U.S. Department of Labor

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

Date: May 13, 1992
Case No.: 90-INA-80

In the Matter of:

RICHARD CLARKE ASSOCIATES,

Employer

on behalf of

SHARON GIBSON,
Alien

Appearances: LEO E. YPSILANTI, Esquire
For the Employer

FRANK P. BUCKLEY, Esquire
For the Certifying Officer

Before: Litt, Chief Judge; Guill, Associate Chief Judge; and Brenner, Clarke, De Gregorio, Glennon, Groner, Romano, and Williams[1], Administrative Law Judges

DECISION AND ORDER

STATEMENT OF THE CASE

On January 28, 1987, Richard Clarke Associates (Employer) filed an application for labor certification pursuant to section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (Act). On October 21, 1988, the New York State Alien Labor Certification Office (ALCO) notified Employer that its wage offer for the job was below the applicable prevailing wage; that the U.S. Department of Labor would not approve an application for labor certification if the wage offer does not meet the prevailing wage; and that ALCO could not proceed with the required recruitment and testing of the labor market for a job that did not offer a prevailing rate of pay. (AF 12). On December 5, 1988, Employer responded to ALCO, challenging the request for a wage amendment as arbitrary and not valid, and requesting details about the ALCO determination of the prevailing wage. (AF 17). ALCO did not reply to Employer, but simply

[1] Judge Clarke and Judge Williams took no part in the decision of this case.

transmitted the application to the Certifying Officer (C.O.) with the comment that Employer had refused to comply with the prevailing wage determination (AF 20).

On May 9, 1989, the C.O. issued a Notice of Findings (NOF), proposing to deny labor certification because Employer's wage offer was below the prevailing wage. The C.O. stated that the prevailing rate of pay was based on a May 1986 Area Wage Survey by the Bureau of Labor Statistics (AF 21). Employer was advised that it could "rebut" the C.O.'s finding of deficiency by raising its wage offer to the prevailing wage level or by submitting countervailing evidence that the prevailing wage determination was in error. Employer was further advised that if it increased its wage offer, it had to document its willingness to readvertise. Ibid. Finally, Employer was advised that efforts to cure the deficiency after the expiration of the rebuttal period could not be considered. (AF 21).

After obtaining an extension of time in which to rebut the NOF, Employer filed a rebuttal on July 13, 1989. Employer did not raise its wage offer, but contended that the prevailing wage determination relied upon by the C.O. was invalid (AF 31). The C.O. rejected Employer's contentions, and denied labor certification on August 18, 1989 (AF 41).

On September 21, 1989, Employer requested reconsideration by the C.O. and, in the alternative, review by the Board. Employer attempted a further clarification of its position, and concluded that, should the C.O. remain unconvinced, the C.O. should remand the case to ALCO so that Employer might recruit at the wage level determined by ALCO (AF 54). The C.O. forwarded the case file to the Board with the statement that "the attached case has been reviewed and determined to be unacceptable for reopening at this level."

On June 6, 1991, a panel for the Board issued a decision sustaining the C.O.'s determination that the wage offered by Employer was below the prevailing rate. However, the panel expressed dissatisfaction with regard to the manner in which the C.O. had disposed of the motion for reconsideration. According to the panel, the sentence quoted above shed no light on the C.O.'s reasons for refusing reconsideration, and indeed provided no evidence that the C.O. had seriously considered the request. The panel held that when an employer makes a good faith effort to clarify its position in its request for reconsideration, a certifying officer must show that the request has been thoughtfully considered; and when the employer offers to acquiesce in the certifying officer's position if the clarification is not accepted, the certifying officer must state reasons for refusing the offer.

Employer had argued that labor certification cannot be denied merely because an employer has challenged a certifying officer's prevailing wage determination which is ultimately upheld on review. According the Employer, prevailing wage determinations are interlocutory in nature, and when they are upheld the proper result is to remand for recruitment at the prevailing rate. The panel rejected this argument, but, nonetheless, remanded the case for recruitment at the correct wage rate, on the grounds that the C.O.'s failure to permit advertising after the denial of certification and to state reasons for denying reconsideration had unnecessarily prolonged the administrative process.

On June 28, 1991, the C.O. petitioned for en banc review of the Board panel's decision. On August 1, 1991, the Board granted the petition, and vacated the panel's decision. We now conclude that the C.O.'s final determination denying labor certification must be affirmed.

Discussion

I

The C.O. presses upon us two basic contentions. First, it is argued that the panel's decision has the effect of adding another rebuttal stage to the certification procedure established by the applicable regulations. This is so, the argument goes, because the decision permits an employer to file a rebuttal to the final determination of a certifying officer in the form of a motion for reconsideration, and then requires the certifying officer to clearly set forth the reasons for his/her ruling on the motion.

Second, it is argued that a motion for reconsideration is addressed to the sound discretion of an agency; that the denial of such a motion will only be reversed for clear abuse of discretion; and that, judged by this standard, the summary denial of the motion for reconsideration in this case was appropriate.

II

The panel's insistence on a statement of reasons for denying the motion for reconsideration raises a threshold question concerning the source of such a requirement.

The Act which authorizes labor certifications is completely silent as to the procedures to be used in considering applications for certifications. The regulations that establish such procedures make no mention of motions for reconsideration. 20 C.F.R. Part 656. There remains to consider the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (APA).

The APA has three provisions relating to statements of reasons. Section 553(c) provides that "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." This provision applies only to rules not required by statute to be made on the record after opportunity for a hearing. Section 557(c)(A) requires all decisions to include a statement of findings and conclusions, and the reasons or basis therefor, on all material issues presented on the record. This provision applies only to formal adjudications and rulemaking. The third APA provision relating to a statement of reasons is found in Section 555(e), which reads as follows:

> (e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

Section 555(e) does apply to informal adjudication, such as a grant of labor certification. But it explicitly exempts agency action which merely affirms a prior denial. Denials of motions for reconsideration are generally exempt from the APA requirement of a statement of grounds. Hence the general practice to deny reconsideration without stating reasons.[2]

The panel cited Linen Star, 90-INA-438 (Dec. 7, 1990) (en banc) for the proposition that certifying officers must state reasons for their determinations. That case, in turn, cited 20 C.F.R. 656.25(g)(2)(ii), 656.25(c)(2), which apply to notices of findings and final determinations. There is an obvious distinction between actions of this character and dispositions of post-determination motions for reconsideration, a distinction that is preserved in the APA. A party is entitled to know the grounds on which an agency is proceeding against him, so that he may have the opportunity to meet them. And a statement of the grounds of a final order is essential to judicial review, since the order may be upheld only upon the grounds invoked by the agency. SEC v. Chenery Corp., 332 U.S. 194, 196, 67 S. Ct. 1575, 1577 (1947). By contrast, a motion for reconsideration or reopening is generally addressed to agency discretion. Moreover, where a motion requests reconsideration on the same record that was before the agency when it rendered its decision, as opposed to a motion for reconsideration based on grounds outside the original record, the denial of such a motion is not itself reviewable. I.C.C. v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 278-280, 107 S. Ct. 2360, 2365-66 (1987); SEC v. Louisiana Public Service Comm'n, 353 US. 368, 77 S. Ct. 855 (1957); Microwave Communciations, Inc. v. F.C.C., 515 F.2d 385, 387, n. 7 (D.C. Cir.1974). "If the petition that was denied sought reopening on the basis of new evidence or changed circumstances review is available and abuse of discretion is the standard; otherwise, the agency's refusal to go back over ploughed ground is nonreviewable." I.C.C. v. Brotherhood of Locomotive Engineers, 482 U.S. at 284, 107 S. Ct. at 2368. The reason for unreviewability in the second class of cases is that a direct appeal of the original order would bring up the whole record, and the appellant would have the opportunity to demonstrate any error that may be in it.

In sum, the CO is required to state clearly whether he has denied an employer's request for reconsideration, Harry Tancredi, 88-INA-441 (Dec. 1, 1988) (en banc), or has granted the request and, upon reconsideration, affirmed his denial of certification. But we find no requirement of a statement of reasons for the denial of a motion for reconsideration which merely lets a prior denial stand. Moreover, we think it ill-advised to depart from general practice and impose on certifying officers the additional burden of responding in detail to arguments presented by motions for reconsideration, even though where a motion is predicated on extrinsic grounds a brief explanation would be helpful on review. In Linen Star, the Board held that while there may be an occasion where a certifying officer may summarily dispose of a request

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[2] "The vast majority of denials of reconsideration, however, are made without statement of reasons, since 5 U.S.C. § 555(e) exempts from the normal APA requirement of "a brief statement of the grounds for denial' agency action that consists of "affirming a prior denial!" I.C.C. v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 283, 107 S.Ct. 2360, 2368 (1987) (emphasis in the text). I note that, although the Court split 5 to 4, the minority questioned neither the number nor the propriety of denials of reconsideration without a statement of reasons. 482 U.S. at 291, n. 4, 107 S.Ct. at 2372, n. 4.

for reconsideration, under the facts of that case the reasons for the denial should have been stated. Upon further reflection, we believe that holding should be restricted to the facts of that case.

III

The panel agreed with the C.O. that Employer had not rebutted the NOF, and rejected Employer's argument that the proper remedy, at this point of the proceedings, was to remand the case for recruitment at the prevailing wage rate determined by the C.O. Nonetheless, the case was remanded for this very purpose, because the C.O. had not provided an adequate explanation for denying Employer's motion for reconsideration.

We take the view that the denial of Employer's motion without a statement of reasons did not contravene any rule of law that has been called to our attention, and was in accord with general practice. Therefore, the denial of reconsideration provides no basis for the remand, which, moreover, is contrary to the procedure set out in the regulations. Section 656.21(e) requires a local job service office to advise an employer that refusal to raise the wage offered to the prevailing level is ground for denying the application, and that if the denial becomes final, the application will have to be refiled at the local office as a new application. The regulation contemplates that if an employer contests a prevailing wage determination but does not prevail, he will have to go back to the beginning of the process. See, also, § 656.29(a). Employer finds itself precisely in this situation. Its alternatives are either to have our decision overturned or to file a new application.

ORDER

The final determination of the Certifying Officer denying labor certification is affirmed.

FOR THE BOARD:

NICODEMO DE GREGORIO
Administrative Law Judge

Judge Groner, concurring:

I concur in the decision to affirm the Certifying Officer's denial of certification.

I dissented from the Board's decision in Linen Star, 90-INA-438 (Dec. 7, 1990) (en banc) that COs must state reasons for their denials of motions for reconsideration, because in my judgment remands to satisfy that requirement would be a futility on the merits and would accomplish only an increase in the time elapsed to a decision on the merits and in the costs of prosecuting the appeal. The Board did not find my views persuasive, and the rule of Linen Star became the law. That being so, I joined in the decision of the Panel below in this case. With

the Board now being willing to limit its ruling in Linen Star to the facts of that case, I am free to join in that restriction of its application, and I do.

My understanding of a motion for reconsideration is that it constitutes a double request: (1) that the deciding authority reconsider—think over once again—its previous decision (a request that usually is granted); and (2) that, having so reflected on that decision, the deciding authority change its mind and reverse its previous decision (a request that in my experience is usually summarily denied). I take it as going without saying that a litigant may ask the decider to reconsider its decision, and that the litigant is entitled to be told whether the decider will change its decision as requested or will not. See Harry Tancredi, 88-INA-441 (Dec. 1, 1988) (en banc). It is also my understanding, however, that the reversal of decision sought is a reversal on the record on which the original decision was based, and that it is not appropriate in a motion for reconsideration to ask that the decider consider newly offered evidence or a concurrent offer to negotiate.

Employer's description of its offer to comply submitted with its motion for reconsideration, as a "clarification", on the basis that "implicit in the employer's challenge was its willingness to recruit at the wage determined by the CO, in the event it was shown [to whose satisfaction is not made clear] that the CO's determination was correct" (Emplr. Brief at 6) is an interesting illustration of the elasticity of the concept of "clarification" as used in the legal vocabulary, but I do not agree that such a willingness was thus implicit. I do not wish to go so far as to agree with Judge De Gregorio that a denial of a motion for reconsideration is, in principle, never reviewable on any basis (D & O at 5) (cf. I.C.C. v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 278-80, 283, 291 n. 4 (1987)), and I consider that the case would be different if Employer had stated in its rebuttal to the CO that it was willing to proceed on the basis of her prescribed wage rate if its objection to that rate was overruled. That would, in my opinion, have been a different case.

In the case actually before us, however, I agree that the CO's decision to deny certification should be affirmed.

Judge Guill, dissenting, with whom Judge Litt joins.

When an applicant challenges a wage determination and fails to convince the Certifying Officer that another wage rate is appropriate, such challenge is not the equivalent of an ultimate refusal to accept the government's wage determination. Therefore, rather than automatically denying certification, the Certifying Officer should issue a supplemental Notice of Findings informing the applicant why its evidence is not convincing and providing the applicant an opportunity to conduct recruitment using the appropriate rate.

The majority interprets the regulations to require an applicant to file a new application if its prevailing wage challenge is unsuccessful. Such a requirement results in loss of the original priority date. Because any act, directly or by innuendo, that penalizes an applicant for questioning an administrative determination is contrary to fundamental fairness, I cannot join the majority's interpretation of the regulations.

Nor is it fair to require an applicant to state from the outset its willingness to accept the government's wage determination if its challenge is not accepted. Such an ostensible inconsistency of positions would inevitably invite an improper assumption by the Certifying Officer that the applicant's challenge is weak.

Because I would hold that the applicant should have been provided the opportunity to accept the government's wage determination after its rebuttal was rejected, I would also hold that the applicant's motion for reconsideration was unnecessary and would not rule on the issues relating to reconsideration. Rather, I would remand this matter to the Certifying Officer for the issuance of a supplemental Notice of Findings in accordance with the above.

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Judge Lawrence Brenner, dissenting:

I respectfully disagree with the majority holding that a C.O. should be free always to deny a motion for reconsideration of a Final Determination without stating any supporting reasons. I believe that the panel decision on this point presents the better policy, even though such a requirement for the C.O.'s reasons may not be compelled by a specific legal requirement.

As stated in the panel decision, where, as here, an employer files a substantial motion for reconsideration, the C.O. should thoughtfully consider the request. Presumably, neither the C.O. nor the majority would disagree. The next step of requiring the C.O. to state her reason for denying the motion has the salutary effects of encouraging such thoughtful consideration and providing employers and this Board with a clearer focus on the nub of the C.O.'s determinations. Even judicial decisions based on full trial records at times benefit from clarification in rulings on motions for reconsideration. The paper "record" in labor certification cases before this Board is generally not as well focused as a trial record would be, and the clarity of C.O.'s Notices of Findings and Final Determinations is not so uniformly praiseworthy that this Board and those who manage the C.O.'s programs should resist bona fide attempts by employers to focus and clarify the case before it reaches us.

In the instant case, the C.O. argues en banc that the panel decision permits the Employer to use a motion for reconsideration as a means to advance a late rebuttal argument. Nothing in the panel decision would prevent a C.O. from declining to consider the substance of a motion to reconsider by pointing to a procedural bar, e.g.: "The Employer's offer to acquiesce and advertise at the prevailing wage set forth in the Notice of Findings is untimely and accordingly will not be considered. Such an offer to cure the defect should have been presented in the Employer's rebuttal." See Meriko Tamaki Wong, 90-INA-407 (Jan. 27, 1992); Royal Antique Rugs, Inc., 90-INA-529 (Oct. 30, 1991).

I fully agree with the majority's point that at least the C.O. is required to state clearly whether he has denied a request for reconsideration, or has granted the request and affirmed his denial of certification upon reconsideration. In the past that has not always occurred. Moreover, if the actions by a C.O. are susceptible of an interpretation which would lead to a finding of error on appeal to this Board, then he would be well advised to seize the opportunity to

clarify his findings, and if appropriate change his determination, when a motion for reconsideration is filed.

LAWRENCE BRENNER