U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)

'Notice: This is an electronic bench opinion which has not been verified as official'

Date Issued: June 17, 1998

Case No. **97 INA 529**

In the Matter of:

B & G COLOR NURSERY,
Employer,

On behalf of:

ENRIQUE GONZALEZ-HERRERA,
Alien

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ENRIQUE GONZALEZ-HERRERA ("Alien") by B & G COLOR NURSERY ("Employer") under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act") and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, 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.

STATEMENT OF THE CASE

On April 28, 1994, the Employer applied for labor certification on behalf of the Alien to fill the position of "Nursery Supervisor" in its nursery business. AF 19. The Employer described the position as follows:

> Supervises and coordinates activities of workers engaged in propagating, cultivating, and harvesting horticultural specialties, especially pansies and petunias. Discusses plant growing activities with manager to plan planting and picking schedules and employee assignments. Obtains authorization for changes in fertilizer, herbicide and pesticide applications techniques and formulas. Resolves problems and develops procedures for new species in product line and new cultivation techniques. Observes plants and flowers in green houses, pots, cold frames, and fields, to ascertain condition, such as leaf texture and bloom size. Oversees changes in humidity and temperature levels and cultivation procedures to ensure conformance with quality control standards. Prepares and assigns work schedules. Inspects facilities for signs of disrepair, such as missing glass pains and clogged sprinklers, and delegates repair duties to ensure refurbishing or replacement of parts in environmental-control structures and system. Drives and operates tractors and other heavy machinery.

AF 19.[2] The position was classified as Supervisor, Horticultural-Specialty Farming, under DOT Occupation Code No. 405.131-010.[3] Although no minimum education or training was required, the Employer required two years of experience in the Job Offered or in the Related Occupation of Nursery Worker.[4] The Other Special Requirements were that the worker hired "Must speak

---

[2]The spelling errors in the original have been noted. This copy is verbatim, however, and no changes or corrections in the spelling or punctuation of the original have been made.

[3]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[4]Although the DOT does not have an entry for "Nursery Worker," it does describe the occupations of "Horticultural Worker I" under Occupational Code No. 405.684-014, and "Horticultural Worker II" under Occupational Code No. 405.687-014, both of which seem consistent with the work described in item 13 of Form ETA 750A at AF 19.

Spanish."[5]

Born July 17, 1973, the Alien completed high school in Mexico. In 1983 Jorge A. Gonzalez, who was the Alien's brother, became the owner and operator of the Employer, the B & G Color Nursery, at Carpinteria, California. The Alien was hired as a Nursery Laborer on January 2, 1990, by the Island View Nursery, another nursery in Carpinteria, California, where he worked until March 11, 1992. The Alien's duties as a Nursery Laborer for the Island View Nursery included watering, planting, spraying, cleaning, and general caring of plants, said that employer, who added that the Alien was "a hard worker" and "very dependable." The actual length of the period of the Alien's employment as a Nursery Laborer was not proven by that employer's statement, however, as the Island View Nursery paid the Alien in cash for the work its owner said he performed as its employee. AF 60. For this reason, both the beginning and ending dates of Alien's employment and the nature of the Alien's duties as a Nursery Laborer are based entirely on the personal recollection of his employer in AF 89, rather than on records kept by the Island View Nursery in the normal course of business. This absence of employment records and the Alien's obvious lack of status as an employable immigrant suggest that the nature and circumstances of hiring by the Island View Nursery cannot be proven because he was working "off the book." Moreover, the value of AF 89 as proof of the Alien's qualifications without documentary corroboration is problematical, as the location of the Island View Nursery in the same small town as the Employer's nursery raised further questions as to the *bona fides* of his prior employment.

The Employer later hired his brother, the Alien, as Nursery Supervisor during October 1992, and on March 25, 1994, after the Alien worked for him for a year and a half, he filed this application. AF 59-60. Although four qualified U. S. workers responded to Employer's recruiting advertisement for this position, none of them was hired for this job. AF 18.

Notice of Findings. In the Notice of Findings (NOF) issued on August 20, 1996, the CO found (1) that the Employer had failed to establish that a current permanent, full time job opening exists to which U. S. workers can be referred; (2) that the Employer's requirement that the worker be fluent in Spanish language was unduly restrictive; and (3) that Employer failed to make a sufficient recruiting effort and that U. S. workers who applied for the job were rejected on the basis of undisclosed hiring criteria.

(1) Addressing the identity of interest between the Alien and the Employer, the CO explained that, "The alien as Nursery Supervisor exercises a considerable degree of control over the operations of the company. He is the owner's brother." 20 CFR § 656.20(c)(8). Because of this family connection the CO found that the Employer failed to establish the existence of a clear opening to which U. S. workers could be referred, based on the definition of employment as "permanent full-time work by an employee for an employer other than oneself" in 20 CFR § 656.3. (2) Citing 20 CFR § 656.21(b)(2)(i)(c), the CO explained that the occupation of Nursery Supervisor normally does not require a foreign language. As to this Employer's language

---

[5]This was a forty hour a week position with hours from 7:30 A.M., to 4:30 P.M., at a wage rate of $10.95 per hour, plus overtime at time and a half, as needed.

requirement, the CO said, "It appears you hire only Spanish-speaking workers and thereby perpetuate a monolingual workforce; the Department cannot approve petitions that discriminate based on race, sex, religion, or national origin." AF 14. (3) The CO found reason to deny certification in the Employer's rejection of U. S. workers Peres, Goena, and Radde as unqualified because he said they did not have training in the cultivation of bedding plants, citing 20 CFR § 656.21(b)(1)(i)(F). The CO explained that (a) the Employer had not included this hiring criterion in Form ETA 750A and that (b) before the Employer hired him the Alien's occupational qualifications did not include the expertise in the cultivation of bedding plants on which the Employer relied in rejecting U. S. workers Peres, Goena, and Radde. The CO further found that the Employer's contact with Mr. Meza was untimely and that his rejection of that job application was not based on reasons that were either lawful or job related under 20 CFR § 656.21(b)(6), all of which indicated a lack of good faith in his recruitment efforts under the Act and regulations and that the job at issue was not clearly open to any qualified U. S. worker, citing 20 CFR § 656.20(c)(8). The CO then stated the rebuttal proof to be offered and the other remedial action required by the Employer's application.

Rebuttal. The Employer's rebuttal of September 16, 1996, addressed issues identified in the NOF. AF 08-12. First, the Employer, Jorge A. Gonzalez, said that his brother, Enrique Gonzalez, had no interest in his business and took no part in hiring workers for the nursery, or in assessing the qualifications of the U. S. workers who applied for the job at issue. Employer then said that the reason his workforce was entirely monolingual in Spanish was that no English speaking nursery workers were available to hire in the area where his business was located. The Employer also said that it would be impossible for him to operate the business with a Nursery Supervisor who could not speak Spanish.

The Employer said Mr. Radde was unqualified because (1) he did not speak Spanish and (2) his horticultural expertise was in raising roses, whose care is completely different from the care required by pansies and petunias, the nursery's specialty. The Employer asserted that the Alien's work experience at Island View Nursery included raising bedding plants. The Employer then said Mr. Goena was not qualified because all of his nursery experience was as a sales manager and packing house manager. Mr. Perez was not qualified, said the Employer, because he had less than two years of experience as a nursery worker and no experience as a supervisor. As to Mr. Meza, the Employer contended that his attorney had advised that he was not required by law to supply the documentary evidence of contact that the CO had described in the NOF.

Final Determination. The CO's Final Determination of November 15, 1996, denied Certification after examining the Employer's rebuttal. AF 05-07. (1) As to the existence of a job opening, the CO said the NOF questioned whether the job was clearly open to any qualified U. S. workers since the Alien is the Employer's brother and was working in the job for several months before the application. The CO said this was confirmed by the Employer's rebuttal admission in rebuttal that he and his wife used to be the nursery supervisors before they hired his brother to take over some of those duties. The CO concluded,

> It is clear from your rebuttal that you created this job for the alien, your brother; there is no evidence you have ever employed a nursery supervisor other than yourself. The evidence is not convincing this job opportunity has been and is clearly open to any U. S. worker.

(2) Turning to the foreign language requirement, the CO said the NOF had advised the Employer that this hiring criterion had not been documented to be essential to his business operation, and that the Employer said in rebuttal that he "always had trouble hiring English-speaking workers." The CO concluded that the rebuttal documented neither the business necessity of this foreign language job requirement nor the Employer's alleged inability to hire English-speaking workers, observing that all of the U. S. workers who responded could speak English. The CO concluded that it was unduly restrictive of otherwise qualified U. S. workers.

(3) Finally, the CO noted in the NOF (a) that the Employer rejected three U. S. workers who applied for the position because they did not meet a hiring condition that was not stated in the job description in the Employer's application for alien labor certification, and (b) that Employer did not prove that he made a timely response to the job application of a fourth U. S. worker. The Employer's rebuttal was (a) that he required candidates who could handle his specialty plants (pansies and petunias), and (b) that his lawyer advised him that he did not have to send response letters to the applicants by certified mail, if he had also tried to call them by telephone. (a) The CO observed that Employer's application addressed horticultural specialties that included but was not limited by its job description to pansies and petunias. The CO explained that the Employer did not limit the work of this position to these two plant categories, since he expressly stated his willingness to hire a job applicant with two years' experience as a general nursery worker. Employer's recruiting advertisement was misleading and inconsistent with any such limitation, moreover, because it did not even mention pansies and petunias. Lastly, said the CO, the Employer's limitation of the job qualifications to work experience with pansies and petunias was inconsistent with the Alien's asserted work experience which was not shown to have included bedding plants except as an inference implied by the general nature of the job duties he alleged he performed for the Island View Nursery. As Employer's rebuttal did not indicate whether the Alien, his brother, came to him with the pansy and petunia experience he now required of U. S. applicants for the job, the CO concluded that the Employer had failed to provide lawful, job-related reasons for having rejected three qualified U. S. applicants for the position at issue. (b) Finally, the CO found that the Employer refused or otherwise failed to make any response whatsoever to the NOF direction to file documentary evidence demonstrating that he had made timely contact with Mr. Meza, a willing, able, and available U. S. worker who applied for this job.

Appeal. Employer's appeal of December 4, 1996, repeated its rebuttal arguments which, he contended, the CO's Final Determination had misconstrued or misapplied. AF 01-04.

Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its

business, the employer must comply with the Act and regulations when it seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. This is particularly the case where, as in this application, the employer's hiring criterion conflicts with the explicit prohibition of 20 CFR 656.21(b)(2)(C), a regulation adopted to implement the relief granted by the Act, which provides that the job offer shall not include the capacity to communicate in a language other than English as a hiring criterion unless that requirement is adequately documented as arising from business necessity.

The Board held in **Information Industries**, 88 INA 082 (Feb. 9, 1989)(*en banc*), that proof of business necessity under this subsection requires the employer to establish that (1) the foreign language requirement bears a reasonable relationship to the occupation in the context of its business and (2) that the use of the foreign language is essential to performing in a reasonable manner the job duties described in its application for alien labor certification. In proving the first prong of this test, it is helpful to show the volume of the employer's business that involves foreign language speaking customers or its business usage of that language. This is demonstrated with proof as to (1) the customers, co-workers, or contractors who speak the foreign language and (2) the percentage of the employer's business that involves that language. In the context of the instant case, the second prong invites evidence that the employee communicates or reads in the foreign language while performing the job duties.

Business necessity is not proven under the first prong where the percentage of customers who speak the foreign language is small. **Felician College**, 87 INA 553 (May 12, 1989)(*en banc*). That share of employer's affected business must equal a percentage that is significant. **Raul Garcia, M.D.**, 89 INA 211 (Feb. 4, 1991). In **Washington International Consulting Group**, 87 INA 625 (Jun. 3, 1988), however, the Board held that a foreign language was not a necessity where only twenty-three per cent of the client base was affected by the employer's foreign language requirement. Both prongs of the **Information Industries** test must be met, however. Simply proving that a significant percentage of the employer's customers speaks the foreign language is not sufficient to establish business necessity under this subsection, unless the employer also proves the existence of a relationship between the customers' use of that foreign language and the job to be performed.[6]

The CO's reasoning in the instant case was reviewed with the holdings in precedents cited above. The Employer did not persuade the CO because its argument as to its business necessity for a Nursery Supervisor fluent in the Spanish language turned entirely on the proof of the facts that the CO described in the NOF. After examining the Appellate File the Panel agrees

---

[6]In **Coker's Pedigree Seed Co.**, 88 INA 048 (Apr. 19, 1989)(*en banc*), and in **Hidalgo Truck Parts, Inc.**, *supra*, business necessity was established by evidence of significant customer dependence on Spanish-speaking employees. In **Splashware Company**, 90 INA 038 (Nov. 26, 1990), where the employer did show that a significant percentage of its clientele spoke the foreign language, the Board found that business necessity was not proven because no relationship was proven between the customers' use of the foreign language and the job to be performed.

that the Employer's rebuttal evidence failed to meet its burden of establishing business necessity because the Employer's proof is vague, incomplete, and limited to Employer's bare assertions, which he failed to support with any objective facts. **Analysts International Corporation**, 90 INA 387 (Jul. 30, 1991). Any written statements of the Employer could be accepted as documentation, if they were reasonably specific and indicated their sources or bases. The CO is not required to accept as credible or true the written statements Employer has supplied in lieu of independent documentation, but in considering them must give Employer's statements the weight they rationally deserve. The bare assertions that Employer's statements offered without supporting evidence were insufficient to carry its burden of proof. **Gencorp**, 87 INA 659 (Jan.13, 1988)(*en banc*).[7]

Although the Employer ostensibly complied with the directions to file evidence supporting his position on the issues the NOF raised in this case, the CO explained that the facts sought were not proven by the Employer's vague assertions, which offered no specific examples and which were limited to general statements that appeared unconnected with tangible data. Moreover, the Employer's proof failed to demonstrate a frequent and constant need to communicate in a foreign language in business transactions with business customers that was sufficient to affect the performance of the worker's duties as a Nursery Supervisor. Compare **International Student Exchange of Iowa, Inc.**, 89 INA 261 (Apr. 30, 1991), *aff'd*, 89 INA 261 (Apr. 21, 1991)(*en banc*)(*per curiam*). It follows that the conclusion of the Certifying Officer that the Employer failed to establish that it is not feasible to hire a U. S. worker without the foreign language stated by the job description of its application and the denial of alien labor certification was supported by the evidence of record and should be affirmed. [8]

Accordingly, the following order will enter.

---

[7]To the same effect see **Our Lady of Guadalupe School**, 88 INA 313 (Jun. 2, 1989); **Inter-World Immigration Service**, 88 INA 490 (Sep. 1, 1989), and **Tri-P's Corp.,** 88 INA 686 (Feb. 17, 1989)..

[8]It should be noted that the Panel agrees with the CO's observation that the Employer's rebuttal clearly indicated that it created this job for the Alien, the brother of its owner. The absence of evidence that the Employer ever had a nursery supervisor other than the owner, himself clearly supports this inference, as the CO pointed out. The Panel further agrees that the Employer failed to provide convincing evidence that this job was open to any U. S. worker. While noting that this application clearly violated the foreign language restriction of the regulations for the reasons discussed herein, we further conclude that the Employer failed to sustain its burden of proof that *bona fide* position of employment exists under 20 CFR § 656.3.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

_____
FREDERICK D. NEUSNER

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within twenty 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 decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions 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 ten days of service of the petition and shall not exceed five, double-spaced, type-written pages. Upon the granting of the petition the Board may order briefs.