



Issue Date: 09 September 2003

BALCA Case Nos. 2003-INA-230 to 235
ETA Case Nos. P2002-GA-04396312, P2002-GA-04396316,
P2002-GA-04396318, P2002-GA-04396365,
P2002-GA-04396373, P2002-GA-04396375

In the Matters of:

SUPERMERCADO LA FAVORITA, INC.,
Employer,

on behalf of

GUSTAVO RODRIGUEZ-MUNIZ,
ERASMO MORALES-RIVERA,
JESUS MORALES-VARGAS,
JOSE GONZALEZ,
ABEL GARCIA-MARTINEZ,
SERGIO RIVERA-CORDOBA,
Aliens.

Certifying Officer: Floyd Goodman
Atlanta, Georgia

Appearance: Hipolito M. Goico, Esquire
Atlanta, Georgia
For Employer and Aliens

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

JOHN M. VITONE
Chief Administrative Law Judge

DECISION AND ORDER
OF REMAND

These cases arose from applications for labor certification filed by Supermercado La Favorita, Inc. ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and

Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the “Act”) and Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). The Certifying Officer (“CO”) of the United States Department of Labor denied the application, and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and Employer’s request for review, as contained in the Appeal File (“AF”) and any written arguments of the parties.

STATEMENT OF THE CASE

Employer is a grocery store catering to the Hispanic community. (AF 164).¹ On April 30, 2001, it filed applications for labor certification on behalf of the Aliens listed in the caption above for the position of Meat Cutter. (AF 154). The positions were all for the 5:00 am to 1:00 pm shift. On April 9, 2002, Employer requested that the applications be granted a reduction in recruitment. (AF 160).

On January 24, 2003, the CO issued a Notice of Finding (NOF) proposing to deny the applications based on the conclusion that the job openings were not *bona fide* job opportunities as required by 20 C.F.R. § 656.20(c)(8). The CO stated that “[i]t has come to the attention of the Certifying Officer that the above-named employer has filed approximately ten (10) Labor Certification applications for the exact same job. This office believes it is doubtful that ten actual jobs exist for grocery store Meat Cutters, all needed for the first shift in three store locations. The CO directed Employer to provide documentary evidence to establish that a *bona fide* job opening truly exists and is clearly open to qualified U.S. workers, including a list of all current employees for each store location showing positions and duties, hours of operation for each location, addresses and pictures of the exterior and exterior of each store, the square footage of each store, mortgage/lease agreements for each location, monthly sales data for each location for the

¹ The Sergio Cordoba Appeal File, 2003-INA-235, contains all the Exhibits, including Employer’s rebuttal documentation, which is voluminous. The other Appeal Files do not include the rebuttal documents. Citations in this decision are to the Appeal File in Case No. 2003-INA-235, as representative of all the appeals.

prior six months, and invoices or inventory listings detailing customary meat purchases at each location. (AF 151-152).

Under cover letter dated February 19, 2003, Employer provided a large package of rebuttal materials, including all the documentation which the NOF expressly directed to be provided. (AF 171-509). Employer argued that the documentation showed that it is a corporation with aggregate annual sales exceeding 5.5 million dollars and over 35 employees. Employer stated that the first shift was listed on the ETA 750A because that is the current schedule of all of the beneficiary Aliens, but that Employer is willing to advertise flexibility as to shifts. As requested by the CO, the Appeal File includes photographs of Employer's stores which illustrate substantial meat departments. (AF 390-391, 404-408, 427-429).

On March 31, 2003, the CO issued a Final Determination denying certification. (AF 149-150). The CO observed that Employer provided all the requested documentation in rebuttal. The CO found that the rebuttal documentation established that Employer has three separate grocery store locations; currently employs a total of 36 employees, with 17 of those identified as meat cutters; store #1 has 15 employees with 9 meat cutters, store #2 has 14 employees with 4 meat cutters, and store #3 has 7 employees with 4 meat cutters; and receives meat shipments once a month from various suppliers. The CO then stated that staff from his office "polled major supermarket chains in the metro Atlanta area in an effort to obtain first-hand information in this subject area. Our fact finding revealed that no major stores in the area employed more than three people full-time in the meat department. One indicated that four would be a luxury." The CO then summarized the numbers of employees who would be working as meat cutters at each store when taking into account labor certification applications pending or already approved, and concluded that there was "no justification for the number to exceed three at any one store." (AF150).

On May 3, 2003, Employer filed a motion to reconsider/appeal. (AF 1-19). Employer argued that the CO erred in the Final Determination by (1) denying the

application based on information not requested in the NOF, (2) using a “business necessity” analysis to deny the cases, when a “bona fide” job offering issue was the one raised, and (3) failed to find that Employer met the requirements of a business necessity (even though that was not the formal basis for the denial). Attached to the motion to reconsider/appeal were letters from a C.P.A., the President of the Georgia Hispanic Chamber of Commerce, the President of Carniceria Hispana (a three-store butcher shop chain), and a Vice-President of New Star Advertising (NSAC),² all attesting that meat cutting is more specialized and service oriented in the Hispanic/Latino community than in the general community.

On July 8, 2003, the CO transmitted the Appeal Files in the above-captioned cases to the Board. The files received contain no indication of whether the CO considered Employer’s motion for reconsideration.

On August 14, 2003, the Board received Employer’s Statement of Position and Legal Briefs requesting a remand for a ruling on the motion to reconsider, or alternatively, that labor certification be granted.

DISCUSSION

Certifying Officers have the authority to reconsider a Final Determination prior to its becoming final. *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (*en banc*). If the employer did not have a prior opportunity to present evidence to support its position, it is an abuse of discretion for the CO not to reconsider. *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (*en banc*). Moreover, the Board in *Richard Clarke Associates*, 90-INA-80 (May 13, 1992)(*en banc*) concluded that "the CO is required to state clearly whether he has denied an employer's request for reconsideration . . . or has granted the request and, upon reconsideration, affirmed the denial of certification."

² The letterhead showing the full name of this organization is cut off on the photocopies in the Appeal Files.

In the instant cases, the NOF requested information which appears essentially to be directed toward establishing whether Employer has the financial and physical capacity, and business volume, to provide *bona fide* employment for the number of meat cutters it proposes to employ. Employer supplied all the information requested in its rebuttal submission. The CO was not obligated to accept that documentation as proving that Employer has *bona fide* positions available for additional meat cutters, but only to give it the weight it rationally deserved. When the CO, however, polled other supermarkets, a new, specific factual basis for denial of the labor certification applications was introduced – namely that other supermarkets in the area do not typically employ more than three workers in their meat departments. It appears that the Final Determination was based primarily on this factual determination. Employer, however, first learned of this precise factual basis in the denial letter. Thus, Employer was forced to submit responsive evidence in a motion for reconsideration. This additional evidence proffers that groceries catering to the Hispanic/Latino community have a different emphasis on the meat department than do groceries catering to the general population. There is no indication that the CO took any action on to the motion to reconsider other than to assemble Appeal Files and transmit them to the Board.

Accordingly, we remand these cases to the CO to consider Employer’s new evidence and rule on the motion to reconsider. We express no opinion on the credibility of the new evidence or whether it is sufficient to establish the *bona fides* of the position. If new questions are raised, the CO may wish to issue a supplemental NOF to further develop the record. Also, we observe that the applications are in the status of a request for reduction in recruitment (“RIR”). Thus, even if the CO finds that *bona fide* job opportunities have been established, the question remains of whether Employer should be granted the RIR.³

In its motion to reconsider/appeal and appellate brief, Employer argues that the CO erred by surreptitiously applying a “business necessity” test to a *bona fide* job

³ We note, for example, that the newspaper clipping offered in support of the RIR lists the job in the classified section under “Restaurant” rather than “Grocery.” (*see* AF 166-168),

opportunity citation. In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*) the Board adopted a "totality of the circumstances" test for consideration of the *bona fides* of a job opportunity. In an accompanying decision, *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*), the Board wrote:

A showing of "business necessity" for the position itself under section 656.21(b)(ii)(2) may not be required by the CO. *See, e.g., Lebanese Arak Corp.*, 1987-INA-683 (Apr. 24, 1989) (*en banc*) (by implication); *Joon Sup Park*, 1989-INA-231 (Mar. 25, 1991). As delineated in *Carlos Uy . . .*, however, a CO may question whether the employer is presenting a *bona fide* job opportunity.

In other words, the *bona fide* job opportunity analysis inherently involves an aspect of questioning the employer's need for a particular position. In *Martin Kaplan*, 2000-INA-23 (July 2, 2001) (*en banc*), the Board recognized that there is a "danger of section 656.20(c)(8) analysis subsuming the rest of Part 656 where a 'totality of the circumstances' test is employed to gauge the *bona fides* of an employment offer." Here, we find that the CO acted properly in questioning whether there was a *bona fide* opportunity for employment because it appeared that Employer was applying for more meat cutters than its business could reasonably support. Accordingly, we find no abuse by the CO in raising the *bona fide* job opportunity citation. Nonetheless, as the Board wrote in *Carlos Uy*: "A finding of a violation of section 656.20(c)(8) is especially problematic insofar as it is a highly generalized citation of error. An employer faced with a section 656.20(c)(8) citation is in a difficult position unless the precise reasons for finding that a job is not clearly open to U.S. workers is stated in the NOF. Thus, when the CO invokes section 656.20(c)(8) as grounds for denial of an application, administrative due process mandates that the CO specify precisely why the application does not appear to state a *bona fide* job opportunity." Thus, we reject Employer's citation of error based on the alleged improper use of a business necessity test for the position. However, we caution the CO that the Board will heighten its scrutiny of fair notice when section 656.20(c)(8) is cited as the grounds for denial of labor certification.

ORDER

The CO's denial of labor certification in these matters is hereby **VACATED** and the matters **REMANDED** for further proceedings consistent with the above.

For the Panel:

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JOHN M. VITONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO 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 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, NW, 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 the petition the Board may order briefs.