U.S. Department of Labor

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

DATE: FEBRUARY 16, 1989
CASE NO. 88-INA-16

IN THE MATTER OF

MR. & MRS. CHARLES SHINN
Employer

on behalf of

CARMELA AYVAR a/k/a SONIA AYVAR
Alien

Appearance: Daniel M. Kowalski, Esquire
For the Employer

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

LAWRENCE BRENNER
Administrative Law 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 a 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.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 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 ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

The Employer, Mr. & Mrs. Charles Shinn, of Denver, Colorado, filed an application for labor certification on behalf of the Alien, Carmela Ayvar, a/k/a Sonia Ayvar, for the position of children's tutor, on February 3, 1987 (AF 52). The job duties entailed caring for children ages 4, 6, 11 and 13 in a private home; overseeing their recreation, diet, health and deportment; controlling the children's behavior, arranging outings, and assisting with their school work. The requirements for the position, as initially stated by Employer in the application were: a high school education and 3 months of experience as a children's tutor.

On April 17, 1987, the Certifying Officer (C.O.) issued a Notice of Findings (AF 39-42). In pertinent part, the C.O. found that although the employer had advertised, and contacted a general employment agency i.e., Snelling and Snelling, such efforts were nonproductive. Instead, the C.O. directed Employer to contact a private employment agency which, unlike Snelling and Snelling, specializes in placing workers in domestic occupations (e.g., the National Academy of Nannies, headquartered in Arvada, Colorado), via certified mail, return receipt requested. See 20 C.F.R. §656.21(b)(4).

Secondly, the C.O. questioned whether the 3 months of experience as a children's tutor was actually Employer's minimum job requirement. The C.O. noted that the Alien had only worked one day per week in prior jobs for different employers as a children's tutor, and therefore the Alien was hired without the qualifications now required. See 20 C.F.R. §656.21(b)(6). The C.O. afforded Employer several options to rebut this finding. Among those suggested was one to delete the requirement. If Employer chose this option, the C.O. directed that it must readvertise and recruit for the job opportunity as required in §656.21(b)(4), (5), and (7), and §656.21(f)(g), and (j).

Finally, the C.O. found that Employer had improperly rejected a qualified U.S. worker, namely Kenneth G. Little, citing §§656.21(b)(7), 656.20(c)(8), and 656.24(b)(2)(ii). The C.O. stated that the Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles provides a standard of proficiency in the subject occupation of over 6 months up to and including 1 year combined training, education, and experience. Based upon a review of his resume, the C.O. found that Mr. Little possesses such qualifications. The C.O. correctly noted that Mr. Little's resume establishes that he has an A.A. in Early Childhood Education and Management (AF 42, 76-77). Accordingly, the C.O. directed Employer to contact Mr. Little via certified mail, return receipt requested, arrange for an interview and document the results. Furthermore, if the applicant is rejected, thereafter, Employer is required to submit documentation of the lawful, job-related reasons why he could not perform the job.

In its Rebuttal (AF 10-38), the Employer amended the minimum requirements to read 6 months of training or experience as a children's tutor (AF 12), recontacted Applicant Little (AF 23), contacted the National Academy of Nannies (AF 20), and readvertised the position with a new job order number provided by the Colorado Job Service Center (AF 16-18, 21, 24). In addition, Employer submitted duplicate original Amended ETA 750 B statements, detailing extensive training by the Alien, including completion of 290 class hours and 150 practical training hours in child care (AF 27-36).

The C.O., in her August 17, 1987 Final Determination, denied the application for labor certification (AF 6-9). The Employer requested review on September 17, 1987 (AF 4), and subsequently submitted an appellate brief on or about December 7, 1987. By letter dated December 9, 1987, the Board was advised that the C.O. would not file a brief, since the case "appears to involve only factual issues." The Employer filed a response thereto dated December 17, 1987. In view of our decision herein, the question raised therein is inapplicable to the case at bar.

Discussion

In her Final Determination, the C.O. accepted the Employer's rebuttal regarding the minimum job requirements issue. Thus, the two issues upon which the C.O. denied labor certification were: (1) Recruitment Normal to the Occupation and (2) Rejection of U.S. Worker (AF 6-9).

Regarding the "Recruitment Normal to the Occupation," the C.O. had, in her Notice of Findings, directed Employer to contact a more appropriate private employment agency, such as the National Academy of Nannies, by certified mail, return receipt requested. The Employer's rebuttal was that it had complied with the C.O.'s directive, but did not receive a response to its inquiry. Notwithstanding Employer's precise compliance with the C.O.'s instructions, the C.O. stated that Employer's letter was written to discourage response, citing a low rate of pay. Yet, we find that the C.O. never objected to this same pay rate ($4.50 per hour, $5.50 for overtime) in the Notice of Findings, and, in fact, did not specifically find the offered pay rate to be below the prevailing wage in her Final Determination. In addition, the C.O. noted that "nothing prohibited Employer from calling NANI to demonstrate true interest in seeking qualified referrals for the position."

Our review of the record indicates that Employer's letter to the National Academy of Nannies, dated May 5, 1987, which was sent by certified mail, return receipt requested, and which was received by that agency on May 14, 1987 (AF 20), fully and completely complies with the C.O.'s own directive, as set forth in her Notice of Findings (AF 40). Accordingly, the C.O.'s continued denial on that basis, and the adding of additional requirements in the Final Determination is inappropriate.

Similarly, regarding the "Rejection of U.S. Worker" issue, the C.O., in her Notice of Findings, had directed Employer to re-contact a seemingly qualified U.S. worker, i.e., Kenneth G. Little (AF 41-42). The Employer's rebuttal was that it had complied with the C.O.'s directive, but that

Mr. Little did not call Employer as requested. Notwithstanding Employer's precise compliance with the C.O.'s directions, including a signed return receipt, she again concluded that Employer's letter to Little discouraged a response. Specifically, the C.O. determined that Employer should not have stated "If you are still interested . . . ", but instead should have written "something to the effect that": "This is to let you know our position is still open and we would like you to contact us to discuss your qualifications and interest . . . " (AF 8-9).

Our review of the record establishes that Employer's letter to Mr. Little, dated May 5, 1987, which was sent by certified mail, return receipt requested, and which was received by Mr. Little on May 14, 1987 (AF 23), complies with the C.O.'s directive, as set forth in her Notice of Findings (AF 42). In Employer's letter, Mr. Little was advised that if he is still interested and available, he should call Employer for an interview. We find that it is clear from this letter that the job is available. Accordingly, the C.O.'s conclusion that ""employer's letter to Little discouraged response" is erroneous. Finally, we note that the C.O., in her Final Determination, stated it is hardly surprising that a qualified applicant, such as Mr. Little, was no longer available. ""However, the issue is not whether an applicant is available for the position several months after applying but rather whether the applicant was initially lawfully rejected in the first place." Thus, the C.O. determined that Employer ""neither cured the deficiency nor satisfactorily rebutted the finding" (AF 9).

We agree with the C.O.'s conclusion that an initial unlawful rejection of a qualified U.S. applicant is not cured by the Employer's subsequent attempt, without success, to contact him. See 20 C.F.R. §656.25(e); In the Matter of Arcardia Enterprises, Inc., 87-INA-692 (February 29, 1988); In the Matter of Dove Homes, Inc., 87-INA-680 (May 25, 1988) (en banc). Thus, the C.O. would have been perfectly within her rights to state in her Notice of Findings that Employer could only rebut this finding by specifying why it had initially rejected Mr. Little. The C.O., however, chose instead to direct Employer to re-contact Mr. Little. Only if the applicant was then rejected, was Employer required to submit specific documentation of the lawful, job-related reasons why he could not perform the job (AF 42). As summarized above, we find that Employer did comply with the C.O.'s own directive. Moreover, as noted in Employer's brief, Mr. Little did not have the minimum requirements as provided in the original job offer (i.e., 3 months of experience as a children's tutor). It was only after the requirements were changed, in accordance with the C.O.'s directive, to 6 months of experience or training, that Mr. Little met the minimum requirements. At that point, the Employer amended the ETA 750 A, re-advertised the position, and specifically contacted Mr. Little with the new job offer, all in accordance with the C.O.'s directives in her Notice of Findings.

In view of the foregoing, we find that Employer has properly rebutted each and every deficiency raised by the C.O. in her Notice of Findings. Moreover, it is clear that the C.O.'s grounds for denial of labor certificaton must be set forth in the Notice of Findings, giving an Employer an opportunity to rebut or, if possible, to cure the alleged defects. See 20 C.F.R. §656.25; Downey Orthopedic Medical Group, 87-INA-674 (March 16, 1988) (en banc). Thus, it was improper for the C.O. to belatedly recognize that she could have limited Employer's method of rebuttal, and to use that as a basis for denying certification in her Final Determination. Therefore, the C.O.'s determination is reversed.

ORDER

The Final Determination of the Certifying Officer denying certification is REVERSED and the application for labor certification is GRANTED.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/MP/gaf