



DATE: MARCH 16, 1988
CASE NO. 87-INA-674

IN THE MATTER OF

DOWNEY ORTHOPEDIC MEDICAL GROUP
Employer

on behalf of

ADEL BOUTROS
Alien

Appearance

Dan E. Korenberg, Esquire
For the Employer

Before: Litt, Chief Judge, Vittone, Deputy Chief Judge,
and Brenner, DeGregorio, Fath, Levin and Tureck Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. § 656.26 of the United States Department of Labor Certifying Officer's denial of labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (the Act).

Under Section 212(a)(14) of the Act, 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.

The procedures governing labor certification are set forth at 20 C.F.R. Part 656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. § 656.21 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.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File [hereinafter AF], and any written arguments of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

In the fall of 1986, Downey Orthopedic Medical Group filed a labor certification application on behalf of the Alien, Adel Boutros, for the position of Medical Diagnostician at a wage of \$26,000 per year (AF 16-17). In this application, the Employer said that the Diagnostician would work with the orthopedic physician, reviewing the results of lab tests, cardiograms, and x-rays; would make a preliminary diagnosis of illness or ailment and propose a course of treatment; would review the patient's chart and discuss symptoms and methods of treatment with the doctor; and would recommend additional tests and refer the patient to other specialists as necessary.

The Employer listed as a job requirement an M.D. or equivalent degree and one year's experience in the job offered or the related occupation of medical doctor in the orthopedic field, in addition to a background in orthopedic surgery (AF 16).

At the time of the application, the Alien had earned a Bachelor of Medicine from Ain Shams University, Arab Republic of Egypt; was licensed to practice medicine in Egypt; and had one year's experience as a surgeon in an orthopedic surgery clinic (AF 31-32).

In his February 13, 1987 Notice of Findings (AF 10-12), the Certifying Officer (C.O.) denied the Employer's application for labor certification on the ground that the job requirements are unduly restrictive, in violation of 20 C.F.R. § 656.21(b)(2). Specifically, he objected to the educational requirement of an M.D. degree and one year of related experience as a medical doctor in the orthopedic field. He based his determination on designating the job as a Medical Technologist (D.O.T. 078.361-014). He also inquired as to what constitutes the equivalent of an M.D. degree.

In its Rebuttal (AF 7-8), the Employer noted that the C.O.'s finding is premised on the description of a Medical Technologist rather than a Diagnostician, which is the position offered; and it compared the duties involved in both positions. The Employer concluded that an M.D. degree is not an excessive requirement because a less-educated person could not perform the job properly, and that certification as a Medical Doctor in another country is considered the equivalent of an M.D. in the United States.

The C.O.'s Final Determination of May 27, 1987 (AF 5-6), rejected the Employer's Rebuttal on the same grounds as he stated in the Notice of Findings. In addition, he accused the Employer of wanting to hire a trained Medical Doctor while paying the salary of a Medical Technologist (AF 6).

In response, the Employer filed a Request for Review on July 1, 1987 (AF 2-4), followed by a Brief on October 13, 1987. The Certifying Officer submitted a Brief supporting his position on October 15, 1987.

Discussion

While we agree with the C.O. that the Employer's Rebuttal does not document a business necessity for what the C.O. considered unduly restrictive requirements, we do not affirm his denial of certification because we disagree with his basic premise that the position the Employer wishes to fill is that of Medical Technologist. For the following reasons, we remand this case to the C.O. for further fact-finding, consideration, and determination, pursuant to § 656.27(c)(3).

In his Notice of Findings, the C.O. said that a Medical Technologist would not normally have one year of related experience as a Medical Doctor and that the education requirement of an M.D. is not a normal requirement for the occupation (AF 11). The C.O. then gave detailed instructions for recruiting without the restrictive requirements, under 20 C.F.R. § 656.21(f) and (g) (AF 11-12).

The Employer's Rebuttal and its Brief in support of Appeal provided the C.O. with a detailed description of the position it wishes filled. After noting that a Medical Technologist receives specimens for laboratory tests and performs tests to provide data for use in the treatment and diagnosis of disease (AF 9), the Employer explained a Medical Diagnostician does not perform those tests, but rather analyzes those test results to prepare a preliminary diagnosis of the patient's condition. We agree with the Employer that the duties of a Medical Technologist are not the same as the duties of the job which the Employer is seeking to have performed. Accordingly, the education and experience requirements of these two positions must also differ.

Because the "Medical Diagnostician", as described by the Employer, renders preliminary opinions with recommendations for treatment or additional testing, the requirement of education or experience greater than that of a Medical Technologist is not unduly excessive. We note in passing that there is no D.O.T. classification of "Medical Diagnostician." It appears that a person performing the duties required by the Employer is acting in the guise of a physician, and there may be merit in the C.O.'s observation in the Final Determination that the Employer "basically wants to hire a trained medical doctor while paying the salary of a Medical Technologist" (AF 6). But because no such finding was made in the Notice of Findings, the Employer was not given an opportunity to rebut that specific finding.¹

¹ Indeed, had the C.O. made this finding in his Notice of Findings, and if the further assumption is made that the Employer failed to rebut or cure that finding before the C.O., then we would be in essential agreement with our dissenting colleagues on the lack of merit of the substance of the Employer's case. However, the fact that the Employer's case on the merits appears to be extremely weak before the opportunity for the Employer's rebuttal, does not permit the C.O. or this Board (however wide our "aperture" of oversight is in the "view" of our dissenting colleagues), to nearsightedly cast aside the fundamental due process requirement of the regulations that the C.O. give notice to the Employer of the reasons for denial of the

(continued...)

Because we agree with the Employer that the position in question is not a Medical Technologist, we remand this case to the C.O. for a more accurate job title which may be, as the C.O. observed in the Final Determination, that of a physician. Only then can the C.O. determine, with the opportunity for rebuttal by the Employer, whether the requirements are unduly restrictive, pursuant to § 656.21(b)(2); whether the requirements represent the Employer's actual minimum requirements for the position, pursuant to § 656.21(b)(6); and all other related issues, including whether the wage offered for the job title found by the C.O. meets the prevailing wage. § 656.40.

ORDER

The Final Determination of the Certifying Officer is vacated, and this case is remanded to the Certifying Officer for further findings and actions, consistent with this Decision and Order.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/JPF/kat/gaf

Jeffrey Tureck, Administrative Law Judge, concurring:

I am in complete agreement with Judge Brenner's decision, which I join. This case is simple and clear-cut. Regardless of the merit one may see in the ultimate denial of certification in this case, the fact remains that the Certifying Officer denied certification for a different job than the one Employer sought to fill. It is incumbent upon this Board to insist that the Certifying Officer perform his regulatory duties and adhere to the requirements of due process. Rather than overlooking so basic a flaw by the Certifying Officer, and affirming the denial of certification on grounds that he never addressed, this case must be remanded to the Certifying Officer for further consideration.

JEFFREY TURECK
Administrative Law Judge

John Vittone, Deputy Chief Judge, concurring:

I concur in the Board's decision to remand this case to the Certifying Officer. The Certifying Officer mistakenly designated the job offered by Employer (which Employer termed "Medical Diagnostician") as "Medical Technologist." The C.O. reached this determination by looking at the salary offered by Employer and then attempting to determine which job title the Employer could

¹(...continued)
application, along with an opportunity to rebut or if possible cure those alleged defects before the C.O. 20 C.F.R. §656.25.

"buy" with that salary. Through this arbitrary process the C.O. determined that Employer could "buy" a Medical Technologist. It then found that Employer's job requirements were unduly restrictive and excessive for that position.

On rebuttal, Employer addressed the C.O.'s finding, and persuasively argued that the C.O. incorrectly determined that Employer was looking for a Medical Technologist because the duties which are normally performed by a Medical Technologist are quite different from those duties Employer wishes to have performed. Further, Employer argued that for the position it wishes to fill, the requirements are not unduly restrictive or excessive.

The C.O. found Employer's rebuttal unpersuasive. The C.O. then stated that it appeared that Employer actually wanted a Medical Doctor whom it would compensate at a rate usually commanded by a much less qualified person (for example, a Medical Technologist). As Judge Levin correctly points out, the Act clearly prohibits this. The alien's desire to stay and work in this country does not make it permissible for an alien to accept or an employer to offer wages or working conditions which a U.S. worker, similarly employed or educated, would deem unacceptable.

The Employer must, however, be provided an opportunity to rebut the findings contained in the C.O.'s Final Determination. Employer had the opportunity to address the C.O.'s finding concerning the Medical Technologist designation. Employer must now be granted the chance to address the C.O.'s finding that Employer actually wishes to hire a medical doctor, but at a wage not commensurate with that position. As the C.O. deprived Employer of an opportunity to address the serious flaws in its recruitment efforts, I believe that this case must be remanded.

JOHN M. VITTONI
Deputy Chief Judge

Stuart A. Levin, Administrative Law Judge, Dissenting. George A. Fath, Administrative Law Judge, Concurring in the Dissent.

The employer seeks certification for an alien medical doctor specializing in orthopedics to work as a "diagnostician" in the Los Angeles area for \$26,000 per year. Not surprisingly, the recruitment effort failed to unearth a U.S. worker with similar credentials and any interest in the position.

I.
Work and Pay
Correlations

In the U.S. labor market, a direct correlation usually exists between the level of skill or knowledge employed and the fee or wages paid. As expertise increases in sophistication, wages and fees ordinarily increase accordingly. When expertise and compensation move in opposite directions and a gap appears, caution is warranted. When the gap widens into a chasm, the Board's credulity is tested.

Now the Board disagrees with what it infers is the Certifying Officer's "basic premise that the position the employer wishes to fill is that of a Medical Technologist." Yet, the Board peers down at the process below through a very narrow aperture. It sees and accepts the employer's alleged need for a doctor with a year of orthopedic experience, but it overlooks the significance of the salary offer.

The Certifying Officer, in contrast, viewed the job in a broader, more appropriate context. He considered not only the employer's alleged needs and the DOT, but he also found that the annual salary of \$26,000 was the prevailing wage for a medical technologist without an M.D. degree, or its equivalent. As such, viewing the salary as a fairly objective measure of the skill levels the employer might reasonably expect to obtain, the Certifying Officer's assessment of the type of worker available in the domestic labor market for \$26,000 per year seems, according to the prevailing wage study, quite accurate. (AF 14). Indeed the employer is not free to embrace the wage of a medical technologist while imposing job requirements only a doctor can satisfy.

The Certifying Officer's "premise," then, simply reflects the correlation between the wages offered and what those wages will buy in the domestic labor market. As such, he did not mistakenly designate the job as a medical technician. To the contrary, he identified a job more compatible with the objective indicators than the employer's subjective preferences, and he correctly designated the employer's job requirements as unduly restrictive.¹

Nor is the Certifying Officer's determination especially novel. In Professional Insurance Management Co., 83-INA-336, 5 ILCR 1-138, for example, a denial of certification was affirmed under circumstances analogous to those now before us. In Professional Insurance, the fact that the alien doctor would engage in malpractice claims review rather than medical practice as a licensed physician was rejected as justification for the \$25,000 annual wage. Moreover, the rationale underpinning the denial in Professional Insurance is equally applicable here: "The importation of alien labor for employment at a rate of pay below that demanded by U.S. workers is precisely the practice that the Act was intended to prevent." Id. at 1-141. See also, Pesikoff v. Secretary of Labor, 501 F.2d 757, (D.C. Cir., 1971).

¹ Far from being arbitrary as some might suggest, the Certifying Officer's use of the salary as a factor in determining a reasonable designation for the position was rational and objective. Indeed, the salary level for the position was set and advertised by the employer before the application for alien labor certification was filed. (AF 25, 21). Furthermore, in its brief on appeal, the employer reiterated its adherence to the advertised wage. (App.Br. at 1). Thus, as the Court of Appeals observed, in the context of a case in which job comparability was a crucial issue:

we consider compensation to be the prime criterion of comparability; the other factors enumerated in the case law, legislative history, and regulations are generally (though concededly imperfectly) reflected in the level of compensation. Compensation, moreover, provides an objective standard, less subject to the vagaries of individual administrative law judges. Echo v. Director, 744 F.2d 327, 331 (3rd Cir., 1984).

It is fairly predictable that the wages and working conditions of American workers would be adversely affected if employers imported alien doctors willing to work at the pay rates prevailing for medical support staff occupations. See, Pesikoff, at 763. As a practical matter, few U.S. health care professionals, with or without an M.D. degree, would successfully compete with an alien doctor who is willing to work for the same wage a medical technologist would find acceptable. Yet, such competition is unnecessary and impermissible. The lower the wages offered, the less discretion the employer enjoys to impose restrictive education or skill level requirements. The Act and the regulations simply do not permit an employer or an alien to pit the desirability of living in this land against the wages and working conditions of the American workforce.

II.

SCOPE OF REVIEW

A.

The Board is Beyond the Employer's Appeal

We are mindful that the Board may find "merit in the C.O.'s observation that the Employer 'basically wants to hire a trained medical doctor while paying the salary of a Medical Technologist.' " The Board is concerned, however, that this observation appeared in the Final Determination rather than in the Notice of Findings, and, therefore, "the employer was not given an opportunity to rebut that specific finding." Notably though, the employer did not challenge that "specific finding" in its brief to the Board, nor did it pursue the appeal to "cure" that finding.

The Certifying Officer's observation apparently came as no surprise to this employer. The job was advertised in LACMA Physician in a classified advertising column headed "OPENINGS PHYSICIANS." The ad itself described the job requirements, including an M.D. degree or equivalent, plus "min. of 1 yr. exp. in this job or as dr. in orthopedics. Salary \$26,000/yr." (AF 25). In essence, then, the Certifying Officer's finding was virtually a restatement of the employer's ad. Consequently, a remand for the purpose of having the employer attempt to rebut the Certifying Officer's finding is, in this instance, tantamount to a remand for the purpose of permitting the employer to rebut its own advertisement. The employer, on appeal, does not seek a remand, let alone for that purpose. To the contrary, the employer seeks to overturn the Certifying Officer's denial and have the alien certified at the advertised wage.

B.

Procedural Due Process

We note further the majority's contention that the Certifying Officer "nearsightedly cast aside" the employer's fundamental due process rights. Ordinarily, we would expect a due process contention of this sort to originate with the party allegedly aggrieved. In this instance, however, it emanates directly from the Board, sua sponte, and there is no merit to it. The employer never contended that the Certifying Officer either failed to afford it procedural due process or deprived it of an opportunity to address flaws in its recruitment effort. The employer was afforded a full and fair opportunity to present its case to the Certifying Officer, and, subsequently, to appeal every

aspect of the Final Determination it deemed to be in error. Suggestions to the contrary, notwithstanding; complete due process has been afforded in these proceedings.

III.
Conclusion

The record on appeal reveals, between the expertise demanded and the salary offered, a chasm which is clearly too wide to bridge. The Board has before it a classic, textbook example of a case in which the requirements of the job and the salary offered are tailored to the education, training, experience, and salary expectations of the alien. As such, the Certifying Officer correctly denied labor certification, and his denial should be affirmed.

STUART A. LEVIN
Administrative Law Judge,
Member of the Board

Concur:

GEORGE A. FATH
Administrative Law Judge,
Member of the Board

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