U.S. Department of Labor

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

Date issued: May 31, 1990
Case No: 88-INA-288

In the Matter of:

KENNETH R. GOLDMAN
Employer,

on behalf of

SONIA SOTO-LIZARRAGA
Alien

BEFORE: Litt, Guill, Brenner, Marcellino, Marden, Romano, Silverman and Williams
Administrative Law Judges

For the Board
James Guill
Associate Chief Judge

DECISION AND ORDER

This matter arises from a request for administrativejudicial review of a United States Department of Labor Certifying Officer's denial of labor certification.[1] 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 the Appeal File (AF), and written arguments of Employer. See §656.27(c).

Statement of the Case

On December 15, 1986, Employer, Kenneth R. Goldman, filed an application for alien labor certification on behalf of the Alien, Sonia Sota-Lizarraga, to fill the position of Child Tutor. Requirements for the position, as set forth in Form ETA-750, included one year of experience in the job offered or a total education of not less than 13 years. Good references were also required. The job description was as follows:

[1] Labor certification is governed by §212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14), and Title 20, Part 656 of the Code of Federal Regulations, 20 C.F.R. Part 656. Unless otherwise noted, all regulations cited in this Decision and Order are contained in Title 20, Part 656.

> Child tutor to provide instructional services to young child. Must encourage discipline, good manners, and productive leisure time. Supervise meals. Teach Spanish language.

The position's hours were listed as 40 hours per week, Monday-Friday 2:30 p.m. - 9:00 p.m., Saturday 9:30 - 5:00, with Sunday off. The child to be tutored was nine months of age at the time of the application. (AF 1).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on December 4, 1987 (AF 8). She cited §656.21(b)(2)(1) of the regulations, which requires that the job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States and those defined for the job in the D.O.T. The CO proposed to deny the application because:

> The hours of employment in the Job Offer shown as Monday through Friday 2:30 p.m. to 9:00 p.m., are not standard hours for a Children's Tutor. Also the one year of college is a restrictive requirement and is tailored to the qualifications of the alien since it appears she does not have one year of experience in the job offered.

Employer was instructed to justify the business necessity of the restrictive requirement or, in the alternative, amend the hours of employment and minimum requirements and re-recruit.

In rebuttal, Employer asserted that the hours of employment and stated minimum requirements are in fact normal for the position of Child Tutor. (AF 9). In support of its position, Employer refered to the D.O.T., noting the "large distinction" between the job of "Tutor" and that of "Child Tutor" (AF 9, Rebuttal letter at 1). He emphasized that in the case of a Tutor, the job duties are limited to teaching academic subjects; however, in the case of a Child Tutor, the duties encompass total child care, including supervision of recreation, meals, school-work, encouragement and discipline. Employer contended that the hours of employment as listed coincide with the children's availability, i.e., when they are home from school. (AF 9, Rebuttal letter at 2).

Regarding the CO's finding of one year of college as a restrictive requirement tailored to the qualifications of the Alien, Employer asserted, that one year of college is not restrictive where, as in the instant case, the Tutor is to provide "instructional services." (AF 9, Rebuttal letter at 4). Employer argued that, considering that the community in which the child is to be raised stresses education, a "minimum of 1 year college in an environment where the majority of people have four year college educations, and more, does not seem unduly restrictive." (AF 9, Rebuttal letter at 4). Employer further stated that an individual who has spent a year at college "has learned personally to structure her own leisure time and homework assignments whereas an individual with a high school diploma, or less, has mainly had homework assignments and leisure time structured under parental supervision." (AF 9, Rebuttal letter at 4). Employer cited the Specific Vocational Preparation (SVP) supplement to the D.O.T. and noted that he "made the requirements less restrictive in allowing an alternative to the experience requirement of 1 year of college." (AF 9, Rebuttal letter at 4). In addition, Employer submitted letters from a school

administrator and from a children's psychotherapist which both documented one year of college as normal for the position. Employer contended that the qualifications were not tailored to the Alien since the Alien has a liberal arts college degree and an additional degree in Telex and computers, as well as prior working experience.

A Final Determination denying certification was issued on February 25, 1988. (AF 10). It stated:

> The hours of employment in the Job Offer and ads are shown as 2:30 p.m. to 9:00 p.m., Monday through Friday. The child who the alien will tutor is nine months old. The documentation provided is not sufficient to show that the unusual hours of employment arise from a "business necessity."
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> In addition, the year of college in lieu of the one year of experience as a children's tutor which the alien does not have is a restrictive requirement. The documentation provided does not show that it arises from a business necessity in violation of 656.21(b)(2)(i).

Employer filed a request for review on March 14, 1988. (AF 12). A Motion to Remand and Appeal Brief was filed on July 12, 1988. The Motion for Remand was based upon Employer's contention that the Final Determination was erroneously issued by an Alien Employment Certification Specialist rather than by the Certifying Officer.

Discussion

Educational requirement

The CO denied labor certification partly on the ground that the requirement of one year of college in lieu of one year of experience as a Children's Tutor is a restrictive requirement, and was not shown to arise from business necessity. §656.21(b)(2)(i). The CO reasoned that the requirement was tailored to the alien given that she did not have one year of experience.

Employer argues that the requirement of one year of college is reasonable given the special circumstances of the environment in which the child will be raised (that is, that the child will have to fit into a community in which education is stressed), and the fact that the role of a Children's Tutor involves more than monitoring of the child, but also instructional services. Unlike the CO, we find that the letters from the school administrator and the child psychotherapist document the reasonableness of the one year of college requirement since that evidence is uncontradicted and the CO failed to proffer any reason for rejecting those letters as not credible.

We conclude that the alternative requirement of one year of experience or one year of college education is not unduly restrictive for the position of a Children's Tutor.

Nonstandard Hours of Employment

The Certifying Officer also denied labor certification on the ground that Employer failed to show that the hours of employment listed in the job offer, Monday-Friday 2:30 p.m. to 9:00 p.m., are those normally required in the United States for a Children's Tutor, §656.21(b)(2)(i)(A), or that such hours are required by business necessity, §656.21(b)(2)(i).

Employer contended that work hours are standard for a Children's Tutor where they coincide with the child's availability. This is a reasonable proposition, but is disingenuous when applied to the facts of this case. Certainly when a child is attending school, his or her availability would be after school, and in that case the hours of 2:30 p.m. to 9:00 p.m. could be justified. Employer's child, however, was only nine months of age at the time application was first made for alien labor certification. Although the child will mature, he was not in school at the time the application was filed, there is no evidence that he had been placed in day care or in preschool, and it seems unlikely that he would start preschool before the age of three or four. Specifically, there is no evidence that the child would not be available for tutoring during a more traditional "9 to 5" workday for several years prior to his obtaining school age.

Although Employer's "availability of the child" justification is inadequate, it is not apparent that a traditional "9 to 5" workday is normal for a Children's Tutor. Given that the role of a Children's Tutor is more expansive than the role of a Tutor, we conclude that the normal hours for that position has not been adequately explored. Especially in the case of a very young child, a Children's Tutor's role will concentrate more heavily on overseeing the child's "recreation, diet, health, and deportment." During the early years of a child's development a Children's Tutor's role presumably is closer to that of a Child Monitor than that of a Tutor. Given this fact, it might be that the job, at least for the first several years, would have better been described under the D.O.T. position of "Children's Tutor, Nursery," whose normal working hours would probably encompass the times when the adults in the household are away from the house and when the child is most often awake.

Had this appeal proceeded more expeditiously a remand in order to permit Employer to reform its job description as requiring a "Children's Tutor, Nursery" until the child reached school age, with the job changing to the position of "Children's Tutor" afterwards, may have been in order. The child has now reached an age when preschool is a possibility, and the original explanation for the "nonstandard" hours (i.e., availability after school) may now comport with reality. For this reason, Employer will not be required to make a retrospective justification of work hours for a Children's Tutor, Nursery, of a nine month old infant. Rather, on remand the CO is directed to evaluate the job's hours in view of the child's current age, and to provide Employer with the opportunity to provide additional pertinent documentation or to modify the hours of employment required. If the child's availability for the type of tutoring performed by a Children's Tutor is shown to be during the hours required in the job offer, labor certification is to be granted.

Signature of Certifying Officer on Final Determination

In view of the remand ordered in this matter, it is not necessary to address Employer's procedural argument that the Final Determination was defective because it was not signed or initialed by the CO.

ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby VACATED and the matter is REMANDED for further development of the evidence consistent with the above.

James Guill
Associate Chief Judge

JG/trs