



Date: October 30, 1992

Case No.: 90-INA-479

In the Matter of:

BRONX MEDICAL AND DENTAL CLINIC

Employer

on behalf of

NAZRUL ISLAM

Alien

Appearances: Neil A. Weinrib, Esq.
For the Employer

Vincent C. Constantino, Esq.
For the Certifying Officer

Before: Brenner, Clarke, De Gregorio, Glennon,
Groner, Guill, Litt, Romano, and Williams
Administrative Law Judges

NICODEMO DE GREGORIO
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. § 656.26 (1991) 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) (1990) ("Act").

Under section 212(a)(14) of the Act, as amended, 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, 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.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 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 ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

I

Statement of the Case

In March of 1988, Bronx Medical and Dental Clinic (Employer) filed an application for alien employment certification, to enable Nazrul Islam (Alien) to fill the position of Controller. The duties of the job were described as follows:

Analyze and examine accounting records. Prepare balance sheets and profit and loss statements. Provide financial and tax counseling. Perform corporate and financial planning. (AF 14).

Employer stated on the application that the minimum education, training, and experience necessary to perform satisfactorily the duties of the job are a Master's degree in Business Administration and five years of experience in the job offered or as an accountant. (AF 14).

As required by the regulation, Employer advertised the position in order to recruit U.S. workers. Six workers applied for the job, and all were rejected. Two of the applicants, Adam Rosenfeld and Abdul W. Haqiqi were found to be unqualified for lacking the required M.B.A. degree (AF 46-47). After issuing a Notice of Findings (NOF) and considering Employer's rebuttal, the Certifying Officer (CO) held that pursuant to section 656.24(b)(2)(ii) applicants Rosenfeld and Haqiqi were both qualified for the position, even without the M.B.A. degree. Accordingly, the CO concluded that Employer had not documented that the two applicants had been rejected for job-related reasons, in violation of § 656.21(b)(7). (AF 61-62).

Employer sought review of the CO's Final Determination. We reverse.

II

Basic Labor Certification Process

An employer who desires a labor certification on behalf of an alien must file an Application for Alien Employment Certification form with an appropriate State Job Service office. The application must set forth, *inter alia*, a description of the job offer, as well as a statement of the requirements for the job. 20 C.F.R. 656.21(a)(2). The job requirements may not be unduly restrictive. They must be those normally required for the job in the United States and/or defined in the Dictionary of Occupational Titles, and must not include requirements for a foreign language. § 656.21(b)(2). A job requirement that goes above these limits must be shown to arise from business necessity. *Ibid*. In addition, the job requirements must be the employer's actual minimum requirements, and the employer must document that he has not hired workers with less training or experience for similar jobs, or that it is no longer feasible to hire workers with less training or experience. § 656.21(b)(6).

If the Job Service office finds the application acceptable, it calculates the prevailing wage for the job opportunity and attempts, in cooperation with the employer, to recruit U.S. workers. While the office places a job order into the Job Service recruitment system, the employer advertises the job in a medium most likely to bring responses from able, willing, qualified and available workers. § 656.21(e)-(g). The employer must provide to the local office a written report of the results of the employer's recruitment efforts. In particular, the employer must provide lawful, job-related reasons for not hiring any U.S. worker who was interviewed or simply applied for the job. §§ 656.21(b)(7), (j)(1)(iv). If the recruitment has been unsuccessful, the local office sends the application to a Certifying Officer of the United States Department of Labor.

III

Labor Certification Determinations

The authority to make labor certifications is delegated to Certifying Officers (CO). Section 656.24(b) provides that a CO shall make a determination either to grant labor certification or to propose to deny it on one of three bases: (1) whether the employer has met the requirements of the regulation; (2) whether there is in the United States a worker who is able, willing, qualified and available for the job; and (3) whether the employment of the alien would have an adverse effect upon the wages and working conditions of U.S. workers similarly employed. In determining whether a U.S. worker is qualified, the CO "shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in a normally accepted manner" the duties of the job. § 656.24(b)(2)(ii).

IV

Facts of the Case

After completing its part of the recruitment process, Employer filed its recruitment report. Employer had rejected two U.S. applicants, Adam Rosenfeld and Abdul W. Haqiqi, as unqualified for the job, in that neither had the M.B.A. degree required by Employer. The CO did not dispute the report, nor did she challenge the degree requirement as restrictive or otherwise inconsistent with the regulation. Nonetheless, the CO issued a Notice of Findings (NOF), alleging a violation of section 656.21(b)(7) because Employer had failed to document job-related reasons for rejecting Rosenfeld and Haqiqi. Disregarding the degree requirement and citing section 656.24(b)(2), the CO stated that the "Department of Labor standard for proficiency in the occupation of Controller is four to ten years combined training, education and/or experience," and that applicants possessing education, training and/or experience "equivalent to the employer's requirements and/or to the DOT standard" were considered qualified for the job. (AF 52). The CO then requested Employer to further document job-related reasons for the rejection of the applicants.

Employer sought to rebut the CO's findings, contending that the U.S. applicants had been rejected for lawful, job-related reasons. Moreover, Employer sought to contact Rosenfeld and Haqiqi, inviting them to an interview, but they did not respond.

In her Final Determination, the CO adhered to her view that Employer had failed to give lawful, job-related reasons for rejecting the two workers, in violation of section 656.21(b)(7). The CO dismissed the apparent unavailability of the two workers after the issuance of the NOF as irrelevant, noting that she had "only required that Employer submit documentation showing that the applicants were not qualified, willing and available at the time of initial consideration and referral." (AF 61).

V

Discussion

A.

The Board has decided to consider en banc the following issue:

Whether 20 C.F.R. § 656.24(b)(2)(ii) provides a separate standard for judging the lawfulness of an employer's rejection of a U.S. applicant, where the minimum job requirements specified in Items 14 and 15 of Form ETA-750 are not found to be unduly restrictive pursuant to 20 C.F.R. § 656.21(b), and where it is not found that any U.S. job applicant possesses those minimum job requirements.

In order to appreciate the problem, it is necessary to consider the time sequence in which it arises. An employer applying for a labor certification is required to advertise the job, in an attempt to recruit U.S. workers. Only if the recruitment efforts prove fruitless is the application transmitted to a Certifying Officer for his/her decision to grant or deny labor certification. Thus,

section 656.21 of the regulation may be said to impose on the applicant-employer a burden of production, to make a prima facie case that there are not U.S. workers who are able, willing and qualified for the job. See Production Tool Corp. v. Employment and Training Admin., 688 F.2d 1161, 1170 (7th Cir.1982).

The CO's position presupposes the view that section 656.24(b)(2)(ii) applies to an employer at the recruitment stage of the labor certification process. But this view is untenable. Section 656.24(b)(2) speaks only to Certifying Officers, and requires nothing from an employer. Moreover, this section, unlike section 656.21(b)(2) which specifies the qualifications that an employer may require for a job opportunity, does not set forth job qualifications that an employer could apply even if he wanted to do so. Section 656.24(b)(2)(ii) directs a Certifying Officer to form a judgment concerning a worker's qualification for the job, on the basis of education, training and experience. Until such a judgment is formed, there is nothing to apply. Thus, the practical result of the CO's approach is to require an employer, in order to comply with section 656.21(b)(7), to judge job applicants on the basis of all possible combinations of education, training, and/or experience that a CO might consider qualifying if and when the case requires his action. In this case, for instance, the CO considered Rosenfeld and Haqiqi both qualified for the same job, on the basis of different academic degrees and work experience, and then dismissed as immaterial Employer's efforts to re-evaluate the two applicants on the basis of the CO's notions of alternative qualifications. We do not believe that section 656.21(b)(7) requires foreknowledge.

In conclusion, section 656.21(g)(6) expressly requires an employer to state "the employer's minimum job requirements" in the job advertisements, and thus implicitly authorizes the employer to judge the qualifications of job applicants by those requirements. Therefore, the question whether the employer has rejected an applicant for a lawful, job-related reason must be determined on the basis of those job requirements.¹ We find no warrant, in law or good sense,

¹ We may point out that Technical Assistance Guide No. 656, which provides supplementary information for explaining and applying the regulations at 20 C.F.R. Part 656, is in full accord with this view.

"f. Rejection of U.S. Workers. U.S. workers may not be rejected for a job opportunity offered to an alien except for lawful job-related reasons. The employer must state specific reasons for rejecting each U.S. worker who applies in response to advertising the posted notice, the job order, or other sources of recruitment. Resumes of applicants, if available, should be submitted with the application for certification to support the employer's statement.

The employer should screen applicants against the stated requirements in the job offer and should not impose additional requirements during interviews with U.S. workers. U.S. workers must make it known during interview or on their resumes that they meet the employer's stated requirements to be considered qualified for the job. It is not acceptable for an employer to reject U.S. workers who may be

(continued...)

for a CO substituting, after the fact, his/her own judgment for the employer's job requirements, and then penalizing the employer for having acted without regard to that judgment.

We leave for another day the question of how far a CO may go, pursuant to section 656.24(b)(2) and consistently with procedural fairness, in disregarding job requirements allowed by section 656.21(b) and substituting his/her own judgment as to what it takes to do a job in a normally accepted manner. Today we only reaffirm what we stated in Concurrent Computer Corp., 88-INA-76 (Aug. 19, 1988) (en banc) and Adry-Mart, Inc., 88-INA-243 (Feb. 1, 1989) (en banc). We hold that, so long as an employer's job requirements are within the limits prescribed by section 656.21(b), the rejection of a U.S. worker who does not meet all those requirements is a rejection for a lawful, job-related reason, within the meaning of section 656.21(b)(7).²

B.

Three concurring colleagues are concerned that the effect of our interpretation of section 656.21(b)(7) would be either to read section 656.24(b)(2)(ii) out of the regulations or to use it only in one direction. In view of the fact that we explicitly reserve consideration of section 656.24(b)(2)(ii), the alarm is premature, to say the least. Moreover, our colleagues' solution of the problem, by shifting the burden of proof, misses the point. The question is not who should carry the burden of proof, but what does an employer have to prove in order to demonstrate compliance with section 656.21(b)(7). On a section 656.21(b)(7) issue, the burden of proof, in both senses of this term, should be just where the regulation puts it, on the employer who can best document his own reasons for rejecting job applicants. The question, rather, is whether a CO may, after the recruitment process is closed, substitute his/her job qualifications for those which the employer is permitted to require, and required to advertise, by section 656.21, and then second guess the employer's hiring decisions.

Our concurring colleagues also suggest that this case is no different from one in which a CO finds that the employer has unlawfully rejected an applicant who met the stated requirements. We see the instant case as quite different, in that the CO has switched the standard to be used in screening out the applicants. This difference is reflected in BALCA decisions. Where a CO raises an issue of unduly restrictive requirements, the normal practice is to give the employer a choice to rebut the NOF or to delete the restrictive requirements and retest the labor market, despite the fact that every employer has advance notice of which requirements are restrictive, from a reading of section 656.21(b)(2). See, for instance, Babtech Enterprise CO, 91-INA-228 (Oct. 5, 1992). In fact, panels of the Board have gone farther. In A. Smile, Inc., 89-INA-1 (Mar. 6, 1990) a panel held that if an employer attempts to justify a requirement

¹(...continued)

"over qualified," but are willing to accept the job at the wage and conditions offered." TAG No. 656, at 53.

² Of course, a Certifying Officer may challenge an employer's requirements for a job as restrictive under § 656.21(b), and allow the employer an opportunity to rebut the finding or cure the defect.

deemed unduly restrictive by the CO, and also expresses the willingness to delete the requirement and readvertise if the CO is not persuaded by the justification, the CO may not deny certification but must offer the employer the opportunity to readvertise. See also Mr. & Mrs. Herbert G. Peabody, 90-INA-230 (April 30, 1991). In contrast, a violation of section 656.21(b)(7), which is the ground of denial in this case, implies culpability, and for this reason the wrongdoer is not given a chance to retest the labor market, which is what happened in this case. See Arcadia Enterprises, Inc., 87-INA-692 (Feb. 29, 1988). By changing the standard for judging the qualifications of job applicants after the recruitment process and by denying Employer an opportunity to retest the job market, the CO in effect denied Employer the opportunity to "cure the defects" in violation of section 656.25(c)(3).

C.

The CO has advanced, for the first time on appeal, an alternative basis for the denial of certification in this case. The CO cites cases imposing a duty to make further inquiry where an applicant's resume raises a reasonable prospect that the applicant meets all of the employer's stated actual requirements. We think it sufficient to say that reliance on such cases is misplaced, in view of the fact that the CO has conceded that Rosenfeld and Haqiqi did not meet the M.B.A. degree requirement. Moreover, when "an applicant's resume is silent on whether he or she meets a 'major' requirement such as a college degree, an employer might reasonably assume that the applicant does not and, therefore, rejection without follow up may be proper." Gorchev & Gorchev Graphic Design, 89-INA-118 at 2 (Nov. 29, 1990) (en banc).

ORDER

The Final Determination of the Certifying Officer denying labor certification is **REVERSED**. The Certifying Officer is directed to **Grant** labor certification.

For the Board:

NICODEMO DE GREGORIO
Administrative Law Judge

NDG/sjn

Bronx Medical and Dental Clinic, 90-INA-479

Judge Lawrence Brenner, joined by Judges Groner and Guill, concurring in the result

We disagree with Judge De Gregorio's four-judge plurality holding that a U.S. worker is unqualified, and therefore properly rejected by an employer, simply because the U.S. applicant does not meet the employer's job requirements, if the requirements are not found to be unduly restrictive. By using this as the sole standard, the plurality fails to recognize the applicability of section 656.24(b)(2)(ii).¹ As stated in Judge Brenner's dissent in Adry-Mart, Inc., 88-INA-243 (Feb. 1, 1989) (en banc), we believe that the plurality's holding should be applied as a general rule, but not as the end of the analysis.

In recognition of the general rule, section 656.24(b)(2)(ii) cannot provide a basis for the Certifying Officer ("CO") simply to dismiss an employer's job requirements without determining that the requirements are unduly restrictive. Consistent with several BALCA panel decisions, we would recognize both the general rule and the applicability of section 656.24(b)(2)(ii) by putting the burden on the CO to show how a U.S. applicant's qualifications ("... education, training, experience, or a combination thereof, ...") specifically compensate for the failure to meet the stated requirements and therefore enable the applicant to perform the employer's job. See, e.g., External Resources International, Inc., 90-INA-32 (Apr. 19, 1991); Houston Music Institute, Inc., 90-INA-450 (Feb. 21, 1991); Shakti Engineering & Design Group, 89-INA-347 (Nov. 2, 1990).

The plurality is concerned that if a CO is permitted to use section 656.24(b)(2)(ii) at the time of recruitment, an employer would be in the dark about how to judge the qualifications of job applicants because there are a myriad of possible combinations of education, training and experience which a CO might later consider qualifying. In part, the plurality's problem is that an employer's first notification of a defect from the CO is by the Notice of Findings ("NOF"), issued after the recruitment process. But this is almost always the case in the labor certification process; e.g., a CO's finding that a U.S. worker who met the stated requirements was unlawfully rejected is contained in the same NOF issued after the recruitment process. There is no way, of course, for a CO to earlier make a finding under section 656.24(b)(2)(ii), since it must be applied to a specific applicant.

¹ 20 C.F.R. § 656.24(b)(2)(ii) provides that:

The Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed ...

When the plurality decision is combined with Judge Romano's separate concurrence, a five-judge majority of this Board would not permit the CO to apply this section in the circumstances of this case.

To the extent the plurality believes that the application of section 656.24(b)(2)(ii) would be unfair to an employer because the criteria for judging an applicant qualified under this section are vague, we disagree. As applied to a specific applicant, it is reasonable to expect an employer who is open-minded about who to hire to evaluate the education, training and experience of an applicant to decide if he or she can properly do the job. Moreover, because the burden would be on the CO to specifically show why an applicant who fails to meet the employer's unchallenged requirements compensates for this failure and therefore is nevertheless qualified to do the job, any vagueness will benefit the employer. When such a judgment by a CO is upheld by the Board, the applicant's ability to perform the job would have been quite clear to an employer at the time it evaluated the applicant during the recruitment process.

We have considered whether it would be good policy to allow an employer to conduct a new recruitment, and thereby allow an alien to retain the visa priority date, after a CO has determined that the employer rejected an applicant who is qualified to do the job under section 656.24(b)(2)(ii), where the qualified rejected applicant has become unavailable subsequent to the recruitment period. On balance, we are inclined to the view that although such a second bite of the apple would provide an ultimate safeguard for an employer which truly did not appreciate that the rejected worker was qualified even though he or she did not meet the stated requirements, such an outlet would provide an incentive for employers to reject qualified applicants in the hope that those applicants would become unavailable and that no new ones would apply. We do not permit an employer to try again as part of the same application where it has rejected an applicant who met its requirements. If our rulings in this regard should be changed, in light of our views in the previous two paragraphs such rulings should be the same for all of these situations. Thus, the inability of an employer to later cure the wrongful rejection of a U.S. worker under section 656.24(b)(2)(ii) is not unique to this regulation, and cannot serve as a basis to ignore the applicability of this section to the case before us. If we ever change the rule for all such situations, we would need to decide at which stage in the process an employer should be permitted to conduct a new recruitment after rejecting a qualified U.S. worker: after the NOF, after the Final Determination, after a decision by a panel of this Board, as late as a further appeal?

The effect of the plurality's decision would be either to read section 656.24(b)(2)(ii) out of the regulations, or to use it only in one direction. If the latter, we believe it is unfair to U.S. workers to allow an employer to use section 656.24(b)(2)(ii) to reject a U.S. worker who meets its requirements because the worker nevertheless cannot perform the job (a principle we agree with where all reasonable requirements were stated) while not allowing the symmetrical use of this section by a CO to show that a U.S. worker who does not meet the requirements is nevertheless qualified to perform the job. See Ashbrook-Simon-Hartley v. McLaughlin, 863 F.2d 410 (5th Cir.1989); Houston Music Institute, Inc., supra.; See also Quality Inn, 89-INA-273 (May 23, 1990). Contra Chatwal Hotels and Restaurants, Inc., 88-INA-68, slip. op. at 4n.4 (Feb. 20, 1990) (Panel states Ashbrook principle valid only in favor of an employer allowed to invoke section 656.24(b)(2)(ii) to reject a U.S. applicant who meets the requirements but cannot do the job).

Notwithstanding our disagreement with the plurality's view of the applicable law, we concur in the result. The CO's NOF simplistically concludes that the two rejected U.S. applicants in question are qualified because each of them has a combination of education, training and experience which falls within the broad range of the four to ten year standard for proficiency in the job set forth in the Dictionary of Occupational Titles (AF 25). This does not show why the qualifications of the applicants specifically compensate for the lack of the unchallenged MBA requirement.

The CO's brief on appeal contains a more thorough analysis of the experience and education of the two U.S. applicants. The brief also asserts (at 19) that the foreign master's degree earned by the Alien is the equivalent of a Master's in Accounting, not an MBA. Presumably, this would be inconsistent with the Employer's requirement of an MBA and its distinction between an MBA and U.S. applicant Haqiqi's Master's degree in economics and finance, and also not fully consistent with its argument on why U.S. applicant Rosenfeld's 18 credits towards an MBA are insufficient. The CO's brief comes too late. Her showing under section 656.24(b)(2)(ii) must be disclosed while the case is before her so the Employer can react and respond. Moreover, the CO cannot for the first time on appeal argue that the Alien himself does not possess the stated requirements. If the CO had included this alleged violation of the prohibition against giving the Alien preferential treatment over U.S. applicants as a proposed finding in her NOF, see 20 C.F.R. § 656.21(b)(6), the Employer would have had an opportunity to address it in its rebuttal.

LAWRENCE BRENNER
Administrative Law Judge

Bronx Medical and Dental Clinic - 90-INA-479

J. Romano, concurring separately.

I agree with the result reached in this case, but unlike my colleagues, would not "leave for another day" our setting of the appropriate outer reach of Section 656.24(b)(2)(ii). There presently exists much too much inconsistency and disparity in this Board's treatment of the proper use of this section by C.O.s. See e.g. Adry-Mart, Inc., 88-INA-243 (en banc, February 1, 1989); Chatwal Hotels and Restaurants, Inc., 88-INA-68 (February 20, 1990); Houston Music Institute, Inc., 90-INA-450 (February 21, 1991); Shakti Engineering & Design Group, 89-INA-347 (November 2, 1990); Fritz Garage, 88-INA-98 (en banc, August 17, 1988); External Resources International, 90-INA-32 (April 19, 1991). It is time we put an end to such, in fairness to that section of the public and bar interested in the invocation of this regulation.

I would squarely hold that §656.24(b)(2)(ii) does not provide a separate standard for judging the lawfulness of an employer's rejection of a U.S. applicant who does not meet all non-experience requirements which are found appropriately demanded within the context of §656.21(b)(2). Rather, in such cases in which no experience is required by the employer in the

job offered or in a related occupation, a rejected applicant who does not meet those requirements cannot be determined by the certifying officer as otherwise qualified under §656.24(b)(2)(ii). Such rejection is lawful, and the certifying officer's determination that the applicant, is, nevertheless, qualified for the job by reason of his ability to perform the job under §656.24(b)(2)(ii) may not be invoked to deny certification.

Moreover, where a certifying officer concedes that an applicant lacks experience in the job offered, or in a related occupation (and such experience is required and unchallenged), any assertion that 656.24(b)(2)(ii) qualifies the applicant for the job, is misplaced and without merit. A C.O. may challenge under 656.21(b)(2) any experience requirement, but may not, after the recruitment process, invoke 656.24(b)(2)(ii) as a means to qualify the applicant by substituting, for example, a certain educational achievement, for the required experience.

Section 656.24(b)(2)(ii) is properly invocable, in my view, only where the work experience required is acknowledged, but the question whether such particular experience renders the U.S. applicant "able" to perform the offered position's job duties in a "normally accepted manner, is raised.

In the Matter of Bronx Medical and Dental Clinic, 90-INA-479, Judge David A. Clarke, Jr., dissenting:

I do not agree with the decisions of my colleagues to reverse the denial of labor certification.

Judge De Gregorio, joined by Judges Litt, Williams and Glennon, views it as untenable that 20 CFR §656.24(b)(2)(ii) should be applied to the employer at the recruitment stage of the labor certification process.¹ However, since it was the employer who conducted the recruitment procedure, it was incumbent on the employer to evaluate each U.S. applicant on the basis of the applicant's experience, education and training to determine if he or she could perform the job in a normally accepted manner. This Board has held that where a U.S. applicant's resume shows such a broad range of experience, education and training that it raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. Gorchev v. Gorchev Graphic Design, 89-INA-118 (Nov. 29, 1990) (en banc)

¹ Section 656.24(b)(2)(ii) provides, in relevant part:

The Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed.

Therefore, when the employer rejected apparently qualified applicants, the employer must provide convincing justification to support the rejections.

In addition, the plurality would limit the CO's authority to challenge certification on the basis of a violation of section 656.21(b)(7) specified in the Notice of Findings (NOF) until after the CO challenged the job requirements as restrictive or otherwise inconsistent with the Act and regulations or challenged the employer's recruitment report.²

In this case, the CO notified employer in the NOF, which is normally the CO's first notification to employer of certification problems, that employer had failed to document job related reasons for rejecting three of the job applicants.³ I do not know how the CO could have notified employer of other so called preliminary certification problems before issuing the NOF. Perhaps the plurality are suggesting that a special communication should have issued from the CO to the employer before issuance of the NOF or that the violation of section 656.21(b)(7) cannot be first on a list of certification problems identified in the NOF.

The CO in this case did not challenge the Masters of Business Administration degree requirement because it appeared to be reasonable. However, when it was learned that there were U.S. workers with Bachelors and/or Masters degrees and training and experience who appeared to be able to perform the duties of the offered job in a normal manner, the CO acted properly in denying certification of the alien on the basis of a violation of section 656.21(b)(7).

The majority are reversing the denial of labor certification on the basis of a perceived procedural error by the CO which they view as unfair to the employer. However, in so doing, they are penalizing U.S. workers, the very people the Act was intended to protect.

U.S. workers should not suffer loss of employment to aliens because of CO error, real or perceived. My colleagues are balancing equities in favor of the employer and alien and this is contrary to the stated intent of the Act. Section 212(a)(14) of the Act was enacted to exclude aliens competing for jobs American workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." Cheung v. District Director, INS, 641 F2d 666, 669 (9th Cir.1981); Wang v. INS, 602 F2d 211, 213 (9th Cir.1979) To achieve this Congressional purpose, the regulations set forth a number of provisions intended to give statutory preference to U.S. workers, not aliens.

² Section 656.21(b)(7) states that:

If U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful job-related reasons.

³ The CO subsequently determined in the Final Determination that two of the applicants met DOL standards for education, training and/or experience and were qualified for the job.

Alien labor certification is a very serious matter and each case should be decided on its merits, in accordance with the Act and regulations. In no case should an alien be granted permanent work status in this country on the basis of a procedural error in the certification process.

Judge Brenner, joined by Judges Guill and Groner, also disagree with the reasoning of the plurality, but concur with the result. They base their concurrence on a determination that the CO failed to adequately explain in the NOF " why the qualifications of the applicants specifically compensate for the lack of the unchallenged MBA requirement." (p. 3) In so doing, they have shifted the burden of proof to the CO; which has the effect of improperly shifting the burden of proof to U.S. workers. This was never intended by Congress and my colleagues have erred by shifting the burden to the CO. See: U.S.Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.Code Cong. & Ad.News 3333-3334. The NOF contained correct legal citations and provided clear and understandable reasons for the proposed denial of certification. It appears adequate in every respect and the burden was on the Employer to rebut those reasons.

Moreover, Judges Brenner, Groner and Guill did not make a determination that the rejected applicants are not qualified for the job. In fact, they cite facts which suggest that they are qualified and that the Alien may not be qualified; a further indication that the denial of certification should be affirmed.

As to Judge Romano's concurring opinion, I leave its interpretation for the reader to ponder.

For the reasons stated herein, I would affirm the denial of labor certification.

DAVID A. CLARKE, JR.
Administrative Law Judges