



DATE: MAY 31, 1989
CASE NO. 87-INA-541

IN THE MATTER OF

NANCY JOHNSTONE,
Employer

on behalf of

HELEN McEWEN WATSON
Alien

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; Guill, Associate Chief Judge; and
Brenner, Tureck, and Williams, Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

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) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer Benjamin Bustos' denial of a labor certification application pursuant to 20 C.F.R. §656.26.¹

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 a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available 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; 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 Part 656 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

¹ All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

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 a labor certification is based on the record upon which the denial was made, together with the request for administrative - judicial review, as contained in an Appeal File ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case

On April 28, 1986, Employer filed an application for Alien employment certification on behalf of the Alien, Helen McEwen Watson, for the position of Live-in Domestic Worker (AF 25-26). Requirements for the position, as set forth in Form ETA 750, Part A, were three months experience in the job offered.

Following the issuance of a Notice of Findings ("NOF") on December 18, 1986, (AF 9-12), and the filing of a rebuttal by Employer on January 26, 1987 (AF 5-8), the Certifying Officer ("CO") issued a Final Determination on April 30, 1987, denying certification (AF 3-4). The denial was based upon a finding that Employer had rejected qualified U.S. workers for other than lawful job-related reasons in that she had failed to document that live-in experience was a necessary qualification for the job.

In May 1986, Employer placed a job order and an advertisement for the position of Live-in Domestic Worker (AF 28-30). In a letter dated June 2, 1986, Employer reported that she had received two applicant referrals and indicated that both were rejected owing to a lack of live-in domestic worker experience. One of the applicants also was rejected owing to her intent to leave the area of employment in two years (AF 27). In addition, Employer submitted a letter and accompanying physician's statement documenting the business necessity of a live-in domestic worker (AF 21-23).

On December 18, 1986, the CO issued a NOF citing sections 656.21(b)(7) and 656.24(2)(ii), and indicating an initial determination of denial of labor certification (AF 9-12). Section 656.21(b)(7) requires employers to document that if U.S. workers were rejected, they were rejected solely for lawful job related reasons. Section 656.24(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

In a four-page NOF consisting almost entirely of boilerplate, the CO stated:

Joyce Vincent and Gussi Hodge rejected based on qualifications deemed unduly restrictive. The unduly restrictive requirements are must have "live-in experience."

In rebuttal (AF 5-8), Employer submitted a letter dated January 26, 1987 stressing Employer's "urgent needs" for the live-in requirement and enclosing documentation "in support of the Employer's business necessity requirements for a Live-in Domestic Worker" including letters from the Employer and her personal attorney attesting to Mrs. Johnstone's need for a Live-in Domestic Worker, and from the Employer's eye surgeon explaining her handicapped condition.

A Final determination denying certification was issued on April 30, 1987 (AF 3-4). The rebuttal evidence submitted was found to be irrelevant to the issue raised in the NOF. The CO stated that he had indicated that Employer had to justify the requirement that job applicants have live-in experience, but Employer provided evidence to justify the live-in requirement of the position instead.

Employer filed a Request for Review on May 29, 1987 (AF 2), followed by a brief on July 27, 1987. The CO submitted a Brief supporting his position on July 27, 1987.

DISCUSSION

It is evident, upon review of the record in this case, that Employer misunderstood the NOF. The NOF consists almost entirely of boilerplate. It is confusing and unspecific regarding both the basis for denial and the necessary corrective action needed to rebut the findings. The CO cites §656.21(b)(7) dealing with rejection of U.S. workers for other than lawful job-related reasons, and §656.24(2)(ii) which defines a "qualified" U.S. worker. The actual basis of the proposed denial, however, was that the job requirement was unduly restrictive, a violation of the business necessity requirements of §656.21(b)(2)(i).²

We hold that, under the circumstances of this case, the CO should have issued a second NOF rather than deny certification. Employer's rebuttal is defective in that it fails to address the unduly restrictive requirement of "experience as a live-in" raised by the CO. It appears, based on Employer's rebuttal, that Employer mistakenly believed that the issue raised in the NOF was whether a live-in domestic worker was needed, when in fact the CO's actual ground for denial was that Employer was requiring applicants to have live-in experience.

In light of the unclear and confusing nature of the NOF, we find that an order of remand for clarification is warranted. On remand, the CO should address, first, whether the live-in experience requirement is not normally required or usual for the job or inconsistent with the D.O.T. Secondly, if he finds that either of these prerequisites has not been met, and hence that Employer must establish business necessity for the requirement of live-in experience, the case should be analyzed in accordance with the standard set forth in In re Information Industries, Inc. 88-INA-82 (Feb. 9, 1989) (en banc). In that case, we held that "to establish business necessity under §656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are

² Since the CO did not challenge the requirement that the employee live on the employer's premises, no violation of §656.21(b)(2)(iii) has been raised.

essential to perform, in a reasonable manner, the job duties as described by the employer." (Id. at 9). Lastly, 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 Employer with a reasonable opportunity to rebut.

ORDER

The Certifying Officer's determination denying labor certification is vacated, and the case is remanded for further proceedings consistent with this opinion.

JEFFREY TURECK
Administrative Law Judge

JT/jb

In the Matter of Mrs. Nancy Johnstone, 87-INA-541
Joel R. Williams, Administrative Law Judge, dissenting:

I fail to see the need to remand this case on the basis of a defective Notice of Findings (NOF). It may be true that the NOF is not a model of clarity. Nevertheless, Employer's thirteen page brief on appeal contains not one word of complaint as to any defect in the NOF. Indeed, Employer acknowledges that the NOF was directed to only one area of concern, i.e., that relating to "live-in experience." The regulations at § 656.26(b)(1) requires that a request for review set forth the "particular grounds" for the request. I do not believe that the Board should be raising issues on its own motion which have not been so set forth by an employer unless the question relates to the Board's jurisdiction. This is particularly true where, as here, an employer has been represented by counsel ab initio.

The parties have addressed fully the issue here presented in their respective briefs. Only a legal conclusion based on the existing facts is needed to resolve the same. We should proceed with deciding this matter on the existing record.

JOEL R. WILLIAMS
Administrative Law Judge