



DATE: JUL 20 1988
CASE NO. 87-INA-667

IN THE MATTER OF

PHOTOTAKE

Employer

on behalf of

MEIR REUVEN

Alien

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

Nicodemo DeGregorio
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 certifications 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 March of 1985 Phototake (Employer) filed an application for labor certification, to enable Meir Reuven (Alien) to fill the position of Photo Retoucher-Scientific. The duties of the position were described as follows:

Determines color, produces colored prints from negatives and slides of biological and scientific materials. Inspects finest prints, removes defects, retouches colored prints in order to highlight details of biological and scientific materials according to the nature of job using special paints and brushes.

The minimum requirements for the job were (1) four years of college education with a major in agriculture; (2) one year of experience in the job offered to Alien; and/or (3) one year of experience in darkroom and photography (AF 6, 13).

On January 31, 1986, a local office of the New York Department of Labor (Local Office) requested a justification for the requirement of four years of college study in the field of agriculture (AF 14). In response, Employer reduced the education requirement to two years of college studies in agriculture or botany. Employer explained that 95 of its work was close-up micro photography for medical and scientific books and journals, and that in order to reproduce clear and accurate details a retoucher in the darkroom must have a knowledge of basic scientific structures which can be acquired through a study of agriculture or botany (AF 16).

On April 22, 1986 the Local Office raised additional issues, noting that the wage offered by Employer was below the prevailing wage (AF 19). Employer again amended the application by raising the wage offer to the prevailing wage level, and reposted the position for 10 days (AF 21). The job was then advertised in a professional publication, and a job order was placed into the Job Service recruitment system.

On February 13, 1987 the Certifying Officer issued a Notice of Findings, proposing to deny certification on the grounds (1) that any requirement of college education, unless documented as arising from business necessity, was restrictive; and (2) that the job had not been advertised in a publication most likely to bring responses from U.S. workers, such as The New York Times (AF 35-36). On March 4, 1987 Employer responded to the Notice of Findings, explaining the necessity of its college education requirement. With regard to the newspaper advertisement, Employer stated that initially it had advertised the job in the Daily News, but "the local Labor Department" had required it to re-advertise in the Photo District News, a standard photo journal (AF 37).

On June 12, 1987 the Certifying Officer issued another Notice of Findings. In a letter of May 14, 1987 Employer had reported that it had interviewed a U.S. worker, Stergios Prapavessis,

by phone and had been advised that he did not have the necessary darkroom experience in airbrushing and retouching of transparencies. For this reason, Employer continued, Mr. Prapavessis was not qualified for the job (AF 67-68). The Certifying Officer again proposed to deny certification on two grounds: (1) the rejection of Mr. Prapavessis was unlawful under 20 CFR 656.21(b)(7), because airbrushing is not a stated requirement for the job, and because he appeared to be qualified to do retouching; (2) alternatively, Employer was in violation of 20 CFR 656.21(b)(6), in that Alien also lacks experience in airbrushing (AF 80-81). On June 24, 1987 Employer explained that it is common knowledge in its business that "special paints and brushes," as this phrase appears in the job description on its labor certification application, includes the use of airbrushes. Further, the Alien's qualifications include experience in the use of special paints and brushes (AF 82-83).

On July 10, 1987 labor certification was denied. The Certifying Officer apparently accepted Employer's clarification of the airbrushing requirement (AF 95). Certification was nonetheless denied on the ground that, contrary to Employer's assertions, Mr. Prapavessis had advised that he does have airbrushing and retouching background, and that he feels fully competent in the use of these techniques (AF 95). This information had been obtained by a DOL employee during a telephone conference with Mr. Prapavessis on July 2, 1987 (AF 88), subsequent to Employer's submission of its rebuttal evidence. The Final Determination did not again raise the issue of the education requirement (AF 95-96).

Apparently surprised to learn that Mr. Prapavessis had given a different story to the Labor Department, Employer wrote to Mr. Prapavessis on July 18, 1987. After referring to the conflicting information given by Mr. Prapavessis about his airbrushing experience, Employer invited him to an interview to discuss his qualifications for retouching. On July 21st, Mr. Prapavessis declined the invitation because he was about to leave this country to take up permanent residence in Greece (AF 98). On July 27th, Employer sought reconsideration of the Final Determination, on the ground that Mr. Prapavessis was no longer available for the job (AF 102). The appeal file does not disclose any action on this motion.

Both Employer and the Office of the Solicitor of Labor filed briefs, which have been duly considered.

Discussion

Employer complains that it is "somewhat unfair for the Labor Department to state that the applicant [Mr. Prapavessis] is qualified based upon his resume, especially after the employer has interviewed the applicant and found that he is missing a basic element of the job offer. . . ." (AF 108). As a matter of fact, the Certifying Officer's determination was not based on the resume. Rather, it was based on information obtained on July 2, 1987, after the issuance of the second Notice of Findings and Employer's rebuttal thereto, and not disclosed to Employer prior to the denial of certification (AF 88, 105). This is why Employer made further contacts with Mr. Prapavessis after the denial of certification, which Employer alleges led to the discovery that Mr. Prapavessis was no longer interested in the job, and moreover, had never been qualified to work in this country.

Although Employer is incorrect as to the basis of the Certifying Officer's Final Determination, its complaint of unfairness raises the related issue of whether it was fair for the Certifying Officer to deny Employer's application on the basis of information not disclosed to Employer prior to the denial, thus foreclosing an opportunity to rebut it. For reasons more fully set forth in *In the Matter of The Little Mermaid Restaurant*, 87-INA-675 (March 9, 1988), we believe that Employer was denied the right to be apprised of the information to be used against it, and to have an opportunity to rebut it, in violation of the regulations. 20 CFR 656.25(c). Since the Certifying Officer accepted Employer's rebuttal of one of the two grounds stated in the Notice of Findings, ignored the other ground, and nonetheless denied certification, the notice-and-rebuttal procedure turned out to be a waste of time and effort.¹ Moreover, the undisclosed information is not relevant to any of the issues specified in either of the Notices of Findings. Rather, it tends to prove that Mr. Prapavessis met Employer's airbrushing requirement. Thus, the Certifying Officer denied certification on an issue she raised for the first time in the Final Determination, in violation of section 656.25.

For these reasons, and because further delay in the circumstances of this case would be unfair, the Final Determination of the Certifying Officer must be reversed. Thus, it is not necessary to address the other issues raised by Employer, and the Solicitor of Labor's objections to our consideration of those issues are moot.

ORDER

The Certifying Officer is directed to grant labor certification.

NICODEMO DeGREGORIO
Administrative Law Judge

Stuart A. Levin and George A. Fath
Administrative Law Judges, Dissenting

Upon consideration of the majority decision in this matter, we are unable to agree with the Board's description of the rebuttal procedure as a "waste of time and effort" in this proceeding.

¹ In light of the dissent's insinuation that we discourage thorough inquiries by Certifying Officers, we may point out that *In the Matter of The Little Mermaid Restaurant*, 87-INA-675 (March 9, 1988) encourages them in express terms. "We do not mean to suggest that the specialist did anything wrong in contacting the restaurants. On the contrary, efforts to verify an employer's representations are entirely proper and to be encouraged." *Ibid.*, at p. 4. The point made in these two cases is a simple one, that a petitioner is entitled to know the issues and the evidence on which a Certifying Officer intends to rely and to an opportunity to be heard with regard to them.

The Notice of Finding dated June 12, 1987, advised the employer that airbrushing experience was not a stated requirement of the job, and, consequently, it was improper to reject applicants who lacked such experience. The employer was then afforded an opportunity to rebut by demonstrating that airbrushing experience was a business necessity and by further documenting the rejection of one applicant, Mr. Prapavessis. Contrary to the implications conveyed by majority then, Mr. Prapavessis' experience and qualifications were not raised for the first time in the Final Determination.

In response to these concerns, the employer submitted an explanation which satisfied the Certifying Officer that airbrushing experience was indeed essential to the employer's business. The employer further advised, however, that Mr. Prapavessis had stated that he lacked such experience. To confirm this, the Certifying Officer contacted Mr. Prapavessis and ascertained that he had airbrushing experience. Thus, the Certifying Officer discovered a conflict between the employer's report of Mr. Prapavessis' experience, and Mr. Prapavessis' own account of his experience.

Recognizing that the purpose of the labor certification process is to ensure that U.S. workers are afforded every reasonable opportunity for employment before an alien is admitted, it would seem that the time spent by the Certifying Officer in her investigation was productively invested. We, therefore, consider it unwarranted to discourage, as wasteful, thorough inquiries of the type conducted here.¹

Now within 35 days of the issuance of the Final Determination, the employer contacted Mr. Prapavessis and was advised by him that he had changed his plans and was no longer interested in the position. The employer, on the basis of this information, requested the

¹ The Board further signals its displeasure regarding "unfair" delay by the Certifying Officer in the processing of this application. In this context, it may, in fairness, be appropriate to observe that the employer's first recruitment effort was nullified, because the employer offered the job at less than the prevailing wage. In its second recruitment, the employer required unduly restrictive educational achievement. The employer's next recruitment effort was complicated by the employer's initial failure to document the business necessity of the airbrushing experience requirement. Nevertheless, the time expended in resolving these problems has, it appears, been tolled by the Board against the Certifying Officer.

Thus, while the Board's rhetorical policy may appear as one which encourages thorough investigations, in specific cases, care must be taken that the policy agenda actually implemented by the Board is not precisely the opposite of the one articulated.

Certifying Officer to reconsider her decision.² Indeed, the motion for reconsideration is still pending.

Although no provision of the regulations at Part 656 govern reconsideration of Final Determinations by Certifying Officers, such determinations by their own terms are not final for a period of 35 days following the date of the denial. Within that period, it would seem that the Certifying Officers have inherent authority to reconsider their decisions.³ Moreover, it would not seem inappropriate for the Board to exercise its discretion, in the interest of administrative and appellate efficiency, to refrain from deciding appeals until proceedings before the Certifying Officer have been exhausted. Under circumstances such as these, we would remand this matter to the Certifying Officer for the purpose of affording her the opportunity to address the motion to reconsider filed by the employer.

STUART A. LEVIN
Administrative Law Judge

GEORGE FATH
Administrative Law Judge

² We, of course, fully agree with our colleagues' concern that petitioners be given notice of the issues and an opportunity to respond, but that is really not the issue here. The employer obviously was aware of the evidence and issues, and was pursuing its opportunity to be heard when it recontacted the applicant to clarify his experience, and then moved for reconsideration by the Certifying Officer.

³ The Board, for example, which also lacks specific regulatory authority to reconsider, has recently undertaken to reconsider one of its own decisions. See, Exxon Chemical Co., 87-INA-615, (January 25, 1988), vacated en banc, July 18, 1988.