U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street Avenue, NW, Suite 400-N
Washington, DC 20001-8002

DATE: MAR 14, 1996
CASE NUMBER: 94-INA-53

In the Matter of

MIAOFU CAO
Employer

On Behalf of

MIN SHEN SHI
Alien

BEFORE: Guill, Huddleston, Jarvis, Vittone, Williams and Wood
Administrative Law Judges

John M. Vittone
Acting Chief Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations. Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, 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.

We base our decision on the record upon which the CO granted certification and the Employer's request for review, as contained in an Appeal File, any written argument of the parties, and *amicus curiae* briefs from interested parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 14, 1991, Miaofu Cao ("Employer") filed an application for labor certification to enable Min Shen Shi ("Alien") to fill the position of tutor (AF 17). On the Form ETA 750, the duties were listed as:

> Teach academic subjects, such as Math, Science and Chinese in pupil's home, adapting curriculum to meet individual's needs.

According to the application, the job requires forty hours a week from 2:00 p.m. until 10:00 p.m. at a rate of pay of $14.35 per hour. Employer required two years of college in general studies and either one and one-half years experience in the job offered or one and one-half years experience in the related occupation of teaching (AF 17).

Prior to being referred to the CO, the Department of Economic and Employment Development in Baltimore, Maryland in a document dated September 16, 1992 had requested that Employer provide them with the following information:

> (1) a business necessity letter stating child's daily school schedule; (2) the Dept. of Labor requires that in "private household" positions, the employer (or attorney involved) is required to advise, in writing, whether there is more than one employee at employer's residence; & (3) need to add to 750-B, Block 7, "Other than the Employer's residence" as this is a live-out position (be sure to initial & date change).

(AF 23). In response to this request, Employer's attorney, by letter dated October 16, 1992, stated that "[t]he child leaves for school at 8:30 a.m. and arrives home at 3:00 p.m. In addition to the teaching hours, the Tutor needs time to prepare teaching materials and to review and grade the student's homework and assignments." (AF 22). Employer further stated that there is only one employee at the Employer's residence and provided the live-out wording.

On November 9, 1992, the CO issued a Notice of Findings ("NOF") proposing to deny labor certification (AF 12-13). The CO's findings contained the following language:

EMPLOYMENT. The regulations at 656.50 defines "employment" as permanent full-time work by an employee for an employer other than oneself.

In order to determine the full-time nature of the job offer in the instant application, the following information must be provided:

- number of children
- age of children

(AF 13). Employer's attorney responded, in a letter dated November 18, 1992, that there were two children ages two and thirteen (AF 21).

In a letter dated January 8, 1993, the CO requested that Employer indicate who in the household will care for the two year old (AF 11). Employer replied in a letter dated February 8, 1993 that the two year old is in the care of his grandmother (AF 10).

A second Notice of Findings was issued on March 22, 1993 in which the CO once again proposed to deny certification based on the finding that [t]utors are not normally employed on a full- time basis in private households. The CO questioned whether Employer's household circumstances could support a full-time tutor and made the following request:

> Therefore, additional information is required to establish that the position is, in fact, full-time, as stated on the Application for Alien Employment Certification. The evidence or documentation you submit must consist of data to support each of the assertions or conclusions raised. Data must include:
>
> 1. Will the alien be required to perform any duties other than tutoring? If non-tutoring duties will be performed, list each one and the frequency of performance.
>
> 2. How will pre-school aged child(ren) be cared for when both parents are gone from the home and the alien is fully engaged in tutoring?

(AF 8). By letter dated March 31, 1993, Employer's attorney responded by stating first, that the alien would not be required to perform any duties other than tutoring and second, that the pre-school aged child would be in the care of the grandmother, who is living with Employer (AF 6).

In the Final Determination dated August 23, 1993, the CO denied the application based on the finding that the CO did not accept the employer's contention that this is full time employment. To support this finding, the CO stated

> Since the child does not arrive at the residence until approximately 3:00 p.m, I am assuming that the hours of 1:00 p.m. to 3:00 p.m. are hours worked by calling those hours preparation time. It stretches credibility that, in this household, a thirteen year old child will be subjected to a full additional five to seven hours of substantive tutoring on a daily basis after completing a full day of school. Furthermore, it is very difficult to believe that the child will immediately begin (upon arrival home at 3:00 p.m.) a full five-hour or more tutoring session with the alien without any break for dinner.

AF 5.

Employer requested review by the Board of Alien Labor Certification Appeals on September 27, 1993 (AF 1-3). A decision by a three judge panel was issued on November 29, 1994 affirming the CO's denial of certification. The panel found that Employer's statement that the alien will not be required to perform any duties other than tutoring did not constitute documentation supporting a finding that the job offer was full time employment. Judge Litt dissented stating that the NOF did not inform Employer that the CO questioned prior statements submitted by Employer regarding the schedule of the tutor. Therefore, since the CO only requested information regarding other duties of the tutor and arrangements for the care of the other child, the NOF was unclear and did not provide sufficient opportunity for Employer to rebut the basis stated for the Final Determination denying the application. Judge Litt stated that the case should be remanded to the CO, so Employer could submit evidence pertaining to the grounds upon which the final denial was based.

By letter filed December 19, 1994, Employer petitioned for *en banc* review of the panel's decision and order, contending that the CO's NOF's did not provide adequate notice of what evidence was required to rebut or cure the deficiencies identified and mislead the Employer into focusing the rebuttal solely based on the questions raised in the Notice of Findings. A Notice that the matter would be reviewed *en banc* was issued June 6, 1995 inviting the American Immigration Lawyers Association and the American Immigration Law Foundation to participate as *amici curiae*, ordering the Employer to file a statement of intent to proceed and ordering the parties and *amici* to file briefs in the matter. Employer filed a statement of intent to proceed on June 12, 1995. Briefs were filed by the Certifying Officer and the Employer following the granting of two extensions of time.

DISCUSSION

The issue before the Board is what provides adequate notice to an employer of the issues on which certification may be denied and the scope of rebuttal documentation that may be needed to permit cure of the deficiencies raised by the Certifying Officer.

Employer contends, in its brief, that the NOF dated March 22, 1993 led Employer to believe that all that was necessary was the provision of the requested information, namely whether the tutor would be performing other duties and who would care for the pre-school age child. Employer argues that it was not informed that the feasibility of the tutoring schedule was in question, until the Final Determination, and therefore, did not receive adequate notice prior to the issuance of the Final Determination. Employer asks that the Certifying Officer's Final Determination be reversed and certification granted based on evidence submitted with its Request for Review.

The Certifying Officer contends that the NOF clearly set forth the basis on which the CO proposed to deny certification, namely that it was questionable whether the household can support a full time tutor. The CO further argues that even though the NOF raised two specific questions, there was no ambiguity as to the responsibility of the Employer to document the full time nature of the position.

Twenty C.F.R. § 656.25 requires that the CO issue a Notice of Findings if certification is not granted. The Notice of Findings must give notice which is adequate to provide the employer an opportunity to rebut or cure the alleged defects. *Downey Orthopedic Medical Group,* 87-INA-674 (Mar. 16, 1988) (*en banc*). Although the NOF must put the employer on notice of why the CO is proposing to deny certification, it is not intended to be a decision and order that makes extensive legal findings and discusses all evidence submitted to the file. The CO is not required to provide a detailed guide to the employer on how to achieve labor certification. The burden is placed on the employer by the statute and regulations to produce enough evidence to support its application. Case law has established that to provide adequate notice, the CO need only identify the section or subsection allegedly violated and the nature of the violation, *Flemah, Inc.*, 88-INA-62 (Feb. 21, 1989) (*en banc*); inform the employer of the evidence supporting the challenge, *Shaw's Crab House*, 87-INA-714 (Sept. 30, 1988) (*en banc*); and provide instructions for rebutting and curing the violation, *Peter Hsieh*, 88-INA- 540 (Nov. 30, 1989).

In the present case, the CO stated in the second NOF that Employer had violated 20 C.F.R. § 656.50 by failing to establish that the position was full time. To support this conclusion, the CO stated that [t]utors are not normally employed on a full time basis in a private household and that [i]t is questionable whether [Employer's] household can support a full time Tutor. Finally, the NOF indicates that additional information is required to establish that the position is, in fact, full-time. The CO, therefore, provided the section violated and the nature of that violation, the reasons (evidence) that support the challenge and how the challenge could be rebutted. At that point, the CO had provided enough information under the case law to put the Employer on notice of what it was challenging and inform the Employer that it needed to provide more evidence to support its position that the job was full time.

However, the CO then proceeded to request two specific types of information from the Employer. Because of the way the NOF was worded, it was not made clear in the NOF that other information, in addition to the specified information, may be needed to rebut the finding that the position was not full time. Therefore, Employer was mislead, in this instance, into believing that the only information necessary to rebut the NOF was answers to the two specific questions. The information requested by the CO was provided. However, the CO denied certification based on the failure of Employer to submit information to further support the tutoring schedule which it found not credible.

Once the CO provides specific guides, he/she must be careful not to mislead the employer into believing that the specific evidence requested is all that is needed to rebut the NOF and for the application for labor certification to be granted. Often it is necessary for the CO to request specific information that he/she has a particular interest in obtaining in light of the deficiencies of the application. However, when the CO requires more than the specific information requested to find that the deficiency has been remedied, he/she must clearly state this fact in the Notice of Findings to avoid any ambiguity.

Due to the ambiguity created by the inclusion of two specific questions without any notification to Employer that more information was needed to rebut, this case must be remanded to the CO for further proceedings. Another NOF must be issued providing the Employer the

opportunity to address the other reasons for denial based on the failure to establish that the position is full time.

ORDER

IT IS HEREBY ORDERED that the Decision and Order of the panel is VACATED and this matter is REMANDED for further proceedings consistent with this decision.

For the Board:

JOHN M. VITTONE
Acting Chief Administrative Law Judge