U.S. Department of Labor

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

Date: April 28, 1998

Case No: 97 INA 256
In the Matter of:

DR. H. S. BRAR, M.D.,
Employer

on behalf of

RANJIT SINGH,
Alien

Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of RANJIT SINGH (Alien) filed by DR. H. S. BRAR, M.D., (Employer), pursuant to § 212(a)(14)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5) (A) (the Act), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at New York, New York, denied this application, the Employer requested review pursuant to 20 CFR § 656.26.[1]

Statutory authority. 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 U. S. 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 not adversely affect the wages and working conditions of the U. S. workers similarly employed. See 8 U.S.C. § 1182(a)(5)(A). An employer desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. Such requirements include the responsibility of the employer to recruit U. S. workers at the prevailing wage and under

[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 the Appeal File (AF), and written arguments of the parties. 20 CFR § 656.27(c).

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 at that time and place.[2]

STATEMENT OF THE CASE

Application. On December 15, 1995, the Employer applied for labor certification to enable the Alien, a national of India to be hired for the job of "Home Health Care Aide." AF 38.[3] The position was classified under the DOT Occupational Title of "Home Attendant, Live-out under DOT No. 354.377-014. Employer described the job as follows:

> Provide home health care, to attend to patient, to assist with daily living activities, special meal preparation and light housekeeping.

AF 38. (Copied from AF 38 with addition of data from AF 52). Employer offered wages at the rate of $5.75 per hour based on a forty hour week, from 7:00 AM to 3:00 PM. The education required was high school graduation with the Major Field of Study in English and Punjabi Script, Training for two weeks as a New York State Personal Care Aide, and three months of experience in the Job Offered. As other Special Requirements, the Employer stated the following:

> Must speak Malawi Punjabi & English and have ability to speak, read & write Punjabi & English for interpreting & translating skills & maintain technical patient records.
> Must know oriental (Punjabi-Indian) vegetarian cooking--Preparation of basic East-Punjabi Indian diets
> Must have knowledge & ability to recite the Adi Granth Gurmukhi-Script

AF 38. (Copied verbatim AF 38 with addition of data from AF 52). The Alien graduated high school in Punjab, India, with his Field of Study in Punjabi (Gurmakh Script), English, Math, Science, and Hindi. He graduated college in Punjab, India, with his field of study in Punjabi (Gurmakh Script) and English; and he also completed a baccalaureate course leading to the degree of Bachelor of Education in English and Social Studies at the same institution. [4] The Alien's prior employment from November 1966 to March 1994 was in Punjab, India, where he worked was as an agriculturalist for sixty hours a week.[5] This took place during a period from August 1977 to March 1994, when he worked as a Social Studies Master teaching social studies

---

[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]The application originally was filed in 1995, and was resubmitted on February 27, 1996. See AF 57.

[4]The Alien further noted Special Qualifications and Skills in native Punjabi-Indian oriental vegetarian cooking and knowledge of The Holy Adi Granth and the ability to recite it. He said he also had extensive experience in care of elderly needing special skills that included feeding, physical therapy, skin care, interpretation, and translation. AF 50.

[5]The CO did not find Alien's assertion of a sixty hour work week simultaneously with other jobs in his prior employment to require further investigation. As this does not relate to the issues on appeal, the Panel will not consider this representation.

for thirty-five hours a week. During periods from October 1966 to July 1970 and from February 1981 to October 1983 he worked as a Home Health Aide in Canada and in Punjabi, India, for fifty-two hours a week and twenty-four to forty-eight hours a week, respectively. His employment at those times encompassed work that appears to have been substantially similar to the job duties described in the Employer's Form ETA 750A. AF 49. AF 50.

Notice of Findings. No qualified U. S. workers were found, and the file was referred on March 27, 1996. AF 57. The Certifying Officer (CO) issued a Notice of Findings (NOF) on July 23, 1996.

1. The CO first found that the Employer's requirement for a college degree, two weeks of training and two years of experience in the Job Offered was excessive and restrictive under 20 CFR § 656.21(b)(2). Noting that Employer's letters of February 23, 1996, and March 19, 1996, were inadequate documentation for the excessive requirements of education and experience for the position of Home Attendant, the CO explained:

> If employer requires duties of clinical observation, the position may be that of a nurse, practical; if employer requires duties of translation, the position may be a translator. In either case, employer should describe the position with the actual duties required, and re-file with the State Office.

The CO then specified the alternatives available to the Employer, who could either reduce the hiring criteria as to education and experience or document their business necessity under 20 CFR § 656.21(B)(2)(i). AF 59.[6]

2. Under 20 CFR § 656.21(b)(5) the CO directed that the Employer present evidence to establish that its hiring criteria are the minimum necessary for the performance of that job and that it is not feasible to hire workers with less training and experience. Noting that the Employer required a two week training class as a Home Health Aide for the performance of this job, the CO observed that the Alien had no training in this occupation before he was hired by the Employer. Inferring that the Employer apparently trained the Alien for this job, the CO required that the Employer to fully document the reasons it is not feasible for him to train someone else at this time. In the alternative, the Employer was required to submit evidence clearly showing that the Alien had the qualifications Employer now requires at the time he was hired. The CO then specified the alternatives available to the Employer. AF 58.

Rebuttal. On August 27, 1996, the Employer filed a Rebuttal to the NOF in the form of a letter in which he discussed the issues identified in the NOF. AF 68-70. The Employer called to the attention of the CO the description of the Alien's training and experience in the Form ETA750B by way of responding to the issue suggesting that this worker had acquired qualifications as a Home Attendant while working on this job.

---

[6]To establish business necessity, said the CO, the Employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the Employer's business and are essential to performing the job in a reasonable manner.

Final Determination. The CO's Final Determination denying certification concluded that the Employer successfully rebutted the issue raised under 20 CFR § 656.21(b)(5), which directed the Employer to document that his job requirements are the minimum necessary for the performance of the job, and that no longer was an issue. The CO concluded further, however, that the Employer failed to rebut the finding under 20 CFR § 656.21(b)(2) that the Employer must establish that the education and training hiring criteria were those normally required for the performance of this job in the United States and were consistent with the DOT job requirements. After discussing the NOF findings and the Employer's rebuttal, the CO said,

> We can understand that the employer wants to hire the best possible person for the care of the sick individual. However, in this case employer listed and described a position of Home Attendant; employer advertised for a home attendant; and employer is offering to pay the wage of a home attendant. Since the job duties of the position and wages offered are for a home attendant, the requirements should be the requirements normal to a home attendant. In spite of this, employer requires a degree, training and 2 years' experience, which is far in excess of the normal requirements of the position. Employer failed to amend and employer failed [to] document that the requirements, as listed, are essential to the position of home attendant.

AF 71-72. The CO then denied certification for these reasons.

Appeal. On October 12, 1996, the Employer filed a motion for reconsideration and review. The CO denied reconsideration on February 13, 1997, citing **Harry Tancredi**, 88 INA 441(Dec. 1, 1988)(*en banc*). The CO thereupon referred this matter to BALCA. AF 96.

Discussion

Before taking up the merits of the Employer's appeal the panel notes his assertion that the reasons given for rejecting the rebuttal under 20 CFR § 656.21(b)(2) constitute a "new issue." After examining the Employer's explanation for this contention, the panel finds that the CO's reasons did not raise a new issue in this case. AF 91-94. Employer also argued that the added hiring qualifications were required by business necessity, based on its concern for the proper care of the patient.[7]

This, of course, was not a new issue, but was the first of the two issues that the CO discussed in the NOF. AF 59. At no point in the Employer's rebuttal or in the exchange of correspondence with the Department of Labor and the Certifying Officer did Employer amend or withdraw any of the hiring criteria and job duties he stated in Form ETA 750A, not withstanding the alternatives offered in the NOF. Because this job involved qualifications that

---

[7]Among the issues he raised in his argument was Employer's requirement of fluency in Punjabi, a foreign language. As this was not mentioned as an issue by the CO in either the NOF or the Final Determination, to the extent that the Employer based this argument on his assumption that this violation of 20 CFR § 656.21(b)(2)(i)(C) was a reason for rejecting his application his contentions are without merit.

exceeded the DOT's description of the duties and qualifications of the Home Attendant, the reasons for the CO's denial of relief are squarely before the panel for review.

The panel agrees with the finding that the Employer's hiring criteria were unduly restrictive within the meaning of 20 CFR 656.21(b)(2) after considering the Rebuttal and Employer's argument on appeal with the entire record. While an employer may adopt any qualifications he may fancy for the workers he hires in his business, the employer is limited by the Act and regulations when he 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 qualifications of training and experience set forth in the Dictionary of Occupational Titles. The logic underlying the CO's conclusion was well expressed by that part of the Final Determination that the Employer regarded as stating a "new issue." As the CO pointed out, the position at issue that was the subject of Employer's recruiting efforts was no more than that of a Home Attendant, and the wages employer offered were no more than those ordinarily paid to a Home Attendant.[8] We agree with the CO's reasoning that, since the job duties of the position and the wages the Employer offered were the same as the duties commonly performed in this job, Employer's hiring requirements must be consistent with the hiring criteria normal to the occupation of Home Attendant that is described in the DOT.

First, the duties his application stated were materially different from the DOT job description and, second, the Employer's hiring qualifications required an academic degree, additional training, and two years' experience. Both of these standards materially exceeded the normal requirements of the position at issue. When this discrepancy was called to his attention as a serious deficiency in the NOF, the Employer neither amended the application nor documented his business necessity with any form of objective evidence beyond his own unsupported statements of assumed fact. Moreover, the evidence of record does not indicate either the identity or the existence of one or more specific individuals to whom the home health care would be administered, if the Employer's application for alien labor certification was granted.

As a result, Employer's lengthy and intense discussion of an assumed patient's welfare was entirely speculative and was not subject to evaluation by the Certifying Officer or to rational review by BALCA. Consequently, we conclude that the denial of this application for alien labor certification was based on sufficient evidence and the denial of certification should be affirmed. Accordingly, the following order will enter.

ORDER

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

For the Panel.

---

[8]In fact, Employer's advertisement offered five per cent less than the prevailing wage, an amount equal to the minimum wage level allowed under 20 CFR § 656.21(g)(4).

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.