U.S. Department of Labor

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

DATE: MAY 30, 1990
CASE NO. 88-INA-433

IN THE MATTER OF

ROBERT L. LIPPERT THEATRES
Employer

on behalf of

JUNG HA LEE
Alien

Appearance: Gerald L. McVey, Esquire
For the Employer

BEFORE: Brenner, Guill, Litt, Marcellino, Marden, Romano, Silverman and Williams
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, Robert L. Lippert Theatres, is the operator of a drive-in movie theater and flea market complex in Ceres, California. On January 7, 1987, the Employer filed for labor certification on behalf of the Alien, Jung Ha Lee, to fill the position of Accountant/Projectionist (AF 16). The duties for this position involved handling all accounting functions for two theaters and the flea market and the operation of the automated projection and sound systems. The Employer specified that all applicants were required to possess three years experience in business accounting and two to three years experience operating and maintaining motion picture projection and sound systems (AF 16).

The Certifying Officer (C.O.) issued his Notice of Findings on December 24, 1987, proposing to deny labor certification (AF 12-14). The basis for the proposed denial was, inter alia, that the Employer had described the job offered with the restrictive requirement of a combination of duties, accountant/projectionist, in violation of 20 C.F.R. § 656.21(b)(2)(ii) (AF 13). The Employer was directed to document that it is its normal policy to hire one worker to perform this combination of duties, that workers customarily perform the combination of duties in the area of intended employment, or that the combination is based upon business necessity. 20 C.F.R. § 656.21(b)(2)(ii).

Following rebuttal by the Employer, the C.O. issued his Final Determination on May 11, 1988, denying labor certification based on the combination of duties issue (AF 2-3). A Request for Review by the Board was filed by the Employer on May 31, 1988, which subsequently submitted a brief in support of its position (AF 1).

On March 2, 1990, the Board decided, sua sponte, to consider this matter en banc, along with other cases, and invited briefs by the parties and amicus curiae. Only the Certifying Officer thereafter filed a brief.

Discussion

I.

Section 656.21(b)(2)(ii) requires that if a job opportunity contains a combination of duties[1], the employer must document that 1) it has normally employed persons for that

[1] The regulation gives "engineer-pilot" as an example of a job involving a (continued...)

combination of duties, and/or 2) that workers customarily perform the combination of duties in the area of intended employment, and/or 3) that the combination job opportunity is based upon business necessity. The first two prongs of this provision, the "normally employed" and "industry norm" tests, are fairly straightforward and easily applied. For example, the Board has previously held that, where a combination of duties is consistent with the description of the job in the Dictionary of Occupational Titles (DOT), the combination is normal and business necessity need not be shown. Alan Bergman Photography, 88-INA-404 (Sept. 28, 1989). Similarly, in Van Boerum & Frank Associates, 88-INA-156 (Dec. 5, 1989), a small engineering firm justified a combination of managerial and training duties by documenting that, although it had never used the combination, it was customarily used by firms in the area of intended employment. The third prong of the section, whether the combination is based upon business necessity, is more difficult to define and apply. As the C.O.'s brief states (at p.7), this prong need only be considered when neither of the first two prongs have been met.

The phrase "business necessity" is a term of art and given to various expressions and formulations depending on the context of its use. In defining business necessity in the context of restrictive job requirements under section 656.21(b)(2)(i), for example, the Board requires that employers demonstrate that the requirements "bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer." Information Industries, Inc., 88-INA-82 (Feb. 9, 1989) (en banc).[2] The application of the Information Industries standard to combination of duties situations, however, would be inappropriate because it was fashioned specifically for the analysis of requirements, and not duties, and cannot be easily adapted to combination of duties issues. The challenge before us, therefore, is to articulate a standard for business necessity in combinations of duties.[3]

As stated earlier, the business necessity of a particular combination of duties need not be examined unless the employer has failed to demonstrate that such employment practice is normal to its operation or that such practice is customary to the industry. This structure within this regulation means that only those combinations which have never been employed previously by the employer or other similar employer will be reviewed under this standard. We are convinced,

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[1](...continued)
combination of duties.

[2] In formulating the Information Industries test, the Board explicitly rejected the more liberal standard for business necessity set forth in Ratnayake v. Mack, 499 F.2d 1207 (8th Cir. 1974), which stated that a requirment arose from business necessity if "there is shown to be a reasonable intent to contribute to or enhance the efficiency and quality of the business." Ratnayake, at 1212. See Information Industries, supra at 9.

[3] The Board made a similar decision to adapt the Information Industries test of business necessity to meet the special problems under section 656.21(b)(2)(iii) posed by a requirement that U.S. workers live on the premises of the employer. See Marion Graham, 88-INA-102 (Feb. 2, 1990)(en banc).

therefore, that such a restrictive formula within this regulatory provision calls for a fairly restrictive approach for review of these cases.

Pursuant to this objective, the Department of Labor argues in its brief with some persuasion that, for an employer to document the business necessity of a combination of duties, it must "show that one duty is essential to perform the other. . . [that] it is the nature of the duties that they be combined." (emphasis added) (DOL brief, p. 2). In the present case, for example, the Employer would be required to show that the ability to run the projection system is essential to perform the specified accounting duties, and vice versa. The "essentiality" test would presumably restrict the combinations of duties permissible under this regulation to a high degree, which the Labor Department argues is mandated by Congressional intent and the purpose of the regulations.

While the "essentiality" test is certainly compelling, we decline to adopt it here because of reservations that the test may be so narrow in approach that it may operate to exclude combinations of duties which legitimately arise out of business necessity. Occasions may exist where, although the duties are not essential to each other, it would nonetheless be highly impractical for the employer to hire two workers, such that the employer would seek to fill the job offered with one worker even if it were not pursuing alien labor certification. The regulation reserves for certification only combinations of duties which, though they have not been employed previously, legitimately represent one job opportunity and not the expedient merger of two distinct vocational endeavors.

Accordingly, for a combination of duties to be based on business necessity under § 656.21(b)(2)(ii), an employer must document that it is necessary to have one worker to perform the combination of duties, in the context of the employer's business, including a showing of such a level of impractibility as to make the employment of two workers infeasible. The intent of this formula is to focus the parties on addressing the fundamental issue of why it is necessary to have one worker perform the duties instead of two or more. Implicit in this standard is a showing by the employer that reasonable alternatives such as part-time workers, the purchase of new equipment, and a reordering of responsibilities within the organization are infeasible.[4] In addition, though not necessary to satisfy the test, a showing that the duties are essential to perform each other would weigh heavily in favor of business necessity.

The level and burden of proof under this standard must necessarily be high because, to rely on this provision, an employer is already proposing a combination which has not been normal to its business or the particular industry in general. A mere showing that the combination produces financial savings, or adds to the efficiency or quality of the employer would not,

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[4] This concentration on the infeasibility of the various alternatives replicates a similar analysis devised in the definition of business necessity in cases involving a live-in requirement. See Marion Graham, supra at 11-12. In that case, the Board required that employers explicitly state why alternatives to a live-in worker are infeasible or detail the reasons for the requirement with a level of specificity which would permit the C.O. to make such an assessment of alternatives.

therefore, satisfy the above standard.[5] As the Labor Department notes in its brief, each combination of duties, no matter how expedient, produces some efficiency and savings for the employer in that it is relieved of the task of locating, and paying, two workers. The standard established in this decision contemplates something greater than an employer's convenience or economy.

For example, even if it is not normally done in the industry, an employer attempting to hire a truck driver to drive over a specific long, desolate route might legitimately combine the ability to make light mechanical repairs with the driving duties. In such a scenario, the alternative of hiring a mechanic to ride along would be impractical, as would having the driver summon help to some remote area for minor repairs. Similarly, where the employer operates a genuinely unique venture, or possesses a unique technological innovation where one of the duties is something no second worker can perform, a combination including that duty would meet the announced standard. In such cases, it is only feasible that the duties be performed, in a reasonable manner, by one and the same person.

Lastly, we note that a showing that the combination of duties is based on business necessity does not end the analysis. The employer must still show that the specified requirements for each set of duties are not unduly restrictive under Information Industries. In the case at hand, for example, even if the Employer were to show that the combination of motion picture projection and accounting duties is justified by business necessity, it would still have to show that its requirements for each -- three years experience in business accounting and two to three years experience with motion picture projection and sound systems -- are not unduly restrictive under section 656.21(b)(2).

II.

Turning now to the present case, the Employer responded to the C.O.'s finding that it had not established the business necessity of its combination of duties by stressing its need for a qualified, experienced projectionist (AF 7-9). Very little attention, though, is given by the Employer to the core issue of the business necessity of the combination itself. At one point, the Employer does state that, once the projectionist sets the film in motion, the rest of his time may be spent doing other activities -- time the Employer argues that the Alien could spend reviewing its books (AF 8).

This argument fails, however, to establish the business necessity of the combination of duties as it arises from the simple convenience and savings of the Employer. Applying the test announced earlier, the Employer has not shown that it is necessary, even in the context of its business, to hire one worker to perform these duties, and that it is impractical to such a degree as to make it infeasible to hire two workers. No consideration of reasonable alternatives, such as using an outside accountant, is made by the Employer. Furthermore, the projectionist duties are

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[5] In this respect, this determination mirrors the rejection of the Ratnayake standard of the "enhance[ment] of the efficiency and quality of the business" accomplished in Information Industries. See supra, note 2.

not essential to the accounting duties, or vice versa. What remains is the Employer's argument that, given the Alien's unusual background, it may "kill two birds with one stone," by combining these heretofore unrelated jobs.

Because the Employer has not shown that it has normally employed persons for the specified combination of duties, or that workers customarily perform the combination of duties in the area of intended employment, or that the combination of duties is based on a business necessity under section 656.21(b)(2)(ii), Employer has not met the criteria of the regulation. Accordingly, labor certification was properly denied by the C.O.

ORDER

The Final Determination of the Certifying Officer is hereby AFFIRMED.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/VF/gaf