



DATE: April 6, 1989
CASE NO. 88-INA-56

IN THE MATTER OF

J. MICHAEL & PATRICIA SOLAR,
Employers

on behalf of

SANTOS ELIODORA ALVARADO,
Alien

Adan G. Vega, Esq.
Houston, TX

For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge;
and Brenner, Tureck, Guill, Schoenfeld and Williams
Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This application was submitted by the Employers 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) (hereinafter "the Act"). The Employers requested review from U.S. Department of Labor Certifying Officer Benjamin Bustos' denial of a labor certification application pursuant to 20 C.F.R. §656.26.¹

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 a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States

¹ All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations 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 a 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 ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case

On September 2, 1986, Employers J. Michael and Patricia Solar of Houston, Texas, filed an application for Alien employment certification on behalf of the Alien, Santos Eliodra Alvarado, for the position of Live-in Domestic. The qualifications for the position, as set forth in Form ETA 750-A, included 3 months experience as a Domestic. Other special requirements were listed as Saturday hours from 10:00 am to 7:00 pm.

Following the issuance of a Notice of Findings ("NOF") by the Certifying Officer ("CO") on May 22, 1987 (AF 13), and the filing of a rebuttal by Employers on June 30, 1987 (AF 9-11), the CO issued his Final Determination on September 14, 1987 denying certification. The denial was based upon a finding that the Employers did not respond to the NOF in a timely and complete manner and thus, having failed to exhaust available administrative remedies, the NOF became the final decision of the Secretary denying the labor certification (AF 6-7).

The record in this case reflects that a NOF was issued on May 22, 1987 in which the CO determined that the Alien and Employers had failed to meet the requirements of sections 656.21(a)(3)(ii) and 656.21(a)(3)(iii)(A) and (B) of the regulations. These subsections concern specific documentation required in the labor certification of a live-in household domestic service worker. Specific corrective action was prescribed:

Employer must furnish two copies of contract signed by both parties, not xeroxed copy. Alien must submit to this office documentation of paid experience (other than present employer) and verified by statements of prior employer(s) as to starting and ending dates of employment, hours worked per day, number of days worked, place, detailed statement of duties, wages paid per week or month.

In its rebuttal, dated June 30, 1987, Employers submitted a letter of experience from one of the Alien's previous employers.²

A Final Determination denying labor certification was issued on September 14, 1987. In his denial, the CO noted that Employers failed to submit two original signed employment contracts (not a xeroxed copy) as required by his NOF, and rejected the prior employer's statement verifying paid experience, citing 20 CFR 656.20(e) which requires any document submitted to a Federal agency in a language other than English be accompanied by a written translation. In addition, the CO determined:

The employer was given a date of June 29, 1987 in order to submit rebuttal evidence or cure the defects. The employer's letter of transmittal (dated June 30, 1987) and enclosed untranslated paid experience letter were transmitted postmarked June 30, 1987.

The CO concluded that Employers did not respond to the NOF in a timely and complete manner and, having failed to exhaust available administrative remedies, the NOF became the final decision of the Secretary denying the labor certification.

Employers filed an appeal on September 24, 1987 (AF 4). Their request for review was based upon three factors: 1) the CO's rejection of copies of the signed employment contract; 2) his rejection of the letter of experience which was submitted in the Spanish language; and 3) the timeliness of the submission of its rebuttal documentation. Employers advised that

[t]he original contracts were presented to the Texas Employment Commission in Austin subsequent to the submission of the Application for Alien Employment Certification. Mr. Bustos was provided with copies which he has rejected. The original employment contracts are unavailable and only copies can be made available to Mr. Bustos.

Employers stated that in the case of the letter of experience, they submitted the original which was rejected in that it was in the Spanish language. Employers contend that if the CO found it to be inadequate he should have requested a translation or issued a second Notice of Findings. Employers maintain that the rebuttal materials were submitted at the earliest possible time in light of the fact that they had to be acquired from Honduras. Employer asserts that the CO's denial is "unreasonable and capricious", and requests review.

Discussion

Section 656.25 of the regulations requires the CO to issue a NOF following the making of a denial determination in a labor certification application. Subsection (c)(3) dictates that the CO specify a date, 35 calendar days from the date of the NOF, by which rebuttal evidence must be submitted. In his Final Determination, the CO determined that because Employers did not

² The letter submitted is written in Spanish.

respond to the NOF in a timely and complete manner, pursuant to §656.25(c)(3), the NOF became the final decision of the Secretary denying labor certification. A review of the record, however, reveals that the NOF does not list a date by which the rebuttal must be filed (see AF 13). Therefore, the rebuttal cannot be found to be untimely.

With respect to the CO's finding that xeroxed copies of the employment contract are insufficient, Employers state that the original contracts are unavailable as they were submitted to the State Employment Commission (AF 4), and this explanation is reasonable.³

The CO also denied labor certification on the basis that the Alien's letter of experience was submitted in the Spanish language. Spanish is not so unusual a language, particularly in Texas, that it would pose a problem for the CO to have obtained a translation. Regardless, if the CO could not or chose not to have the letter translated, he should have issued another NOF asking for a translation. Denials of labor certification on purely technical grounds are not encouraged by the Board.

Nonetheless, we cannot grant certification, and must remand this case in order to afford the CO the opportunity to request a translation of the letter of experience and thus determine whether it comports with the requirements of §656.21(a) (3)(iii). On remand, the CO should give Employers the opportunity to submit a translation of the former employer's letter, at which point the CO can determine if it is sufficient to meet the requirements of the regulations.

ORDER

The Certifying Officer's denial of certification is vacated, and the case is remanded for further proceedings consistent with this decision.

JEFFREY TURECK
Administrative Law Judge

JT/jb

³ If the CO was concerned about the authenticity of the employment contract, he could easily have checked with the State Employment Commission.