted that as the owner of seventy housing units in southern California, he does not need a contractor’s license to perform construction on his own units. (AF 68).

On October 1, 2002, the CO issued a Final Determination (“FD”) denying certification. (AF 66-67). The CO noted that Employer asserted in Rebuttal that he was

submitting his current California contractor's license and tax returns; however, Employer actually submitted a business license, not a contractor's license. (AF 67). In addition, the CO indicated that the tax return was incomplete and failed to establish a viable business. Therefore, the CO found that Employer failed to adequately respond to the NOF. (AF 67).

On November 1, 2002, Employer filed a Request for Review and the matter was docketed in this Office on January 28, 2003. (AF 64-65). Employer asserted that the corrective action required by the NOF included submitting a copy of the current business license and that the City of Huntington Beach Business License fulfilled this requirement. (AF 64).

Employer conceded that the income tax declaration was missing the first page, but stated that it clearly showed "all relevant information as to income and expenses and profit for Mr. Lin Ju, and a net profit of \$154,000 through investment and ownership of 26 separate residential properties." (AF 64). Employer argued that the maintenance work performed by the Alien is "more than sufficient work to be performed in my own properties. I do not need a contractors license since all work to be performed by the Carpenter is all internal to my own units, that I buy and sell as investments in the real estate market." (AF 64). Documents attached to Employer's appeal request included 2001 federal tax forms, including schedule attachments, and 2001 California income tax returns. (AF 1-63).

DISCUSSION

Twenty C.F.R. § 656.3 defines Employer as “a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment and which proposes to employ a full-time worker at a place within the United States.” The employer bears the burden of proving both that he meets this definition and that the position offered is permanent and full-time. If the employer fails to meet this burden, certification may be denied. *Already There Messenger Service*, 1995-INA-138 (Mar. 27, 1997). Upon request by the CO, the employer must provide “directly relevant and reasonably obtainable documentation,” such as a business license or other documentation, to support the assertion of an on-going business and job opportunity. *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991).

In the NOF, the CO requested that Employer provide documentation demonstrating his ability to provide permanent, full-time employment to a U.S. worker at the terms and conditions stated on the ETA 750A. In particular, the CO requested “a copy of Employer’s business license (a Seller’s Permit does not fulfill this requirement), State and federal business income and business tax returns.” (AF 114). In Rebuttal, Employer responded by providing a copy of a City of Huntington Beach Business License for Ju Raymond Construction. (AF 70). Employer stated that because he was the owner of the properties upon which construction was to be performed, he did not need a Contractor’s License. (AF 68). Also included in the Rebuttal was a copy of Employer’s 2001 federal

income tax return. (AF 71-112). The CO denied certification based on Employer's failure to submit the requested documentation and failure to establish his viability as a business. (AF 67).

Employer failed to provide the documentation reasonably requested by the CO. Employer submitted a copy of his federal tax return; however, the first four pages were omitted. (AF 2-5, 71-112). Specifically, the first two pages of the Form 1040 with Employer's signature were not submitted until the Request for Review. (AF 2-3). Evidence first submitted with the request for review is not part of the record upon which the CO denied certification and will not be considered. *See Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). There was no explanation for Employer's omission of these pages. Employer, in the Request for Review, asserted that "DOL could have asked me to include the first page of the income tax declaration." (AF 65). The CO, by requesting the income tax return, did, in fact, request the Form 1040 and any schedules or attachments. Employer's assertion that he did not realize the request included the first four pages or that DOL didn't specifically ask for the first page is without merit. Employer did not comply with the CO's request for documentation with respect to the federal tax return.

Employer has now submitted the entire federal tax return, yet still has failed to establish a viable business. Employer has not shown the viable nature of his business, only that he has investments in real estate. The Form 1040 clearly lists Employer's occupation as "investments," not a real estate manager. (AF 2). This does not establish a

viable business capable of employing a full-time worker. As such, even Employer's belated submission of the full income tax return fails to establish a viable business.

The other piece of documentation requested by the CO was a copy of Employer's business license. There is some confusion as to what was requested by the CO versus what was supplied by Employer. The CO's original request in the NOF was for a copy of Employer's business license. (AF 114). Employer, in Rebuttal, stated that a business license was enclosed and that Employer did not need a contractor's license to perform construction on the units he owned. (AF 68). In a separate letter accompanying the Rebuttal, Employer stated that a copy of his "Current California Contractor's License" was enclosed. (AF 69). The actual license submitted was titled "City of Huntington Beach Business License." (AF 70). Based on this submission, the CO, in the FD, found that Employer had not responded to the specific requests in the NOF. (AF 67).

Regardless of whether Employer needed to submit a business license or a contractor's license, the business license Employer did submit is not valid to establish a viable business. The license submitted by Employer had an expiration date of December 1, 1999. It was issued on December 1, but the year was indecipherable; the typewritten year had been marked out and replaced with a handwritten "2002." The license was submitted in August 2002, three months before the date it was allegedly issued. (AF 70). The letter accompanying the copy of the license states "please note the expiration date," thus indicating that the license expires on that date, December 1, 1999. If the CO questioned the viability of Employer's business and requested a copy of Employer's

business license, Employer's submission of an expired license does not fulfill this requirement. *Doctors Medical Group of California*, 1994-INA-207 (May 8, 1995). As such, it must be determined that Employer submitted an expired business license which does not satisfy the CO's request for documentation.

Employer failed to submit the documentation reasonably requested by the CO. Despite Employer's allegations that he does not need a contractor's license to allow the worker to perform construction and maintenance on the properties, Employer has failed to show any sort of licensing for his business. All Employer has demonstrated is a series of investments in property, as indicated on his tax return. This does not support an application for alien labor certification and as such, Employer has failed to establish a viable business to which U.S. workers can be referred.

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 twenty days from the

date of service a party petitions for review by the full Board. 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the