



Issue Date: 28 August 2008

BALCA Case No.: 2008-INA-00070
ETA Case No.: P-05024-40914

In the Matter of:

MC LANDSCAPE DESIGN, INC.,
Employer,

on behalf of

OSCAR MIGUEL BRUSSA,
Alien.

Appearance: Anita Delgado, Esquire
Delgado & Delgado
White Plains, New York
For the Employer and the Alien

Certifying Officer: Barbara Shelly
Philadelphia Backlog Elimination Center¹

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 August 7, 2002, the Employer filed an application for labor certification on behalf of the Alien for the position of landscaper. (AF 53)³. In its application, the Employer described the duties of the position as “Plant and cultivate plants and lawns, using gardening tools and power operated equipment. Use seed mixtures and fertilizers. Locate and plant shrubs, trees, and flowers. Mow and trim lawns, clean grounds using rakes, brooms and hose. Spray trees and shrubs. Remove snow. Make minor repairs on concrete structures.”

On March 21, 2007, the CO issued a Notice of Findings proposing to deny certification. (AF 48-51). The CO noted that 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 50) (emphasis as in original).⁴ 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. 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 December to March 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 CO also noted that “**the weekly payroll records must show each**

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.

⁴ The CO also raised another issue regarding the amount of experience required the position, but that issue was successfully rebutted by the CO, and therefore is not before the Board on appeal.

employee by name, the number of hours worked, and gross wages. W-2 Forms are not acceptable” (AF 50-51) (emphasis as in original).

The Employer submitted rebuttal on April 21, 2007. (AF 6-47). The Employer’s rebuttal documentation on the full-time employment issue was limited to its Quarterly Federal Tax Returns for 2005 and 2006.

The CO issued a Final Determination denying certification on August 17, 2007 (AF 3-4). 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 the NOF specifically requested weekly payroll records. The CO stated that the Employer’s submission of Quarterly Federal Tax Returns and Quarterly Combined Withholding Wage Reporting and Unemployment Insurance Returns did not show the number of hours each individual worked each week, and that these records did not establish that each individual listed worked full-time each week, including during the non-seasonal (winter) months. Thus, the CO found that the Employer’s rebuttal failed to establish full-time permanent employment on a year-round basis.

On September 14, 2007, the Employer requested BALCA review. (AF 1-2). The Employer argued that payroll records were not submitted because it believes that such information is confidential and would infringe on its employees’ right to privacy. The Employer also argued that it uses its quarterly combined withholding as its payroll. The Employer argued that the quarterly combined withholding showed that it is open the whole year round and was sufficient to establish that the position of Landscape Gardener is a year round full-time permanent job.

BALCA docketed the appeal on November 13, 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 employer bears the burden of proving that a position is permanent and full-time. If the employer's evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988). In the instant case, the Employer was fully advised of the specific documentation needed to rebut the NOF, yet failed to produce this documentation. If a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full-time, the employer must provide it. *Collectors International, Ltd.*, 1989-INA-133 (Dec. 14, 1989).

The Employer's failure to submit the documentation reasonably requested by the CO warranted a denial of labor certification. *Rouber International*, 1991-INA-44 (Mar. 31, 1994). While the Employer's quarterly withholding statements establish that the business is open year-round, they do not establish that the particular job position is for a permanent full-time year round employment. The documentation requested by the CO herein was reasonably requested and relevant to the determination of whether the position at issue constituted full-time employment. If the Employer did not maintain payroll record in the format requested by the CO, it was nonetheless its burden to come forward with alternative credible documentation showing that the duties of the position were performed on a full-time basis throughout the year rather than merely that the business is open throughout the year. In view of the foregoing, we find that 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

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.