



DATE: MAY 25, 1988
CASE NO. 87-INA-680

IN THE MATTER OF

DOVE HOMES, INC.,
Employer

on behalf of

JOAQUIN B. VILLEGAS
Alien

Appearance

Steven D. Karp, 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 a 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. §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

On May 22, 1986, the Employer, Dove Homes, filed an Application for Labor Certification to hire the Alien, Joaquin Barot Villegas, as a project superintendent (foreman) in its construction business (AF 14). The basic duties of the position include estimating time schedules, the number of workers to recruit, and the purchase of necessary materials, as well as supervising the construction project. The Employer requires four years of experience in the job offered, including the knowledge of power tool use.

Following the issuance of the Notice of Findings, dated March 31, 1987 (AF 10-11), the Employer submitted a rebuttal letter on May 1, 1987, in which it stated that no qualified applicants were available for the position (AF 4). On May 27, 1987, the Certifying Officer (C.O.) issued his Final Determination, in which he denied certification on the grounds that the Employer had failed to specify lawful, job-related reasons for not hiring a U.S. worker, pursuant to §656.21(j)(1) (AF 2-3). The Employer filed an appeal on June 23, 1987, contending that certification should be granted because the Employer did specify a lawful, job-related reason for not hiring a U.S. worker.

The C.O. filed a Statement of Position on October 21, 1987.

Discussion

Section 656.21(b)(7) requires an employer to document that U.S. workers who applied for the job opportunity were rejected solely for lawful, job-related reasons. In his Notice of Findings (AF 10-11), the Certifying Officer (C.O.) made an initial determination that Mr. Shuffield, one of the applicants referred by the California Employment Development Department, was qualified, and that the Employer had not submitted convincing documentation of specific job-related reasons for rejecting that U.S. worker.

The Employer had reported to the state agency that it had telephoned Mr. Shuffield in October 1986, but had spoken instead to Mrs. Shuffield, who told the Employer that her husband was no longer interested in the job (AF 18). When the Department of Labor contacted the U.S. worker, Mr. Shuffield responded that he had not been contacted by the Employer, that he had not been offered the position, and that he had not told the Employer he was no longer interested in the job (AF 12).

The Notice of Findings gave the Employer an opportunity to rebut the determination with evidence and argument. In rebuttal, the Employer stated only that it sent a terse certified letter to Mr. Shuffield in April 1987, asking if the worker was still interested in the position, but that the letter elicited no response (AF 4-9). We must agree with the C.O. that the rebuttal was not responsive to his inquiry. The Employer does not dispute the C.O.'s finding that Mr. Shuffield, based on his application, appears to be qualified for the job. The C.O. thought it unlikely that contact was made by the Employer during the first recruitment effort of October 1986, particularly as the certified letter, sent seven months after the advertisement, did not refer to prior attempts to contact Mr. Shuffield (AF 3). If the Employer wanted to attempt to show, in its rebuttal to the Notice of Findings, that its telephone conversation with Mrs. Shuffield did take place as alleged, notwithstanding Mr. Shuffield's March 1987 questionnaire answers that he had not been contacted by the Employer and that he does not know if he would have accepted the job if it had, in fact, been offered (AF 12), then the Employer should have attempted to confirm this in its subsequent correspondence with Mr. and Mrs. Shuffield. Despite its burden of proof, the Employer made no such attempt to rebut the C.O.'s Notice of Findings. See William W. Wright Stables, 87-INA-502 (Jan. 6, 1988).

The portions of the C.O.'s analysis in his Final Determination which we have recited above are sufficient to find that the Employer has not satisfied its burden of proving that Mr. Shuffield was not available for the job during the recruitment period, and we affirm on that basis. In addition to the specific findings related to this case, in the Notice of Findings the C.O. had abstractly stated that "when an employer's response differs from an applicant's response, the weight of evidence is generally afforded the applicant." Although it is harmless error in this case, we must note that this generalization is incorrect. The probative value of evidence is judged on the basis of its own strengths and weaknesses in each case, as we have done here, without general preconceptions based on its source. Screen Actors Guild, Inc., 87-INA-626 (Mar. 9, 1988). The burden of proof does not mean that evidence has less probative value because it is presented by an employer. It is true that an employer's incentive is to present evidence in support of its request for labor certification. But it is also true that an applicant's disappointment in being rejected for a job could certainly cause a biased view of the facts or even an incentive to knowingly misstate the facts. However, an employer is well-advised to strengthen its ability to prove its case by documenting the material facts better than the Employer did in this case.

Even if the Employer had the alleged telephone conversation with Mrs. Shuffield during the recruitment period, such a third-party conversation is insufficient to demonstrate a reasonable, good faith attempt by the Employer to consider all qualified and available U.S. workers. Reasonable attempts must be made during the recruitment period to contact an apparently qualified applicant directly, in order to discuss the job opportunity with the applicant. See §656.21(j)(1). An employer which wants to consider an applicant seriously would not abandon all efforts on the basis of a telephone conversation with the applicant's spouse. Such an approach is particularly unreasonable where the employer is seeking an alien labor certification, and has the burden to demonstrate that it attempted in good faith to employ a U.S. worker. The Employer's asserted attempts here, even if true, fail to satisfy that burden. This is underscored by

Mr. Shuffield's questionnaire answer that he does not know if he would have accepted the job had the Employer offered it to him during the recruitment period (September-October 1986) (AF 12).

Finally, we find that even if Mr. Shuffield did not respond to the Employer's April 1987 letter because he was no longer interested in the job¹, this would not cure the Employer's failure to take reasonable steps to ascertain if Mr. Shuffield was interested in the job some six months earlier, during the September-October 1986 recruitment period. Otherwise, an employer could succeed in its application for alien labor certification by the artifice of improperly rejecting a qualified U.S. worker, and then waiting for several months, until after the Notice of Findings, to "cure" the defect by ascertaining that the U.S. worker is no longer available. Arcadia Enterprises, Inc., 87-INA-692 (Feb. 29, 1988).

The evidence shows that Mr. Shuffield was a potentially able, willing, qualified, and available U.S. worker, but that the Employer has not demonstrated a good faith, timely effort to consider and hire a qualified U.S. worker solely for lawful, job-related reasons, pursuant to §656.21(b)(7), and therefore, we uphold the C.O.'s decision to deny certification.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/JF/gaf

Jeffrey Tureck, Administrative Law Judge, joined by Chief
Judge Nahum Litt and Judge Nicodemo DeGregorio,
dissenting:

We dissent from the majority's decision affirming the denial of certification.

The majority is upholding a determination by the Certifying Officer in which the evaluation of the evidence is flawed. First, we turn to the CO's application of the following "rule":

when an employer's response differs from an applicant's response, the weight of evidence is generally afforded the applicant. [(AF 11)].

¹ Employer has failed even to show this fact. The receipt for its April 1987 certified letter to Mr. Shuffield was signed by one "Harold S. Jones" (AF 8). As the C.O. noted, there is no evidence that Mr. Shuffield received this letter (AF 3).

The majority agrees that this standard of evidentiary review is improper; but it dismisses the CO's error in utilizing it as "harmless." We cannot agree. Rather, it appears from his analysis of the evidence both in the NOF and the Final Determination that the CO applied this standard, to Employer's detriment. In this regard, this case is clearly distinguishable from Screen Actors Guild, Inc., 87-INA-626 (Mar. 9, 1988). The evidence in that case supported the CO's finding that a U.S. worker was qualified for the job. In contrast, in this case the only basis given by the CO in the NOF for finding the Employer's position "unconvincing" was his application of the above - quoted "rule"D" (see AF 11); and the Final Determination, although somewhat broader in scope, also rests on the findings in the NOF. Thus, the CO's error in applying an improper evidentiary standard cannot be held to be harmless -- it was crucial to his decision.

Due to the prejudice to Employer engendered by the CO's misapplication of this standard of evidentiary analysis, the CO's determination should have been vacated even if the rest of his findings had been free of error.

Second, in response to the employer's statement that Mrs. Shuffield (the applicant's wife) informed it that her husband was no longer interested in the job, the CO found that:

It is highly unlikely that Mr. Shuffield's wife would have volunteered the information which the employer claims she stated.

(AF 3). This finding by the CO, who had never met Mr. or Mrs. Shuffield and whose total contact with them consists of Mr. Shuffield's brief answers to a questionnaire, is speculative. It cannot form the basis of a credibility determination by the CO.

Third, the CO further discredited Employer's statement of its conversation with Mrs. Shuffield by finding it inconsistent with Mr. Shuffield's response to a DOL questionnaire to the effect the he was never contacted by Employer for an interview. Since Employer never alleged that it contacted Mr. Shuffield for any purpose, it is hard to understand how Mr. Shuffield's response in any way impeaches Employer's statement. It is unclear why a questionnaire was not sent to Mrs. Shuffield rather than to Mr. Shuffield; or why the applicant was not asked whether Employer spoke to his wife. The Employer reported its phone call with Mrs. Shuffield four months before the issuance of the Notice of Findings, thus affording DOL ample time to confirm Employer's statement if confirmation was believed to be required.

Thus, the CO's determination was based on an impermissible standard of evidentiary review compounded by speculation and irrelevance. By affirming the denial of certification, the majority is condoning this defective reasoning.

Not only has the majority failed to reverse a CO's determination which is in error, but it affirmed the CO on an alternate ground that he never addressed, *i.e.*, that assuming the Employer's version of the events actually was correct, it was nonetheless insufficient to establish the applicant's unavailability. Since Employer has not been afforded the opportunity to respond to this conclusion, the Board should not deny certification on this basis. See Downey Orthopedic Medical Group, 87-INA-674 (Mar. 14, 1988) (*en banc*).

In summary, Employer stated that, in attempting to contact the applicant, who was out working, it spoke instead to the applicant's wife and was informed he was no longer interested in the job. There is no reason, based on this record, to doubt the accuracy of this statement. Since the Certifying Officer denied certification solely on the unsupported basis that he did not believe Employer's statement, his denial of certification should be reversed, and certification granted.

JEFFREY TURECK
Administrative Law Judge