**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
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**Issue Date: 11 March 2011**

**BALCA Case No.: 2010-PER-00253**
ETA Case No.: A-06316-79533

*In the Matter of:*

**ROOTED & GROUNDED NURSERY, L.L.C.,**
*Employer*

*on behalf of*

**DAVID LAGUNA-HERNANDEZ,**
*Alien.*

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Robert J. Jacobs, Esquire
Gainesville, Florida
*For the Employer*

Before: **Romero, Kennington and Rosenow**
Administrative Law Judges

# DECISION AND ORDER
# AFFIRMING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").

## BACKGROUND

On December 11, 2006, the Employer submitted an application for permanent labor certification for the position of Propagation Supervisor (AF 62-70).[1] The Certifying Officer ("CO") accepted for filing the Employer's application on that date (AF 21). On May 6, 2009, the CO sent the Employer an Audit Notification, stating that in addition to the standard documentation, the CO requested that the Employer provide a copy of the job order placed with the State Workforce Agency ("SWA") and provide other SWA related materials. The Employer provided the requested audit materials along with a cover letter dated May 19, 2009 (AF 19). On August 20, 2009, the CO notified the Employer that the Form ETA 9089 had not been certified, in part because the documentation submitted by the Employer in response to the audit was insufficient to demonstrate that a U.S. worker could not be trained to qualify for the position (AF 7-9).[2]

In a letter dated September 16, 2009, the Employer's representative filed a motion to reconsider, and in the alternative, a motion for review (AF 1). The motion argued *inter alia*, that substantial growth, the owner's illness, and other factors prevented the Employer from training a U.S. worker. On January 7, 2010, the CO again denied the certification, restating that there was no evidence that a U.S. worker could not be trained for the position.

The CO forwarded the case to the Board of Alien Labor Certification Appeals (Board or "BALCA") on January 7, 2010, and BALCA issued a Notice of Docketing on February 1, 2010. The Employer filed a Statement of Intent to Proceed on February 16, 2010 and its appellate brief on March 15, 2010. The appellate brief argued in pertinent part that the Employer presented sufficient evidence regarding its inability to train a U.S. worker in its recruitment report and that if the CO found the evidence lacking, it had an obligation to request additional documentation from the employer.

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

[2] In its denial, the CO also noted that the name of the employer as listed in the application does not appear on the notice of job availability provided by the employer and the ETA Form 9089 requires 24 months of experience in the job offered, yet the application does not demonstrate that the alien worker has the required experience. Because we affirm the denial on other grounds, we found it unnecessary to reach the other two issues.

## DISCUSSION

Both the Employer and the CO rely on 20 C.F.R. 656.17 (i)(3), which states in pertinent part that:

> If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of the hiring by the employer, including as a contract employee. The employer cannot require domestic worker applicants to possess training and/or expertise beyond what the alien possessed at the time of hire unless
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> (ii) the employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

On brief, the Employer acknowledges that there is a paucity of on point, post-PERM case law, but states that pre-PERM cases indicate that the CO has an obligation to address the *change in business conditions* that make it impossible to train a U.S. worker and not simply whether a new worker can be trained. It cites the following recent changes in circumstances to support its position:

1) A substantial growth in business and therefore in managerial responsibilities;
2) The owner's health problems, which often require him to have extended time off;
3) The expansion of business operations;
4) That the worker alien is the only employee with the requisite experience to train another Propagation Supervisor;
5) That employer has had significant trouble hiring reliable workers in other positions and that employer experiences high turnover every year.

After a review of the cited cases and of the itemization of the change in circumstances, we disagree that the Employer has demonstrated that it is no longer feasible to train a worker to qualify for the position. While the Employer argues that the burden to train a U.S. worker for the job goes to the employer, not the alien, we find no support for this assertion in the regulations. The regulations state that the employer must demonstrate that it is no longer feasible to train a worker to qualify for the position, not that it is no longer feasible for the *employer* to train a worker to qualify.

Employer admits on brief that the alien is the only employee with the requisite experience able to train a Propagation Supervisor at this time and nothing precludes the alien worker from doing so. We acknowledge the Employer's contention that it has had a substantial growth in business at the same time that the Employer experienced health troubles. Nevertheless, we do not find that these circumstances established that the Employer was precluded from obtaining and training a U.S. worker to do the job.

## ORDER

**IT IS ORDERED** that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

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**PATRICK ROSENOW**
Administrative Law Judge

**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.