U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

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

Issue Date: 28 August 2008

BALCA Case No.: 2008-INA-00061
ETA Case No.: P-05200-35604

In the Matter of:

SUBURBAN NURSERY,
Employer,

on behalf of

LUIS CHABLA,
Alien.

Appearance: Marcia S. Kasdan, Esquire
Hackensack, New Jersey
For the Employer

Certifying Officer: Barbara Shelly
Philadelphia Backlog Elimination Center[1]

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. 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

[1] The Backlog Elimination Centers closed effective December 21, 2007. All further correspondence to the Certifying Officer about this application should be directed to the Chicago Processing Center.

the Code of Federal Regulations ("C.F.R.").[2] 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. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 18, 2001 the Employer filed an application for labor certification on behalf of the Alien for the position of Landscape Gardener. (AF 43)[3]. In its application, the Employer described the duties of the position as:

> Plans and executes small scale landscaping operations and maintains ground and landscape of private and business residences. Prepares and grades terrain, applying seeding, plants and shrubs using manual and power-operated equipment. Plans lawns. Plants new and repairs established lawns, using seed mixtures and fertilizers recommended for particular soil type and lawn location. Locates and plants shrubs, trees and flowers selected by property owner or those recommended for particular landscape effect. Sprays trees and shrubs, and applies supplemental liquid and dry nutrients to lawn and trees.

The Employer required two years of experience in the job offered. In a letter submitted with the application, the Employer requested the application be handled under the special provisions for Reduction in Recruitment (RIR) processing. (AF 31).

On May 5, 2006, the CO issued a Notice of Findings (NOF) proposing to deny certification. (AF 14-16). The CO noted the regulations at 20 C.F.R. § 656.3 define "'employment' as **permanent full-time** work by an employee for an employer other than oneself." (AF) (emphasis as in original). The CO stated that the work of a landscape gardener is generally performed at certain seasons or periods of the year and not at others.

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[2] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

[3] In this decision, AF is an abbreviation for Appeal File.

The CO also stated there was insufficient information to determine whether the Alien would perform the work on a full-time, year-round basis. The CO directed the Employer to submit payroll records for the last three years for all workers employed in this or similar positions to establish that the job duties are permanent full-time positions.

The Employer submitted rebuttal on June 8, 2006. (AF 8-13). The rebuttal documentation included weekly payroll records for the Alien. The Employer's attorney stated that the Alien had "been with Suburban Nursery" for the last six years and that the Employer wants to keep this valued employee for continued full-time permanent employment

The CO issued a Final Determination denying certification on September 25, 2007. (AF 5-7). In the Final Determination the CO found that the Employer's rebuttal did not provide evidence that established that the Alien performs the duties of a landscape gardener on a permanent, full-time year-round basis. The CO noted that the Employer's payroll records for the last three years did not show any pay for the first quarter of each year for the months of January, February and March. Thus, the CO found that the Employer's rebuttal failed to establish employment on a year-round basis.

On October 24, 2007, the Employer requested BALCA review. The Employer argued that the payroll records establish a long-term commitment since they clearly demonstrate that despite the winter hiatus, "everyone returns ready for a new year of hard work beginning in the spring." The Employer also argued that landscaping is considered permanent, full-time year-round work in areas with continuously warm climates and, due to global warming, even northern states are experiencing milder winters and, therefore, have longer landscaping seasons. Finally, the Employer argued that it is time to stop waiting for Congress to pass new legislation on this subject and end the over-reliance upon *stare decisis* and modify the determination of *Vito Volpe Landscaping*, 1991-INA-300 (Sept. 29, 1994) (en banc*)* and *Crawford & Sons*, 2001-INA-121 (Jan. 24, 2004)(en banc), and recognize that landscaping occupations constitute permanent full-time work when the employer can establish that an alien's employment is ongoing rather than seasonal and that ties to the employer are maintained even through a vacation period.

BALCA docketed the appeal on November 9, 2007, and issued a Notice of Docketing on November 15, 2007. Neither the Employer nor the CO filed an appellate brief.

DISCUSSION

This matter is governed by *Vito Volpe*, 1991-INA-300 (Sept. 29, 1994) (*en banc*). As held in *Vito Volpe* and affirmed in *Crawford and Sons*, 2001-INA-121 (Jan. 9, 2004) (*en banc*), a landscape gardener position for which duties can only be performed during approximately nine to ten months per year cannot be considered permanent employment for the purposes of labor certification. Rather, this employment should be considered seasonal employment.

The fact that the same employees return the following year bears no relevance on this determination. The re-employment of the same employees does not cure the defect. The Employer has not demonstrated that the job duties can be performed year-round. As such, the position is seasonal employment and labor certification was properly denied. The Employer's argument that global warming may result in longer landscaping seasons fails to contradict the fact that the Employer's payroll records show that the Alien's employment was only for nine months each year. As such, as the Board found en banc in *Vito Volpe* and affirmed in *Crawford and Sons*, *supra*, the duties for this job as performed during nine months of the year cannot be considered permanent employment for purposes of labor certification.

The instant case was before the CO in the posture of a request for reduction in recruitment. Normally when the CO denies an RIR, such denial should result in the referral of the application for regular processing. *Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003). We have ruled, however, that a remand for supervised recruitment is not mandated if the reason for the denial cannot be cured by a supervised recruitment. *Smith Group Inc.*, 2005-INA-39 (Nov. 27, 2006). Since the Employer has

not established that the application for labor certification was for permanent full-time employment, remand for supervised recruitment is not warranted.

Therefore, we find that the CO properly denied labor certification.

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

PAMELA LAKES WOOD, Administrative Law Judge, concurring.

I concur in the result based upon the clear precedent of *Vito Volpe Landscaping*, 1991-INA-300 (Sept. 29, 1993)(en banc). However, for the reasons stated in my dissent in *Crawford & Sons*, 2001-INA-121 (Jan. 9, 2004)(en banc), I continue to believe that *Vito Volpe* was wrongly decided.

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, NW Suite 400
Washington, DC 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 granting of a petition the Board may order briefs