U.S. Department of Labor

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

DATE: JANUARY 29, 1992
CASE NO. 90-INA-93

In the Matter of:

PARK WOODWORKING, INC.,
Employer

on behalf of

SERAFIN LUIS GASPAR,
Alien

Before: Litt, Chief Judge; Guill, Associate Chief Judge; and Brenner, De Gregorio, Glennon, Groner, and Romano,
Administrative Law Judges

ROBERT M. GLENNON
Administrative Law Judge

DECISION AND ORDER

By a petition filed August 9, 1991, the Certifying Officer requested en banc review of a Decision and Order issued by a panel of this Board on July 15, 1991. The Board, by an order dated September 17, 1991, granted that request, and fixed a date for simultaneous briefs by the parties.

This proceeding involves an application submitted by Park Woodworking, Inc., on behalf of Serafin Luis Gaspar, an alien, for a labor certification pursuant to the provisions of section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). This portion of the Act was amended by section 212(a)(5) of the Immigration Act of 1990, and is now codified at 8 U.S.C. § 1182(a)(5)(A). The regulations which govern applications for labor certification pursuant to the Act are found at 20 C.F.R. Part 656 (1991).

Statement of the Case

In an application filed December 16, 1988, Employer sought labor certification for the above named alien for a job as a furniture finisher. The application stated that the job required a 6th grade education, but no particular training or experience was required. During the initial processing of the application, Employer was advised by the Virginia job service agency that its wage offer of $7.00 per hour was below the prevailing wage for a furniture finisher. Employer

nevertheless advertised and posted the job during March of 1989 at the $7.00 per hour wage level.

On June 12, 1989, the Certifying Officer issued a Notice of Findings ("NOF") proposing to deny the requested certification on the ground that the job had been advertised and posted at a wage level below the established prevailing wage, contrary to the governing regulations. The Certifying Officer gave Employer the opportunity at that time to rebut the NOF either by increasing the wage offer, or by submitting evidence that the stated prevailing wage was in error. Specifically, the Certifying Officer stated:

> You have until July 17, 1989 to submit documentary evidence to rebut the findings outlined below by certified mail on or before date specified above. If the rebuttal evidence is not mailed by certified mail on or before July 17, 1989, this Notice of Findings automatically becomes the final decision to deny labor certification. Rebuttal evidence must include all original documents which accompany this Notice of Findings.

On September 20, 1989, the Certifying Officer issued a Final Determination stating that the requested certification had been denied because Employer had failed to submit a timely rebuttal to the NOF. The Certifying Officer noted that:

> Pursuant to Federal regulations at Title 20, Section 656.25, the Notice of Findings is automatically the final determination of the Secretary of Labor in this matter.

By a letter dated October 5, 1989, Employer requested the Certifying Officer to reconsider his Final Determination denying certification. In that letter, Employer asserted that it did take action in June of 1989 to comply with the substantive requirements of the NOF, and that it mailed the rebuttal documentary evidence to the Certifying Officer on July 5, 1989. No certified mail receipts for the July 5 mailing were offered, however. On October 25, 1989, the Certifying Officer denied the request for reconsideration and forwarded the matter to this Board for review.

By a Decision and Order issued July 15, 1991, a panel of this Board reviewed this matter and remanded the application to the Certifying Officer for further consideration. The panel concluded that the circumstances of this case were such that refusal to waive the July 17, 1989 rebuttal deadline and consider the merits of the rebuttal documentation would represent a manifest injustice within the meaning of Madeleine S. Bloom, 88-INA-152 (Oct. 13, 1989) (en banc), recon. den. (Dec. 20, 1990) (per curiam).

Discussion

On brief, the Certifying Officer contends that, considering the facts of this case, reliance on Bloom in the panel's Decision and Order was misplaced; and that the facts presented here do not represent the type of "rare instance" of manifest injustice envisioned by the Board in Bloom. No brief was filed on behalf of the Employer.

Upon careful review of the record in light of the arguments presented by the Certifying Officer, we are persuaded that the facts do not present an instance of manifest injustice as contemplated in this Board's holding in the Bloom case.[1] That holding, we believe, should be construed strictly, in order to assure clarity and consistency in the application of the rebuttal requirements of 20 C.F.R. § 656.25.

Section 656.25(c) directs the Certifying Officer to advise the Employer in the Notice of Findings that rebuttal evidence or argument must be mailed to the Certifying Officer, by certified mail, before a specified date 35 calendar days from issuance of the NOF. The Employer must be advised in the NOF also that failure to mail the rebuttal, by certified mail, by the date specified:

1. Converts the NOF into a final decision denying labor certification.

2. Constitutes failure to exhaust available administrative remedies.

3. Precludes requesting review of the decision by this Board.

20 C.F.R. §§ 656.25(c)(3)(i)-(iii).

In the Bloom case, the facts were found to require extraordinary relief to avoid manifest injustice. There, the employer had given needed rebuttal evidence to her attorney, who then absconded, abandoning his law practice without employer's knowledge. The needed evidence for rebuttal was a single piece of paper, a copy of the alien's driver's license. The Board concluded that in these special circumstances, the ends of justice would not be served, absent waiver of the 35-day rebuttal deadline.

The distinguishing concerns evident in the Bloom case are not present here. In the first place, there is no specially egregious factor in the case before us, such as a deceptive, defaulting attorney, but rather an apparent misconstruction of the NOF. If, indeed, the rebuttal was mailed on July 5, as Employer asserts, it simply was not sent by certified mail, a requirement of the regulations stated twice in the NOF. Similarly, if Employer did mail its rebuttal on July 5, it neglected to return "all original documents," a clearly expressed directive in the NOF. Those documents were returned to the Certifying Officer with the October 5 letter, without explanation.

Second, even if the rebuttal had been timely filed, it is not at all clear that a grant of certification was virtually inevitable, as was the case in Bloom. In the present case, the NOF required a substantially more complex compliance response by Employer on rebuttal than the simple document involved in the Bloom case. Thus, evaluation of the Employer's rebuttal documentation in the present case would require more than the essentially ministerial function anticipated by the Bloom case facts.

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[1] Despite the limited application of Bloom which we adopt in this decision, we are reluctant to and do not overrule Bloom. To the extent that prior panel decisions may have liberally construed the application of Bloom, this en banc interpretation of Bloom controls.

Finally, it bears emphasis that the requirement for submitting rebuttal documentation by certified mail is not a mere technicality, but rather an important provision designed to prevent the type of dispute that has arisen here. For the foregoing reasons, we conclude that the facts presented do not warrant waiver of the rebuttal deadline, and that the Final Determination of the Certifying Officer should be affirmed.

ORDER

The Certifying Officer's Final Determination denying certification is hereby AFFIRMED.

ROBERT M. GLENNON
Administrative Law Judge

Washington, D.C.

Park Woodworking, Inc., 90-INA-13 (en banc)

Judge Groner, concurring:

I concur in the decision that the Certifying Officer's denial of the application in this case should be affirmed. And I agree, as the majority opinion points out, that the distinguishing concerns evident in the case of *Madeleine S. Bloom*, 88-INA-152 (Oct. 13, 1989, *en banc*), *recon. den*. (Dec. 20, 1990, *per curiam*), are not present here.

However, I disagree with the majority in their view that a strict construction of Bloom is necessary "in order to assure clarity and consistency in the application of the rebuttal requirements of 20 C.F.R. sec. 656.25" (slip op. at 3). On the contrary, I think the Board should never be in the position of not doing what it can to avoid manifest injustice; any other principle seems to me an embarrassment and tends to make us an oxymoron. This case is altogether different from *Madeleine Bloom*. There is nothing about this denial, as there was about the denial in *Bloom*, that particularly shocks the conscience; besides the first two factors cited by the majority, there is the third, which to me constitutes the principal reason for affirmance: the Secretary has provided a specific requirement in the regulations, designed exactly to save applicants from the risk that this applicant claims to have fallen foul of. Instead of complying with that requirement, this applicant chose to gamble, and there is no injustice in holding a gambler to his gambling loss.