U.S. Department of Labor

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

DATE: DEC 29 1988
CASE NO. 88-INA-158

IN THE MATTER OF

UNIVERSITY OF OKLAHOMA - HEALTH SCIENCES CENTER,
Employer

on behalf of

KOK SENG WONG,
Alien

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

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

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) (hereinafter "the Act"'). The Employer requested review from U.S. Department of Labor Certifying Officer Benjamin Bustos denial of a labor certification application pursuant to 20 C.F.R. §656.26.[1]

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 a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available 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; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

[1] All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations 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 a 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 [see §656.27(c)].

Statement of the Case

On November 26, 1986, the Employer, University of Oklahoma-Health Sciences Center, filed an application for alien employment certification on behalf of the Alien for the position of Programmer Analyst. Employer had hired the Alien for this position in July, 1985 (AF 151), but did not file an application for certification at that time. It is unclear from the record why the Employer subsequently filed an application for certification.

After filing the application for certification, Employer advertised the position from January 30 to February 1, 1987, and received responses from two applicants, neither of whom were found to have met Employer's minimum requirements for the job (AF 142).

In a Notice of Findings ("NOF") issued on August 23, 1987 (AD 116-17), the Certifying Officer ("CO") instructed Employer to establish that the "other special requirements" for the position, listed on Employer's Form 750-A, arose from business necessity. Further, the CO found that four job applicants – Sheen, Hankins, Slutzky and Wright – met the job's minimum requirements.

In rebuttal (AF 35-114), Employer provided evidence to establish the business necessity of its job requirements. In addition, Employer pointed out that the four applicants named by the CO had not applied for the job in response to the recruitment efforts run in conjunction with the applicant for certification. Rather, these people applied for the job in 1985, when the Alien originally was hired. It was Employer's position that this prior recruitment has no bearing on the application for certification, since it was not conducted in response to the application.

In the Final Determination (AF 32-33), the CO accepted Employer's evidence that all the job requirements arose from business necessity. However, the CO either did not consider, or did not accept, Employer's argument that the 1985 recruitment was irrelevant. For without specifically identifying any job applicants, he reiterated the reason given in the NOF concerning the qualifications of Sheen, Hankins, Slutzky and Wright, i.e., that Employer could not give preference to a more qualified alien where other applicants met the job's minimum requirements.

Discussion

This case raises the issue of whether the Alien's initial recruitment by the Employer, occurring almost a year-and-a-half before certification was applied for, can form the basis for the denial of certification, assuming that the initial recruitment had turned up qualified applicants who were not hired. Due to the state of this record, this issue cannot be resolved at this time.

For one thing, it is unclear if that is the basis of the CO's decision. Neither the NOF nor the Final Determination mention the 1985 recruitment in specific terms; and it cannot be determined whether the CO was aware that two discreet recruitments were carried out. Second, the record does not explain why two separate recruitments were conducted, or why certification was not applied for in connection with the first recruitment. Surely, if an employer deliberately tries to circumvent the certification process by weeding out qualified U.S. workers prior to applying for certification, such a process cannot be condoned. However, if certification was not contemplated at the time of the original recruitment, it becomes an entirely different question. Third, neither party adequately addressed this issue. The CO, in a short letter in lieu of a brief, simply argued that this situation is covered by §656.21(b)(1), while Employer merely argued that the prior recruitment cannot be applicable.

Under these conditions, there is no choice but to remand this case to the CO for further proceedings. The CO must clarify the basis for his denial of certification, both legally and factually, in a revised NOF. If the CO is contending that a recruitment conducted outside of the certification process can nonetheless be the basis of a denial of certification, he should cite the regulatory basis for this determination.

In the event a new NOF is filed, Employer's rebuttal, inter alia, should clearly explain the procedural history of its certification application, and support this explanation with appropriate documentary evidence. The Employer should also cite the applicable regulations and case law if it continues to contend that its prior recruitment efforts cannot form the predicate of the denial of certification.

Accordingly, the CO's denial of certification is vacated, and the case is remanded for further proceedings consistent with this decision.

ORDER

The Certifying Officer's denial of certification is vacated, and the case is remanded for further consideration.

For the Board

JEFFREY TURECK
Administrative Law Judge

JT:jb