



In The Matter of

John D. Topley:

Complainant

v.

Swiss Bank Corporation:

and

Florida Dept. of Labor and
Employment Security

Respondents

Raymond F. Gregory, Esq. for Complainant

Carolyn D. Cummings, Esq. for Florida Dept. of Labor

Eric S. Roth, Esq. for Swiss Bank Corporation

Yvonne K. Sening, Esq. for the Regional Administrator

Before: NICODEMO DE GREGORIO
Administrative Law Judge

DATE ISSUED: March 21, 1994
Case No.: 93-JSA-2

DECISION AND ORDER

This case arises from a complaint filed pursuant to the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 *et seq.*, and implementing regulations at 20 C.F.R. Part 658. The case is before me on appeal from a decision of a Regional Administrator of the United States Department of Labor. The case presents an important question relating to the labor certification process for the permanent employment of aliens in the United States, i.e., whether an employer who applies for a labor certification on behalf of an alien pursuant to 20 C.F.R. Part 656 assumes the obligation to hire a U.S. worker who, in response to an advertisement required by the regulations, applies for the job offered to the alien and is deemed qualified for the job pursuant to section 656.24. Only Swiss Bank Corporation has requested a hearing. However, because the case must be dismissed on a procedural ground, and the question has been briefed by the Regional Administrator and the corporation, the only interested parties at this point, the case is decided on the record. 20 C.F.R. 658.424(b). The Regional Administrator's Motion to Supplement the Administrative File is granted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

In September 1988, Swiss Bank Corporation (Swiss Bank) filed an application for alien labor certification to enable an alien to fill the position of Vice President and Branch Manager of its Miami, Florida office. Administrative File (AF) at 48-52; Appendix to Swiss Bank's Brief (App.), Resp. Ex.1 The application describes the duties of the job to be performed, and states the minimum requirements necessary to perform satisfactorily the job duties. Id. In accordance with applicable regulations, 20 C.F.R. 656.21(g), Swiss Bank advertised the job opportunity in the Wall Street Journal. App., Resp. Ex. 8. The bank received 33 resumes in response to the advertisement; seven of the applicants were interviewed; none was considered to be qualified for the job. App., Resp. Exs. 9-10.

On August 16, 1989, John D. Topley, one of the seven candidates who had been interviewed and rejected by Swiss Bank, filed a complaint with the Florida Department of Labor. The complaint alleges that Swiss Bank had undertaken a bogus job search with no intention of hiring any U.S. worker, solely for the purpose of obtaining a labor certification in behalf of the alien who was already on the job. App., Cl. Ex.12. Mr. Topley complained that along with many others he had been "used as an unwitting dupe by this giant foreign organization to justify maintaining one of their own nationals in the advertised position". Id at 3.¹

The Florida Department of Labor and Employment Security investigated the complaint and concluded that Swiss Bank had not violated Job Service regulations. App., Resp. Exs. 11,13. In accordance with section 658.416 (d) (5), Mr. Topley was offered the opportunity to request a hearing. *A hearing was requested, and was held on October 22, 1992 before a Florida Hearing Officer. In a decision rendered on December 18, 1992, the Hearing Officer held that (1) Swiss Bank had discriminated against Mr. Topley based on his national origin or citizenship; (2) Swiss Bank had failed to comply with the advertising requirements of 20 C.F.R. 656.21 (g) (9); and that (3) "Swiss Bank's reliance on a lack of European capital market experience [which was not mentioned as a requirement of the position in the labor certification application] as justification for the _ rejection of applicants is, at best, a violation of 20 C.F.R. Part 656.21 21(g) (3) and (6), and, at worst, a misrepresentation to the Department." APP., Final Order at 18-19. Accordingly, the Hearing Officer ordered the State agency to initiate all necessary procedures for discontinuation of employment services to Swiss Bank.

On April 5, 1993, the Regional Administrator of the U.S. Department of Labor affirmed the State Hearing Officer's . decision. AF at 3. On April 16, 1993, Swiss Bank requested a

¹Despite the filing of the complaint, the State office transmitted Swiss Bank's application for labor certification to the appropriate Certifying Officer on or about August 28, 1989. AF at 40. Apparently, the Certifying Officer held the case in abeyance pending the outcome of the investigation of the complaint by the Florida Department of Labor. AF at 38-40. Before a decision was issued, Swiss Bank withdrew its application on July 5, 1990. AF 37, 36.

hearing before a Department of Labor Administrative Law Judge. AF at 1. On November 16, 1993, the Regional Administrator advised Swiss Bank that he was reversing State Hearing Officer's finding of discrimination, on the ground that, pursuant to 20 C.F.R. 658.411(b) (l), the part of the complaint charging discrimination should have been referred to the Equal Employment Opportunity Commission. As a result, this issue is not before me.

II

Under section 212(a)(5)(a) of the Immigration and . Nationality Act, 8 U.S.C. 1182(a)(5)(a), certain aliens may not obtain a visa 'for entrance into the United States to engage in permanent employment unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of the 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 regulations at 20 C.F.R. Part 656 set forth the procedure whereby such labor certifications may be applied for, and granted or denied. Of particular relevance to the instant case is the requirement that an employer seeking a labor certification in behalf of an alien must attempt to recruit U.S. workers at the prevailing wage and under prevailing working condition through the Employment Service, as well as advertisements in newspapers, professional, or trade publications , which are most likely to bring responses from able, willing, qualified, and available U.S. workers. 20 C.F.R. 656.21 (f), (g). The regulations vests Certifying Officers with the authority to grant labor certifications on the basis of whether: (1) the employer has met the requirements of the regulations; (2) there is a U.S. worker who is able, willing, 'qualified, and available for the job opportunity; and (3) whether the employment of the alien would adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. 656.24. Denials of labor certification are subject to review by the Board of Alien Labor Certification Appeals, at the request of the employer seeking the certification, 20 C.F.R. 656.26

III

The Regional Administrator contends that, in recruiting U.S. workers in connection with its application for labor certification, Swiss Bank was required to utilize the local employment service system, and necessarily became subject to the job service regulations. RA Brief at 5. These regulations. provide, according to the Regional Administrator, that job services may be discontinued to employers who:

(3) Are found through field checks or otherwise to have either misrepresented the terms or conditions of employment specified on job orders or failed to comply fully with assurances made on job orders;

X X X X X

(6) Refuse to accept qualified workers referred through the clearance system; 20 C.F.R. 658.501(a)(3), (6). Finally, the Regional Administrator argues that Swiss Bank's rejection of Mr. Topley was in violation of sections 656.20(c)(8), 656.21(g)(3) and (6), and 658.501(a), in that: (1) as a result of availing itself of the labor certification process and the Florida employment services, Swiss Bank "specifically agreed to be obligated" to hire qualified U.S. workers 'referred to it through the clearance system (20 C.F.R. 656.20(c)(8), 658.501(a)(6)); and (2) judged by the criteria set forth in section 656.24(b)(2)(ii), Mr. Topley was qualified for the job advertised by Swiss Bank, notwithstanding the bank's assertions to the contrary. RA Brief at 7,11-12.

Swiss Bank controverts all the principal contentions of the Regional Administrator. Swiss Bank denies that it had any obligation to hire a qualified U.S. worker during its recruitment process, and asserts that where the Labor Department feels that there is a U.S. worker qualified for the position offered to an alien, it simply denies labor certification. Bank Brief at 23- 26. Swiss Bank denies that Mr. Topley was qualified for the job, and asserts that the requirement of European capital market experience is not unreasonable for a manager who must report to a European Bank. Bank Brief at 19-21. Finally, the bank contends that the Florida Hearing Officer acted outside the scope of his authority in finding violations of the Job Service regulations because 20 C.F.R. 658.501 does not apply to the alien labor certification process. Bank Reply Brief at 1-3.

I have concluded that this case must be dismissed because: (1) 20 C.F.R. Part 658 does not apply to the type of complaints that gave rise to this proceeding; and (2) if the regulation does apply, section 658.416(b)(1) required that Mr. Topley's complaint be referred to "the appropriate enforcement agency", i.e., the Certifying Officer handling Swiss Bank's application for labor certification.

IV

The Job Service complaint system established by 20 C.F.R. Part 658 covers two types of complaints: "(i) .Complaints against an employer about the specific job to which the applicant was referred by the JS [Job Service] involving violations of the terms and conditions of the job order or employment-related law (employer-related complaint) and (ii) complaints about Job Service actions or omissions under JS regulations (agency-related complaints)". Section 658.401(a)(1). Mr. Topley's complaint is not an agency-related complaint. Nor is it an employer-related complaint, although this is not apparent, until the definitions section of Part 651 is consulted. Section 651.10 defines "applicant" as used in Parts 651-658 to mean "a person who files an application for services with a local office of a State agency, with out stationed staff or with an outreach worker". In other words, an applicant is a person who applies for "counseling, testing, and job and training referral services for migrant and seasonal farmworkers (MSFFWs)--I provided pursuant to Part 653. Section 653.100. Moreover, the provisions cited by the Regional Administrator for discontinuation of services to Swiss Bank refer to the recruitment of agricultural workers through the JS intrastate and interstate clearance systems, under Part 653, Subpart F.

Section 658.501(a)(6) authorizes discontinuation of services to employers who are "found through field checks or otherwise to have misrepresented the terms or conditions of employment specified on job orders or failed to comply with assurances made on job orders". This clause refers to the "random, unannounced field checks at a significant number of agricultural worksites to which JS placements have been made through the intrastate or interstate clearance system". Section 653.503(a). Also, "assurances made on job orders" refers to the assurances an employer's job order must contain under section 653.501(d)(2), if the job order is to be placed in intrastate or interstate clearance. Contrary to the Regional Administrator's apparent view, RA Brief at 5,7, the representations required by section 656.20(c) are not "assurances", but "conditions of employment". See section 656.20(c)(9); see also employer's certification on labor certification application form, AF at 49. As for the second basis for discontinuation, refusal "to accept qualified workers referred through the clearance system", 20 C.F.R. 658.501(a)(6), the reference is to placements made through the clearance system pursuant to Part 653. See section 651.10 for definition of "clearance". Mr. Topley was referred to Swiss Bank in response to a newspaper advertisement.

Finally, the services which the Florida Hearing Officer and the Regional Administrator have ordered to be discontinued to Swiss Bank are "services provided pursuant to 20 C.F.R. Part 653 to employers by the USES, including State agencies". 20 C.F.R. 658.500. Again, Part 653 provides services for migrant and seasonal farmworkers (Subpart B), and establishes an agricultural clearance order system (Subpart F). If there is any point in denying these services to employers who seek to recruit outside the country aliens with a variety of skills, from cooks, engineers, and managers to "university teacher or an alien represented to be of exceptional ability in the performing arts"(section 656.21a(a)), the point has not been made clear on this record.

In sum, the definitions, the vocabulary, the cross-references, and the regulatory purposes all tend to the conclusion that Subpart E and F of Part 658 are designed to give effect to the provisions of Part 653. Specifically, Subpart F punishes employers who violate Part 653, by denying them services made available under Part 653. It follows that, even if Swiss Bank has violated the regulations governing labor certifications, section 658.501(a)(3) and (6) provide no legal basis for this proceeding.

V

The first impression formed upon a reading of the Regional Administrator's brief is that the case is before me as a result of a derailment. For the brief is devoted primarily to an exposition of the regulations and case law governing the labor certification program. And I am requested to decide questions whose determination has been entrusted to other agencies.

As I read Mr. Topley's complaint, it charges Swiss Bank with fraud in the attempt to obtain a labor certification. Section 656.31(a) provides that if "possible fraud or willful misrepresentation involving a labor certification is discovered prior to a final labor certification determination, the Certifying Officer shall refer the matter to INS [Immigration and Nationalization Service] for investigation and shall notify ... "the employer, the alien and the Department of Labor's Office of Inspector General. The entire section makes clear, in my view,

that a Certifying Officer is not authorized to determine such an issue. See also the parallel provision in section 655.108, concerning temporary alien agricultural labor certifications. These provisions enjoining deference to INS and the courts on issues of fraud are consistent with the view that primary responsibility for implementation of the Immigration and Nationality Act rests with INS, while the labor certification role of the Department of Labor is limited and auxiliary. See Madany v. Smith, 696 F.2d 1008, 1011-12, (D.C. Cir. 1983). It would be at least incongruous if personnel outside the labor certification program were to decide issues of potential fraud raised, as here, in the course of, and with respect to, a labor certification proceeding.

Moreover, the complaint presupposes an interpretation of the labor certification regulations which, as far as my research goes, has not been specifically considered by the courts or the Board of Alien Labor Certification Appeals. The presupposition is that sections 656.20(c)(8), 656.21(b)(6), and 656.21(j)(i)(iv) impose on an employer seeking a labor certification the obligation to hire a U.S. worker whom a certifying officer finds to be able to perform the duties of the position in a normally accepted manner, even though the employer thinks otherwise or desires higher qualifications. The Regional Administrator explicitly endorses this view, which in any case underlies his contention that the rejection of Mr. Topley was in violation of the regulations. RA Brief at 7, 15. This view also implies that an employer who certifies under penalty of perjury that his job opportunity "is clearly open to any qualified U.S. worker" (AF at 49) may be guilty of perjury if he does not intend to hire "any qualified U.S. worker".

Swiss Bank argues that the purpose of the recruitment process is only to test the labor market for the availability of qualified U.S. worker, and that if a U.S. worker is deemed qualified for the position but is not hired, the only consequence is that the labor certification is denied. Bank Brief at 24-26. See Production Tool Core. v. Employment and Training Admin., 688 Ed 1161, 1168-70 (7th Cir. 1982); Warmtex Enterprises v. Martin, 953 F.2d 1133 (9th Cir. 1992).² This interpretation of the regulations, however, implies that U.S. workers may be unwittingly "used" in the recruitment process so that certifying officers may have a valid basis on which to make their statutory findings. This, I take it, is the tenor of Mr. Topley's complaint.

²See also Technical Assistance Guide No. 656 (1981). "Frequently local offices are reluctant to service an employer's job order when an Application for Alien Employment Certification is filed for a job currently filled by the alien. At times, the employer may not be interested in employing anyone other than the alien, and files a job order only because it is a prerequisite for processing the Application for Alien Employment Certification. Nevertheless, State employment service offices must perform the functions of recruitment, referral, and verification for every Application for Alien Employment Certification to conform with 20 CFR Part 656. Local offices should explain to such employers that the Immigration law allows aliens to become permanent residents of this country based on a job offer, in part, only if it can be shown that qualified U.S. workers are not available and willing to accept employment in that job". TAG No. 656 at 57.

I believe the determination of this issue lies within the framework of the labor certification program, where lie the responsibility for the program, and the authority to interpret governing law. Even if I am mistaken as the applicability of Part 658 to the instant proceeding, section 658.416(b)(1) would have required the referral of Mr. Topley's complaint to the Certifying Officer having jurisdiction over Swiss Bank's labor certification application, for his consideration and disposition.

VI

By reason of the foregoing, I conclude that the decision of the Regional Administrator must be reversed, and the case dismissed.

ORDER

The above-captioned case is dismissed.

NICODEMO DE GREGORIO
Administrative Law Judge

NDG/sjn