U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 August 2006

BALCA Case No.: 2005-INA-00116
ETA Case No.: P2004-NJ-02503346

In the Matter of:

INNOTREX CORPORATION,
Employer,

on behalf of

NEERAJ MAHAJAN,
Alien.

Certifying Officer: Dolores DeHaan
New York, New York

Appearance: Derek Gray, Esquire
Philadelphia Pennsylvania
For the Employer

BEFORE: Burke, Chapman and Vittone
Administrative Law Judges

ORDER DISMISSING APPEAL

PER CURIAM. This matter arises out of an application for permanent labor certification filed by the Employer on behalf of the Alien pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656. On December 9, 2004, the Certifying Officer (CO) issued a Final Determination denying labor certification. Subsequently, on January 13, 2005, the Employer filed a request for review before the Board of Alien Labor Certification Appeals (Board). The Board docketed the case on April 12, 2005. After attempting to serve a copy of the Order of Docketing on the Alien, Neeraj Mahajan, the Board received a returned copy of the Alien's Order of Docketing as undeliverable. Accordingly, on July 19,

2005, the Board issued an Order directing the Employer to submit the Alien's current mailing address using USCIS Form AR-11, along with a statement confirming that this is in fact an active appeal, and that the Employer is still sponsoring the alien labor certification on behalf of the Alien within 20 days or risk dismissal of the case.

On August 8, 2005, the Employer submitted its response to the Board's July 19, 2005 Order, in which the Employer "confirm[ed] that this is an active appeal and that the Employer [was] still seeking alien employment certification for the position of Software Engineer." However, the Employer also stated: "[T]he Employer no longer employs Neeraj Mahajan and no longer offers permanent employment to Mr. Mahajan. The Employer has no knowledge of Mr. Mahajan's current address and therefore has not provided an AR-11 address change form as the Board ordered." In addition, the Employer stated that it "continues to have a permanent vacancy for the position of Software Engineer and still wishes to pursue alien employment certification for this position in the hopes of substituting another beneficiary into the application in the future."

Based on the Employer's admission that there currently exists no sponsored alien beneficiary on whose behalf the application was initiated, we conclude that there is no active appeal. We conclude further that the cases cited by the Employer, *Cheema's Supermarket*, 2003-INA-220, 2004 WL 1858207, *2 (August 13, 2004) and *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. 1994), are inapposite to the instant matter.

In support for its request, the Employer argues that this Board has allowed the substitution of a beneficiary into an approved application for alien labor certification, *Cheema's Supermarket*, 2003-INA-220, 2004 WL 1858207, *2 (August 13, 2004), after the U.S. Court of Appeals for the District of Columbia invalidated 20 C.F.R. § 656.30(c)(2) (which precluded the substitution of a beneficiary into an approved application for alien labor certification), *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. 1994). The Employer's contention, however, is an inaccurate account of our decision in *Cheema* and is misplaced in the context of this particular case. Consequently, the Employer's appeal is dismissed as inactive.

First, it is significant that the Employer's application on behalf of the Alien in the instant matter is pending—i.e., no determination has been made that there are not sufficient U.S. workers, who are able, willing, qualified and available at the time of application at the place where the alien is to perform the work, or that employment of the alien will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* 20 C.F.R. §656.1(a). Indeed, the regulations provide that "an employer who desires to apply for a labor certification *on behalf of an alien* shall file," *inter alia*, "a statement of the qualifications of *the alien*, signed by *the alien*." 20 C.F.R. §656.21. In other words, a key piece of the application puzzle is the existence of an *alien* on whose behalf the application is filed.

Without an alien, neither the CO nor the Board is able to determine whether the beneficiary alien possesses the minimum requirements for the position or whether the Employer is tailoring the job to match the alien's experience. An Employer cannot simply file an application for labor certification for a particular position with the intent of filling the position at *some* later time with *some* foreign worker without having to go through the full application process set forth in 20 C.F.R. Part 656. Additionally, by pursuing an application for labor certification without an alien, and stating that it wishes to pursue the application in hopes of filling the position in the future with some other alien beneficiary, the Employer is in effect admitting that it is not considering nor has considered whether there exist qualified U.S. workers available for the position.

Second, the Employer's reliance on *Kooritzky* and *Cheema* is misplaced. In *Kooritzky*, the D.C. Circuit invalidated an Interim Final Rule published in 56 Fed. Reg. 54930 (Oct. 23, 1991) for failure to follow proper notice and comment rulemaking. Significantly, however, the D.C. Circuit never addressed specifically whether substitution of an alien for approved applications—the issue created by the Interim Rule—is permitted under the Act or regulations. Nevertheless, the Employer now contends that substitution is proper in the instant case by arguing that *Kooritzky* is controlling authority for a very different issue—that is, whether substitution of an alien is permitted for a pending application. Simply stated, a pending application requires the sponsorship of an actual alien, not merely the existence of a position to be filled.

Similarly, the Employer's understanding of the Board's decision in *Cheema* is inaccurate. In *Cheema*, the Employer withdrew its sponsorship of the original beneficiary and sought substitution of another alien, thereby rendering moot the CO's actual grounds for denial of the application.[1] Accordingly, the Board, noting the D.C. Circuit's ruling in *Kooritzky*, remanded the case to the CO with instructions to specifically rule on the Employer's request for substitution. More specifically, the Board noted that because the *Kooritzky* decision invalidated a rule prohibiting the substitution of beneficiaries for approved applications and because the Department of Labor had not developed a specific policy addressing a request for substitution of an alien while the application is still pending, the record was "not ripe for decision" on the substitution issue. In other words, the Board in *Cheema* did not, as the Employer now argues, "allow[] the substitution of a beneficiary into an application for alien labor certification." It is also important to note that the employer in *Cheema* substituted the originally named beneficiary with an *actual* alien; here, the Employer hopes to receive certification without an alien and to reserve the actual substitution for a later date. The regulations, however, do not permit certification of such an application.

Accordingly, **IT IS ORDERED** that the Employer's appeal is **DISMISSED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

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:

[1] The CO, in *Cheema*, had denied certification based on the Employer's failure to establish the existence of a *bona fide* job opportunity in view of the familial relationship between the Employer and the Alien.

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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.