U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: December 11, 1997
Case No.: 95-INA-00455

In the Matter of:

COMMERCIAL LANDSCAPING SERVICE,
Employer

On Behalf Of:

DAGOBERTO OROZCO,
Alien

Appearance: Rene Orozco, Esq.
For the Employer/Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
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)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) 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 denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On February 11, 1993, Commercial Landscaping Service, the Employer, filed an application for alien employment certification to enable Dagoberto Ortiz Orozco, the Alien, to fill the position of Gardener. The duties of the job were described as follows:

> Must have a working knowledge of turf maintenance. This includes mowing and trimming techniques, weed identification and basic turf irrigation, proper pruning of trees and shrubs and proper trimming of shrubs. Must provide labor for the weeding and cultivation of shrub beds and ground cover areas. Must have basic knowledge of irrigation systems and irrigation controllers, as well as knowledge of necessary precipitation rates for plant varieties.

The Employer required that applicants have eight years of education, two years of experience in the job offered, a driver's license, knowledge of gardening, and knowledge of water precipitation rates (AF 193).

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on November 22, 1993 (AF 187-191). The CO stated that the occupation of groundskeeper is listed on "Schedule B" (10 C.F.R. § 656.11). Therefore, the Employer is required to place a job order for 30 days or show that the job is not on Schedule B. The CO also stated that the two years of experience requirement is restrictive; that the Specific Vocational Preparation (SVP) required for the job is three months. The CO advised the Employer that the restrictive requirement must be deleted, shown to be common for the occupation in the United States, or justified as a business necessity. The CO also stated that the two years of experience requirement did not appear to meet the Employer's true minimum requirements because at the time the Alien was hired in 1983, he did not have two years of experience and was trained by the Employer after being hired. The Employer was instructed to delete or alter the experience requirement and retest the labor market, or show that the Alien obtained the required experience or training elsewhere, or show why it is not feasible to hire anyone with less than two years of experience.

On December 27, 1993, the Employer requested and was granted an extension of 30 days to file rebuttal (AF 183-184).

On January 26, 1994, the Employer requested another extension of time, stating that it had filed a job order petition with the State Employment Office (EDD). The Employer also sought to amend the statement of the Alien's qualifications on the labor certification application (ETA 750).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Rene Orozco of Rene Orozco and Associates, acting on behalf of the Employer, filed additional rebuttal on March 2, 1994 (AF 172-174). Mr. Orozco stated that the Employer had complied with the 30-day job notice posting requirement identified in the NOF. He further stated that as to the restrictive requirement/business necessity issue, the Employer hires experienced and reliable people because businesses and homeowners depend on their work. Mr. Orozco stated further that the Employer has 48 employees, 40 of whom have over three years of experience and five who have two years of experience. Mr. Orozco stated further that the Alien gained two years and three months of agricultural experience in Mexico from January 1983 to April 1985; that the Employer "has been under DBA Commercial Landscaping Service since 1972 to June 1990 as general partnership" (AF 180), and that the Alien worked for this company from March 1985 to June 1990, a total of five years and one month; and, that Commercial Landscaping Service became a corporation on June 30, 1990, and the Alien has worked for this Company since its incorporation. The Employer summarized the Alien's job experience as follows:

A. Feliciano Orozco total 2 years 3 months
B. Commercial Landscaping Service total 5 years 1 month
C. Commercial Landscaping Service Inc. total 3 years 7 months to present.
Total prior experience is 7 years 4 months, as agricultural/gardener.

The C.O. issued a Supplemental NOF on May 11, 1994 (AF 161-163). The CO stated that the Employer had not complied with the NOF in that it ran a new job order with the same excessive experience requirement of two years. The CO further stated that the notice did not adequately test the labor market for this occupation because of the restrictive experience requirements. The CO also stated that the Employer's contention that most of the Employer's gardeners have more than three years of experience does not establish that the two years of experience requirement is normal for the occupation. The CO stated that the Alien's experience prior to working for the Employer consisted of vegetable picking and had nothing to do with the duties of the advertised job. The CO stated that corrective actions set forth in the NOF remained in effect.

By letter dated June 6, 1994, the Employer requested an extension of time to file rebuttal. The CO granted the request and extended the rebuttal period to July 15, 1994 (AF 159-160). On July 15, 1994, the Employer requested another extension, which the CO denied (AF 157-158).

The CO issued a Final Determination denying certification on August 1, 1994, on the basis of the Employer's failure to file timely rebuttal (AF 156).

The Employer filed a motion requesting that the CO reopen and reconsider the denial of certification (AF 153). The CO denied the motion on September 15, 1994, noting that the Employer had not raised issues which could not have been addressed on rebuttal (AF 152). The CO advised the Employer that it had 35 days in which to file an appeal.

In a letter dated October 28, 1994, the Employer wrote to the CO requesting a review of the denial (AF 7-8). The CO responded on November 3, 1994, stating that even though the Employer's letter, mailed on October 29, and received on November 1, 1994, was not timely, he would forward the file to the Board of Alien Labor Certification Appeals (AF 3).

The Employer argues that the CO erred by not granting its July 15, 1994, request for an extension of time in which to file rebuttal. The Employer states that more time was needed to properly respond to the NOF (AF 7-8). In a letter dated November 25, 1994, the Employer, who resides in Santa Anna, California, stated that it did not receive the CO's September 14th letter denying its motion for reconsideration until September 26, 1994, five days after it was mailed from the CO's San Francisco Office. The Employer argues that its appeal request mailed October 29, 1994, was timely filed.

Discussion

The first issue that must be addressed is whether the Employer's appeal was timely filed. The regulations at 20 C.F.R. § 656.26(b)(1) provide that "[t]he request for review shall be in writing and shall be mailed within 35 calendar days of the determination, that is, by the date specified on the Final Determination form:..." However, when a timely motion for reconsideration is filed, the period for filing a request for review runs from the date of the CO's order denying the motion. *Meriko Tomaki Wong*, 90-INA-407 (Jan. 27, 1992); *Alvarado Pain & Rehabilitation Center*, 94-INA-450 (July 21, 1994).

Here, the CO denied the Employer's motion for reconsideration of the denial of certification on September 15, 1994. Even though the denial was not mailed until September 21st and not received until September 26, 1994, the 35-day appeal period began running on September 16, 1994, the day after the date of the denial. 29 C.F.R. § 18.4(a); *Delmar Family Dental Center*, 88-INA-132 (Sept. 26, 1988) (*en banc*); *Illinois Masonic Medical Center*, 89-INA-63 (Mar. 6, 1990). Accordingly, the Employer's request for review of the denial, which was mailed on October 29, 1994, was not timely filed. Therefore, the Final Determination denying certification became the final decision of the Secretary of Labor. 20 C.F.R. § 625(g)(2)(iv).

The Employer contends that the CO abused his discretion by denying its July 15, 1994, request for an extension of time in which to comply with the NOF. We disagree. The first NOF was issued on November 22, 1993, and the Employer requested and received two 30-day extensions in which to file rebuttal. The Supplemental NOF was issued on May 11, 1994, and the Employer again requested and received an extension of time in which to file rebuttal until July 15, 1994. It was only when the Employer asked for a fourth extension of at least 30 days that the CO denied the request and entered a denial of certification. The CO acted reasonably inasmuch as

the Employer was demonstrating no progress toward complying with the NOF, the Employer's statements that it "is willing and available to comply with DOL Regulations" not withstanding.

We conclude that this appeal was not timely filed and should be dismissed.

ORDER

The Employer's appeal shall be, and hereby is, **DISMISSED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.