U.S. Department of Labor

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

Date: June 30, 1992

Case No.: 90-INA-60

In the Matter of:

NORTH SHORE HEALTH PLAN

Employer

on behalf of

MUN K. LIANG

Alien

Appearances: Lewis Sandler, Esquire
For the Employer

Annaliese Impink, Esquire
For the Certifying Officer

Before: Brenner, De Gregorio, Glennon, Groner, Guill,
Litt and Romano
Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

This case is before the Board en banc by petition from the Certifying Officer ("C.O."). A three-judge panel of the Board ("Panel"), in its April 8, 1991 Decision, found that the C.O.'s Notice of Findings was insufficiently clear to put the Employer on notice of the alleged deficiency for which the C.O. thereafter denied the application for labor certification. After the C.O.'s Final Determination identified the alleged deficiency, the Employer filed a request for review which argued, inter alia, that the Employer had not been given notice of the specific deficiency prior to the denial by the C.O. (AF 1-6). The Employer also enclosed additional evidence rebutting the alleged deficiency (AF 7-10).

After finding that the C.O. failed to give adequate notice of the deficiency prior to the Final Determination denying the application, the Panel found that the evidence submitted with

the Employer's request for review fully rebutted the basis for the C.O.'s denial. Accordingly, the Panel reversed the C.O.'s denial and directed the C.O. to grant certification.

The C.O. does not disagree that the Panel correctly found her Notice of Findings vague and ambiguous (Brief, at 3n.1, July 22, 1991). However, the C.O. argues that the Panel has no authority to consider an employer's evidence which had not been filed before the C.O. Accordingly, the C.O. argues that the case must be remanded to her for consideration of the new evidence.

We find that the C.O.'s Notice of Findings failed to raise the grounds for her later denial of this application. As more fully set forth in the Panel's decision, the Notice of Findings questioned whether the Alien had the required knowledge of ASK 3000 computer language prior to being hired by the Employer for the data planning analyst job which is the subject of this application (AF 19-20). The Final Determination accepted the Employer's rebuttal on this point (AF 12). However, the Final Determination erroneously stated that the Notice of Findings had also required the Employer to show that the Alien satisfied other listed requirements; then, because the rebuttal did not address these other requirements, the C.O. denied the application (AF 12). Since the deficiency alleged in the Final Determination is not properly at issue in this case, the Employer's evidence addressing that ground is irrelevant.

We agree with the Employer's argument that the C.O. failed to put it on fair notice of the alleged defect upon which the denial was based. Section 656.25 specifies the path which a C.O. must follow to issue a Final Determination denying labor certification. The proposed bases for denial must first be presented in the Notice of Findings, thereby giving an employer the opportunity to cure or rebut the alleged defects. Denying labor certification in the Final Determination on grounds not first raised in the warning Notice of Findings violates section 656.25 and denies due process. Marathon Hosiery Co., Inc., 88-INA-420 (May 4, 1989) (en banc); Tarmac Roadstone (USA), Inc., 87-INA-701 (Jan. 4, 1989) (en banc); Downey Orthopedic Medical Group, 87-INA-674 (Mar. 14, 1988) (en banc); Garland Community Hospital, 89-INA-271 (June 20, 1991).

We do not address whether the Board has any discretion to reverse a C.O.'s finding based on evidence which an employer did not first present to the C.O. Accordingly, that portion of the Panel's decision remains vacated. The C.O. is correct that the general rule is that the Board limits its review to evidence in the record upon which the C.O.'s denial was based. 20 C.F.R. §§ 656.26(b)(4), 656.27(c). University of Texas, 88-INA-71 (May 9, 1988).

Since the issue of the Alien's satisfaction of the requirements other than the ASK language was first raised in the Final Determination, we reverse the C.O.'s denial of labor certification.[1]

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[1] Our decision in this case does not restrict a C.O. from issuing another Notice of Findings when she wishes to propose denying an application on grounds not raised in her first Notice of Findings. Moreover, we do not at this time overrule decisions in which we remanded

(continued...)

ORDER

The Final Determination denying labor certification is hereby REVERSED. The Certifying Officer is directed to GRANT certification.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/sjn

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[1](...continued)
the case for the C.O.'s further consideration when the basis for the denial was first raised in the Final Determination because an employer's rebuttal first squarely raised the issue (Downey Orthopedic, supra), or new evidence was presented to the C.O. after the Notice of Findings (Marathon Hosiery, supra; rejected U.S. applicant sent letter to C.O.). However, the much better course when a C.O. wishes to rely on a new or substantially clarified basis for denial subsequent to the Notice of Findings, is for the C.O. to issue a second Notice of Findings. The C.O.'s commendably do so in many such cases. This avoids undue, and perhaps prejudicial, delay in giving an employer and alien their right to attempt to rebut or cure the bases for denial proposed by the C.O.