U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 June 2004

BALCA Case No.: 2003-INA-207
ETA Case No.: P1998-TX-06283695

In the Matter of:

SHIPLEY'S DONUTS,
Employer,

on behalf of

HUGO PUEBLA-BENITEZ,
Alien.

Appearance: John W. Meyer, Esquire
Houston, Texas
For the Employer and the Alien

Certifying Officer: John W. Bartlett[1]
Dallas, Texas

Before: Burke, Chapman, and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER[2]

This case arose from an application for labor certification[3] on behalf of Hugo

[1] The original Notice of Findings was issued by Certifying Officer Charlene G. Giles. The second Notice of Findings and the Final Determination were issued by Certifying Officer John Bartlett.

[2] Citations to the record of this proceeding will be abbreviated as follows: "AF" refers to the Appeal File.

[3] Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review and any written argument. 20 C.F.R. § 656.27(c).

Puebla-Benitez ("the Alien") filed by Shipley's Donuts ("the Employer") for the position of Baker. The Certifying Officer ("CO") denied the application and this appeal ensued.

STATEMENT OF THE CASE

The Employer filed the application for labor certification on July 14, 1998. (AF 78). The position was listed as full-time Baker. The job required two years of experience in the job offered. (AF 78).

On January 13, 1999, the CO issued a Notice of Findings ("NOF") indicating the intent to deny certification pursuant to 20 C.F.R. §§ 656.21(b)(2), 656.21(b)(2)(i), 656.21(b)(2)(i)(A), 656.21(b)(2)(iv), 656.21(b)(5), and 656.20(c)(8). (AF 45-47). Specifically, the CO advised that the requirements were unduly restrictive, noting that "it is not possible . . . to determine the need for two years experience as a baker." Additionally, the CO concluded that the Employer did not establish the need for a full-time baker or that the job opportunity was "clearly open to any qualified worker." Accordingly, the CO requested that the Employer present documentation that a person holding general knowledge of baking could not perform the duties of the job, as well as recipes for the baked goods to be prepared by the Alien as described in the ETA 750A. Finally, the CO requested inventory records and sales receipts that document the amount of items other than donuts purchased at Shipley's Donuts in the past year.

After the CO granted Employer's request for an extension in which to submit its rebuttal, the Employer presented a letter from its owner, Oravanh Peck, describing the amount of daily materials used to produce its baked goods, along with the 1998 gross sales. (AF 39-40). Ms. Peck's letter also explained the need for a full-time baker, and how an applicant must have the skills to mix, bake, follow recipes, supervise, and coordinate kitchen activity. (AF 40). Additionally, the Employer submitted a letter from the Employer's counsel asserting that the shop's gross annual sales in excess of $300,000 is reason enough to employ a full-time baker. (AF 37). Furthermore, the Employer's counsel insisted that the two year requirement was not unduly restrictive because the

position of Baker, as described in the Dictionary of Occupational Titles ("DOT"), requires a Specific Vocational Preparation ("SVP") of 7, which provides "over 2 years up to and including 4 years" of experience. (AF 37).

On July 31, 1999, the CO issued a second NOF ("SNOF"). Again, the CO indicated his intent to deny the Employer's application. (AF 32-34). The CO again cited to the same regulations upon which he based his earlier determination. Specifically, the CO indicated that the Employer failed to provide the requested sales receipts for the past year, as well as the requested recipes. Accordingly, the CO advised the Employer to provide sales receipts of the past year in order to document the amount of pastry items purchased, along with recipes for croissants, kolaches, muffins, cupcakes, cinnamon rolls, and apple fritters. Additionally, the CO asked for a menu of the pastry items, other than donuts, which the Employer makes available at its store, along with pictures of the Employer's establishment that show the type of oven and equipment the Alien would be operating.

In the SNOF, the CO also acknowledged an "error" made in the original NOF: "[t]his office made an error when stating that the two years experience was unduly restrictive. According to the DOT a baker – 526.381-010 has an SVP of 7, which equates to 'Over 2 years up to and including 4 years' experience." (AF 34).

In rebuttal, the Employer submitted pictures of its in-store menu board and kitchen, including photos of its oven and mixer. (AF 27). Although it does not provide individual menus to its patrons, the Employer also submitted a print-version of its menu offering "Do-Nuts," "Kolaches," "Assorted" items, "Cake Do-Nuts," and beverages. (AF 26). The Employer's rebuttal also included recipes of its various items describing the ingredients and mixing, baking, and preparatory instructions. (AF 21-25). The Employer also presented monthly net and gross sales reports of 1999. (AF 15-20). In an accompanying letter dated September 2, 1999, the Employer's counsel explained that the Employer, as a small pastry operation, "does not breakdown its sales in the manner requested." Nonetheless, the Employer maintained that the sale of pastries other than

donuts amounts to more than 50% of its overall sales. (AF 13). Counsel reiterated that despite its relatively small size, the Employer is a successful business that uses a significant amount of goods to produce sizable financial figures.

On March 31, 2003, the CO issued a Final Determination ("FD") denying labor certification because the Employer did not meet the requirements of 20 C.F.R. Part 656. (AF 5-7). The CO determined that the Employer remained in violation of the regulations cited in the first NOF dated January 13, 1999. According to the CO, the gross monthly sales documentation supplied by the Employer is "not sufficient to document the amount of items which have been sold." Moreover, the Employer's assertions that over 50% of its sales were from items other than donuts is "insufficient to substantiate that the job requirements arise from an actual business necessity and are not unduly restrictive." (AF 6). The CO also stressed the insufficiency of the Employer's sales figures as rebuttal evidence: "[i]t is not possible for this office to determine what items were actually sold and whether the item [sic] sold were baked or fried."

After a review of the recipes submitted, the CO determined that those recipes do not indicate that a baker with two years experience in the position offered is required in order to prepare them. (AF 7). The CO concluded that the Employer failed to present documentation sufficient to establish the need for a full-time baker with two years of experience in the job offered "or that the two-year experience requirement actually arises from a business necessity."

On May 2, 2003, the Employer requested review of the denial of labor certification and the matter was docketed in this Office on May 27, 2003. (AF 1). The Employer filed its legal brief on June 25, 2003.

DISCUSSION

Upon review of the record in this case, it is evident that the CO failed to make clear in the NOF, the SNOF, and the FD the issues and precise reasons for the denial. It

is the CO's obligation, under the regulations, to state the specific bases upon which the decision to issue the NOFs and the FD was made. *See* 20 C.F.R. §656.25(c)(2); *Flemah, Inc.*, 1988-INA-62 (Feb. 21, 1989)(*en banc*). If the reasons for denial are not made clear to the employer, it cannot rebut with specificity nor can it attempt to cure any deficiency, both of which are crucial to the employer, as all findings in the NOF that are not rebutted are deemed admitted under 20 C.F.R. § 656.25(e)(3). *The Standard Oil Co.*, 1988-INA-77 (Sept. 14, 1988)(*en banc*).

In two NOFs and the FD, the CO cited to the same six regulation provisions as reasons for denial. In the first NOF, the CO determined, *inter alia*, that the Employer failed to document that the job opportunity had been described without unduly restrictive requirements under 20 C.F.R. § 656.21(b)(2). The first NOF was clear that the two year experience requirement listed in the Employer's application was the specific requirement initially deemed unduly restrictive. In the SNOF, the CO, while citing to the same provision as a reason for deficiency, acknowledged an "error" in the previous NOF. The CO stated that the previous CO made a mistake by characterizing the two year experience requirement as unduly restrictive because the Employer's requirement was in fact consistent with the DOT classification of Baker; two to four years is the appropriate SVP for the position of Baker. Nevertheless, in the FD, the CO still cited to 20 C.F.R § 656.21(b)(2), stating that the Employer's "rebuttal evidence is insufficient to substantiate that the job requirements arise from an actual business necessity and are not unduly restrictive." (AF 6).

By acknowledging the error, the CO in effect conveyed to the parties that the Employer had successfully rebutted that particular issue raised in the first NOF. In other words, the Employer was no longer responsible for providing rebuttal evidence to satisfy that provision. Therefore, the CO improperly denied the Employer's application based on 20 C.F.R. § 656.21(b)(2).[4]

[4] It also follows that because the issue of "business necessity" arises only if the requirements are found "unduly restrictive," the CO's denial based on 20 C.F.R. §§ 656.21(b)(2)(i), (b)(2)(i)(A), and (b)(iv) was also inappropriate.

After reviewing the record, it is also evident that the CO was unclear in his denial based on 20 C.F.R. § 656.20(c)(8), thereby depriving the Employer and the Board of adequate understanding of the precise violation being alleged. In addition to identifying the section or subsection allegedly violated, the CO must also describe the nature of the violation, inform the employer of the evidence supporting the challenge, and provide instructions for rebutting and curing the violation. *Miaofu Cao*, 1994-INA-53 (Mar. 14, 1996)(*en banc*). Here, the CO continuously cited to 20 C.F.R. § 656.20(c)(8) as a reason for denial. Meanwhile, neither NOF specifically addressed the deficiency or the necessary rebuttal evidence regarding that subsection. Instead, each CO simply requested documentation of inventory and sales receipts of baked goods, along with recipes for each item sold without a clear explanation of their relevance. The CO's expressed the determinative issues in terms of "unduly restrictive requirements" and "business necessity." However, based on the documentation requested, they presumably were more interested in whether the position of Baker as described in the Employer's application is a *bona fide* job opportunity under 20 C.F.R. § 656.20(c)(8).[5]

The characterization of the determinative issues as "unduly restrictive requirements" and "business necessity" was simply not consistent with the documentation requested or 20 C.F.R. § 656.20(c)(8). While the CO cited to the provision upon which denial was based, 20 C.F.R. § 656.20(c)(8), and requested documentation relevant to that particular provision (e.g. recipes and sales receipts), the CO did not clearly describe the issue in a way consistent with 20 C.F.R. § 656.20(c)(8). The requested documentation was relevant to the issue of "*bona fide* job opportunity," not to the issue of "unduly restrictive requirements" as stated by the CO. Nevertheless, the CO continued to present the issue in terms of "unduly restrictive requirements," "business necessity," and also whether a "person with a general knowledge of baking could conduct the job duties." By citing to 20 C.F.R. § 656.20(c)(8), and simultaneously

[5] Twenty C.F.R. § 656.20(c)(8) requires that the employer offer a *bona fide* job opportunity. *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991)(*en banc*).

filling his reasoning with buzzwords such as "unduly restrictive" and "business necessity," the CO failed to fulfill his obligation to issue a precise and clear NOF and FD.

In *Carlos Uy, III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), the Board stressed the importance of being precise when denying an application under 20 C.F.R. § 656.20(c)(8):

> [a] finding of a violation of section 656.20(c)(8) is especially problematic insofar as it is a highly generalized citation of error. An employer faced with a section 656.20(c)(8) citation is in a difficult position unless the precise reasons for finding that a job is not clearly open to U.S. workers is stated in the NOF. Thus, when the CO invokes section 656.20(c)(8) as grounds for a denial of an application, administrative due process mandates that the CO specify precisely why the application does not appear to state a *bona fide* job opportunity.

Here, the CO did not meet that standard. By failing to precisely identify the issue under 20 C.F.R. § 656.20(c)(8), the CO did not provide the Employer with adequate opportunity to respond to the request and to rebut the challenge to its application. To compound the confusion, the CO littered the FD with references to a previously conceded issue.

Additionally, in both NOFs and in the FD, the CO cited 20 C.F.R. § 656.21(b)(5). However, the CO failed to specifically address the precise deficiency related to that provision and to instruct the Employer how to cure that particular deficiency. Both the NOF and the FD must state with specificity how the employer violated a section or subsection of the regulations. *Flemah, Inc.*, 1988-INA-62 (Feb. 21, 1989)(*en banc*). Not once did the CO address the provision in the reasoning behind the denial. Nor did the CO provide instruction to the Employer on how to cure the specific deficiency. In short, the CO did not complete his obligation by simply citing to 20 C.F.R. § 656.21(b)(5). Therefore, the CO improperly denied the Employer's application for failure to document that its requirements represent its actual minimum requirements under 20 C.F.R. § 656.21(b)(5).

Specific statements of alleged violations in the NOF enable and encourage employers to file clear responses in rebuttal. Similarly, precise statements in an FD are vital for the Board to understand the specific violation being alleged. The interests of administrative due process are, however, ill served where, as here, the CO issues confusing and unclear NOFs and an FD with inconsistencies abound. Therefore, in light of the unclear and confusing nature of the NOFs and FD, we find that an order of remand for clarification is warranted. If the CO again proposes to deny labor certification, he should be specific in regard to his findings, clearly setting forth any basis for denial and thus providing the Employer with a reasonable opportunity to rebut.

ORDER

The Certifying Officer's determination denying labor certification is **VACATED**, and the case is **REMANDED** to the Certifying Officer for actions consistent with this Decision.

For the Panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. 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:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

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 typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.