



Issue Date: 28 August 2008

BALCA Case No.: 2008-INA-00022
ETA Case No.: P-05921-39142

In the Matter of:

GREENBELT LANDSCAPES, INC.,
Employer,

on behalf of

RUPERTO BELLO,
Alien.

Appearance: Harlan G. York, Esquire
Frank & York, LLC
Newark, New Jersey
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

Greenbelt Landscapes, Inc. (Employer) filed an application for labor certification on behalf of Ruperto Bello (Alien) on December 7, 2001. (AF 348)³. The Employer seeks to employ the Alien as a Landscaper (Occ. Code 37-3011).

In its application, the Employer described the duties of the position as:

Plans new & repairs established lawns, using seed mixtures & fertilizers for particular soil type & lawn location. Locates & plants shrubs, trees & flowers. Participates with Laborer, in preparing & grading terrain, applying fertilizers, seeding and sodding lawns & transplanting shrubs & plants, using manual & power operated equipment. Plants lawns, plants & cultivates them using gardening implements & power operated equipment. Mows & trims lawns, using hand mower or power mower. Trims shrubs & cultivates gardens. Cleans grounds, using rakes, brooms, & hoses. Sprays trees & shrubs & applies supplemental liquid & dry nutrients to lawn & trees. Operates snow removal equipment. May make repairs to concrete & asphalt walks & driveways.

The Employer required two years of experience in the job offered. (AF 346).

On November 29, 2006, the CO issued a Notice of Findings (NOF) proposing to deny certification. (AF 323-326). 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 324) (emphasis as in original). The CO stated that the work of a

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.

landscape gardener is generally performed at certain seasons or periods of the year and not at others. The CO also stated that there was insufficient information to determine if the Alien would perform the work on a full-time year round basis. The CO required payroll records for the last three years for the time period between December and March for all workers employed in this or similar positions to establish that the job duties encompass permanent full-time positions. Since a continuation option letter addressed to the Employer was returned, the CO also found that there was not sufficient documentation that verified the existence of the business or that the business had the ability to pay the wage offered. The CO stated the Employer's response to the second finding could be documented by submitting copies of the most recent business tax return, copies of the last four quarterly reports filed for state unemployment insurance, a list of each employee with the company, the job title of each employee and the annual wage of the employee, and other documentation that would establish the existence of the company. (AF 324).

The Employer submitted rebuttal on August 17, 2006, including weekly payroll records for the Alien and two other employees. The Employer's attorney stated that unlike the traditional landscaper who is not employed during the winter season, the Employer's employees perform their job duties year round on a continuous basis working in the months of December, January, February, and March. The year-round duties included snow removal, repairs to concrete and asphalt walks and driveways, repairs to established lawns, and cleaning of grounds. The Employer also stated that its employees have remained year and after year and are not financially dependent on obtaining other employment or unemployment compensation during the intermittent breaks in the year. (AF 8-322).

The CO issued a Final Determination on June 7, 2007. (AF 3-7). In the Final Determination the CO found that the Employer's rebuttal did not establish 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 showed that the Alien and the other two employees regularly worked less than 35 hours in a given week

during the winter months when landscaping duties are not typically performed. Therefore, the CO concluded that the evidence was not sufficient to establish that the position constitutes permanent, full-time, year round employment as defined by the regulations since the position clearly involves diminished hours during the winter months. The CO also found that the Employer had rebutted the second deficiency. However, based on the finding that the Employer had not established that the job opportunity was for a permanent full-time year round position, the CO denied the application for labor certification.

On July 11, 2007, the Employer requested BALCA review. The Employer argued that the future job offer is for forty hours a week, thus, it is irrelevant how many hours the Alien worked in past employment. The Employer also argued that in more than half the weeks cited by the CO, the Alien was only a few hours away from meeting the standard of 35 to 40 hours a week. The Employer then argued that many employees have time off for vacations, holidays, and sick days and these all detract from the amount of hours an employee works in any given week. (AF 1-2).

BALCA docketed the appeal on October 19, 2007, and issued a Notice of Docketing on October 29, 2007. In a Statement of Position submitted on November 2, 2007, the Employer reiterated its argument that the job offer is of a full-time nature and that the Alien's past employment is irrelevant.

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 future job offer is for forty hours is not sufficient to establish that the job position is for full-time year round employment when the past pay-roll records clearly establish that the job opportunity was for significantly reduced hours during the winter months. We note that the employees averaged between 23 and 26 hours a week from December through February in the 2003/04 season, 2004/05 season and 2005/06 season. Thus, we agree with the CO that the Employer has not demonstrated that the job duties can be performed full-time year-round. Although the Employer argues that the offer for future employment will be for 40 hours each week all year-round, the evidence submitted does not support such a finding. The Employer has not submitted any other documentation to establish that the hours worked for the future job opportunity will be different from those as established by the pay-roll records for the job opportunity in the past. As such, we agree with the CO that the position is for seasonal employment and 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