U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: FEB 28 1989
CASE NO. 87-INA-532

IN THE MATTER OF

DR. & MRS. FREDRIC WITKIN
Employer

on behalf of

MARIA PILAR RUBIO
Alien

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Guill, Schoenfeld and Tureck, Administrative Law Judges

JOHN M. VITTONE
Deputy Chief Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R § 656.26 of the United States Department of Labor Certifying Officer's denial of labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (the Act).

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

The procedures governing labor certification are set forth at 20 C.F.R. Part 656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. § 656.21 have been met. These requirements include the responsibility of the employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File [hereinafter AF], and any written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On February 14, 1986 Employers, Dr. and Mrs. Witkin, filed an application for alien labor certification on behalf of Maria Pilar Rubio (AF 42), a citizen of El Salvador (AF 49). The position for which certification is sought is child monitor/live-out (AF 42). Employers listed the job duties as: "Helps children dress; prepares meals for children, cleans house, does laundry and ironing, play with children; supervises and takes care of them, etc." (AF 42). The job requirements were that the applicant have three months experience, and be a non-smoker. (AF 42).

On December 16, 1986 the Certifying Officer issued a Notice of Findings. (AF 21-24). Using a form decision with certain paragraphs checked, the Certifying Officer indicated that § 656.21(b)(2) requires documentation that the "[j]ob opportunity has been and is being described without unduly restrictive requirements," and that pursuant to § 656.21(b)(2)(iv) an employer's preferences "shall be deemed to be a job requirement." The Certifying Officer also requested Employers to clarify whether the position offered was for a ""live-in" or a "live-out," because Employers had submitted a "live-in" contract.

On January 6, 1987 Employers submitted their rebuttal to the NOF (AF-20). Employers indicated that the job offered was for a "live-out," and requested that the Certifying Officer disregard the "live-in" contract.

On February 12, 1987, the Certifying Officer issued a second Notice of Findings in which he reiterated his previous findings and also indicated that the split-shift requirement is unduly restrictive. The Certifying Officer advised Employers that they must prove business necessity in accordance with attachment No. 1. Attachment No. 1 is not part of the appeal file, and there is no indication that it was attached to the NOF.

Employers filed rebuttal to the Second NOF on March 10, 1987 (AF 7-15). In their rebuttal, Employers asserted that it was not necessary to demonstrate business necessity for the "split-shift" requirement. In support of this assertion, Employers cited a pre-BALCA case for the proposition that "a work schedule is not an unduly restrictive requirement under the regulations so long as it does not conflict with other regulations or statutes." Matter of Ruth I. Peterson, 80-INA-142 (June 11, 1980). In addition, Employers indicated that a two-hour extended lunch should not be considered a split-shift.

Employers also submitted evidence supporting the business necessity of the ""split-shift". Dr. and Mrs. Witkin submitted letters in which they indicate the following information: Dr. Witkin is a self-employed Periodontist whose practice necessitates an erratic work schedule and requires him to be "on call" for his patients at all times. Mrs. Witkin is Dr. Witkin's office manager. As such, Mrs. Witkin contends that she is required to be in the office before the start of

each working day "to see that all is prepared before the rest of the staff arrives," and that she is responsible for being present until the last patient leaves. Employers further indicated that they have two children, ages three and six, who need constant care and supervision and that their erratic work schedules and early morning and late evening hours "make it imperative" that they have someone reliable to provide breakfast, dinner and supervision. Employers contend that, under the circumstances, it not unreasonable to require the extended lunch hour. If a split-shift were not allowed, Employers assert that they would be required to 1) recruit two workers to work part-time; 2) recruit an employee for an extremely long shift; or 3) forego a household worker during the portion of the day when the worker would be needed most. Employers cite a pre-BALCA decision for the proposition that under the circumstances, the extended lunch hour is a business necessity. Matter of Fornell, 86-INA-889 (November 25, 1986).

The Final Determination was issued on April 17, 1987 (AF 5, 6). The Certifying Officer found Employers' rebuttal insufficient, and denied certification because "the attorney [in his rebuttal] failed to explain who would care for the child during the extended lunch.

Employers filed a request for review on May 20, 1987 and a brief in support of its appeal on July 14, 1987. The Department of Labor filed a brief in support of denial on July 17, 1987.

DISCUSSION

We find that the Certifying Officer acted improperly in this case. 20 CFR § 656.25(c)(2) provides that the Certifying Officer shall state the specific bases on which the decision to issue the Notice of Findings was made. In this case, the Certifying Officer did not provide specific bases for his NOF determination. The Certifying Officer merely used a form NOF and second NOF on which he indicated certain deficiencies by check marks and brackets.

In response to the Certifying Officer's sparsely written second NOF, Employers submitted rebuttal in which they attempted to justify the need for a child monitor who could work early morning and late evening hours. In the Final Determination, the Certifying Officer did not discuss Employers' rebuttal, nor did he indicate whether Employers had documented the need to hire a child monitor who could work early morning and late evening hours. The Certifying Officer instead indicated that Employers had failed to explain who would care for the children between the hours of 12:00 noon and 2:00 p.m. As the Certifying Officer's sparsely written NOF and second NOF did not indicate that Employer needed to address this issue, the Certifying Officer, in effect, raised an issue for the first time in the Final Determination. Denial of Alien Labor Certification based on an issued raised for the first time in the Final Determination is improper. See In the Matter of Phototake, 87-INA-667 (July 20, 1988). Because Employers have adequately addressed the issues properly raised by the Certifying Officer and, thus, have established that no qualified U.S. workers were available for the job, the Final Determination of the Certifying Officer must be reversed.

ORDER

The Certifying Officer's Final Determination is REVERSED, and Alien Labor Certification is hereby GRANTED.

JOHN M. VITTONE
Deputy Chief Judge

Washington, D.C.

JMV/GHS/kat