



Date: May 17, 1990

Case Nos.: 88-INA-90 and 88-INA-91

In the Matters of:

S & G Donut Corp. and Sit Donut Corp.,
d/b/a Dunkin Donuts,
Employers

on behalf of

Bhikhabhai Ratilal Patel, and
Nitin Ishwarlal Patel,
Aliens

Before: Brenner, Guill, Litt, Marcellino, Marden, Murrett,
Romano, Silverman and Williams
Administrative Law Judges

For the Board:

JOEL R. WILLIAMS
Administrative Law Judge

ORDER AFFIRMING PANEL DECISION

The Certifying Officer's denials of labor certification in the above-referenced matters were affirmed by a panel of the Board of Alien Labor Certification Appeals (the Board) on July 27, 1988. En banc review was granted on January 8, 1990.¹

Upon review by the Board sitting en banc, it is concluded that reversal of the panel decision is not warranted. The majority of the Board is of the opinion that the Final Determination can be interpreted reasonably as embracing the rejection of U.S. applicants as one of the grounds for denial of certification. A proposal to reject the application on this basis was set forth clearly in the Notice of Findings. The Employer was thus given full opportunity to rebut on this issue and did, in fact, offer evidence regarding the same. Through the avenue of this en banc review it has now been given and has taken the opportunity to brief this additional issue.

¹ Employer's motion to reconsider was treated as a petition for en banc review because two of the three original members of the panel were no longer members of the Board.

Consequently, even assuming that it was misled by a Final Determination that was not a model of clarity, any due process defects which would have been caused thereby have been cured.

The majority has reconsidered the case in light of the arguments now advanced. We see no reason to disturb the findings and conclusions reached by the original panel. As noted by the Employer, the Board did hold, en banc, in Dove Homes, Inc., 87-INA-680 (May 25, 1988)(en banc), that an applicant's disappointment in being rejected for a job could cause an incentive for him or her to knowingly mistate the facts. But the Board noted also that an employer has an incentive to present evidence in support of its application and cautioned that an employer would be "well-advised to strengthen its ability to prove its case by documenting the material facts." In the final analysis, the Board held that "[t]he probative value of evidence is judged on the basis of its own strength and weaknesses in each case * * * without preconception as to its source."

The original panel in the instant case chose to credit the statements of the two applicants over those of the Employer. The majority believes that they had ample cause to do so. For example, Ron Hamden was purportedly rejected because he demonstrated that he was "short-tempered and rude" and thus "not trustworthy as a store-manager." Yet, his uncontroverted resume shows that he had held four management-type jobs for an average of 3 1/3 years each. This is not indicative of someone who is an untrustworthy manager.

Accordingly,

IT IS ORDERED that the three member panel's decision is AFFIRMED, and that such decision is hereby REINSTATED.

JOEL R. WILLIAMS
Administrative Law Judge

JRW/trs

In Re S & G Donut Corp. and Sit Donut Corp. d/b/a/ Dunkin Donuts, 88-INA-90 and 91

Judge LAWRENCE BRENNER, joined by Judges Guill, Litt and Marcellino, DISSENTING:

The Panel decision affirmed the Certifying Officer's (C.O.) denial on the grounds that the Employer failed to show that job applicants Hamden and Bakutis ". . . lack the minimum qualifications for the job offered." The Panel held that the issue of unlawful rejection of U.S. workers was detailed in the Notice of Findings and clearly mentioned in the Final Determination, and was dispositive of these cases. Slip op. at 5, n.1.

We agree with the Employer's Motion to Reconsider that this was not the C.O.'s basis for denial. The Notice of Findings did find that the two U.S. applicants were improperly rejected. However, after the Employer's rebuttal the only reference to the issue to be found in the Final

Determination was the statement: "In the August 24, 1987 Notice of Findings, the employer was informed that it appeared two applicants had not been rejected for lawful job-related reasons, (R. Hamden and M. Bakutis). The employer did respond to this part of the Notice of Findings, even though his comments concerning the applicants appear to be contradictory to the applicants' own responses" (AF 10). The denial then goes on to consider other issues, and bases the determination on those other issues. It would seem clear by the very words of the C.O.'s denial that he did not base his decision on a finding that the Employer unlawfully rejected Hamden and Bakutis. Since this issue was not preserved by the C.O., it should not be used by the Board, sua sponte (and without notice allowing the parties the opportunity to furnish any evidence they may have on a new or resuscitated issue), to deny labor certification.

LAWRENCE BRENNER
Administrative Law Judge

LB/gaf