

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
1111 20th Street, N.W.  
Washington, D.C. 20036



DATE: MAY 13, 1988  
CASE NO. 87-INA-715

IN THE MATTER OF

KINGS COUNTY HOSPITAL CENTER  
Employer

on behalf of

BONIFACE TESHUO-TANKENG  
Alien

Appearance

David Scheinfeld, Esquire  
For the Employer

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

LAWRENCE BRENNER  
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 certification are set forth at 20 C.F.R. §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

The Employer, Kings County Hospital Center, filed the application for labor certification on behalf of the Alien, Boniface Teshuo-Tankeng, for the position of x-ray technician (AF 44). The Alien met all of the Employer's requirements.

In her June 10, 1987 Notice of Findings (AF 38-39), the Certifying Officer (C.O.) denied the Employer's application for labor certification because, inter alia, the job notice that the Employer posted at its place of business stated incorrectly that the salary was \$19,980 per annum while the present collective bargaining agreement indicated a salary of \$23,639 per annum. This incorrect posting was a violation of §656.21(b)(3). The C.O. required the Employer to post a corrected notice for ten consecutive business days and to provide descriptions of the responses that the Employer received. The C.O. required that the Employer's rebuttal, if any, be submitted by July 15, 1987.

In its Rebuttal (AF 45-48), timely filed on July 6, 1987, the Employer submitted a copy of the corrected job notice that it was posting from July 13, 1987, to July 24, 1987 (AF 47).<sup>1</sup> The Employer did not state that it would furnish the C.O. with the results of the new posting at a future date.

In her August 7, 1987 Final Determination (AF 52-53), the C.O. denied the Employer's application for labor certification solely because, within the 35 days allowed for rebuttal, the "Employer failed to document the results of its posting or indicate that such results would be forthcoming." Therefore, the C.O. found that the Employer was still in violation of §656.21(b)(3). The Employer requested review of this denial and filed a brief in support of review.

### Discussion

As part of its Appeal Brief, the Employer includes a copy of an August 19, 1987 letter that it sent to the C.O. (Appellant's Brief, Exhibit D). In accordance with §656.26(b)(4), this letter was not in the Appeal File that was forwarded to us by the C.O. In this letter, the Employer states that

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<sup>1</sup> We believe that our dissenting colleagues are incorrect in equating this case with one in which no rebuttal has been filed by an employer.

it received no responses to the posting of the corrected job announcement.

Since this letter was received by the C.O. after the issuance of the Final Determination, the C.O. was correct not to consider it. Nevertheless, if the letter is credible, it may be appropriate to grant certification in this case. Therefore, this case is remanded to the C.O. for the limited purposes of allowing the C.O. to inquire into the facts of this letter and determine whether its late submission was harmless error in accordance with §656.24(b)(1).

### ORDER

The Certifying Officer's Final Determination denying labor certification is VACATED, and the case is REMANDED to the Certifying Officer for further action consistent with this opinion.

For the Board:

LAWRENCE BRENNER  
Administrative Law Judge

LB/DL/gaf

Administrative Law Judge Fath dissents joined by Judge Levin:

I disagree with the decision to remand this case, but, more importantly, I am convinced that the Board had no authority to consider the merits of the case for any reason.

The only question raised by the Final Determination and the employer's brief is: Whether the Certifying Officer acted properly in denying labor certification for failure of the employer to file a timely rebuttal on the Certifying Officer's requirement that the employer post the job at the prevailing wage. The employer did not file a timely rebuttal on this issue, and the regulations bar consideration of post rebuttal evidence.

Originally, the employer's job was offered at a salary of \$19,500 per annum, and it was posted at that wage on the employer's premises. The prevailing wage for the job was later determined to be \$23,639 per annum. In a Notice of Findings, the Certifying Officer directed the employer to repost the job offer at the higher wage for ten days, and file a copy of the posting notice together with a description of the responses. AF 38. Moreover, the employer was advised: "If rebuttal is not mailed by certified mail on or before July 15, 1987, this Notice of Findings automatically becomes the final decision of the Secretary denying labor certification".

By letter dated July 6, 1987, with enclosures, the employer addressed all of the points raised by the Certifying Officer in the Notice of Findings. With reference to reposting of the job

offer, it stated: "In conformity with the directive contained in your letter of 6/10/87, we are posting a notice of job opportunity reflecting the salary of \$23,639". Enclosed with the employer's letter was a copy of a notice of posting for the revised job opportunity showing posting dates from July 13, 1987 to July 24, 1987. AF 47.

Obviously, the job had not been reposted on the date the employer filed the rebuttal, and, indeed, it was not scheduled for posting until two days before the end of the rebuttal period. Without an extension of time, it was not possible to meet the directions of the Notice of Findings within the time allowed. The employer did not request an extension of time within the rebuttal period.

On August 7, 1987, the Certifying Officer issued a Final Determination denying a labor certification for the reason:

Please note, although employer indicated that he was posting notice of the job opportunity at the salary of \$23,639.00 and a copy of the notice was enclosed, employer failed to document the results of his posting or indicate that such results would be forth-coming. Since the employer failed to comply with this requirement during the 35 day period the application is denied.

AF 51.

The consequences of failing to file timely rebuttal within 35 days must be conveyed to the employer in the Notice of Findings, and in that regard 20 CFR 656.25(c)(3) is clear and unambiguous:

- (i) The Notice of Findings shall automatically become the final decision of the Secretary denying the labor certification.
- (ii) Failure to file a rebuttal in a timely manner shall constitute a refusal to exhaust available administrative remedies; and
- (iii) The administrative-judicial review procedure provided in S. 656.26 shall not be available . . . .

Moreover, the regulations provide:

Failure to file a rebuttal in a timely manner shall constitute a failure to exhaust available administrative appellate remedies. 20 CFR 656.25(e)(2).

All findings in the Notice of Findings not rebutted shall be deemed admitted. 20 CFR 656.25(e)(3).

Discretion cannot be read into these strongly worded regulations for either the Certifying

Officer or the Board. On the day following the thirty-fifth day, the **Notice of Findings** (as distinguished from the Final Determination) issued in this case denying labor certification automatically became the final decision of the Secretary. Furthermore, as a matter of law, the employer lost the administrative-judicial review option. The Final Determination issued by the Certifying Officer merely formalized, nunc pro tunc, the final decision of the Secretary.

A number of principles follow from this discussion of the regulations: on the day after the thirty-fifth day, the record is fixed, and beyond the control of the Certifying Officer; the Notice of Findings becomes the final decision of the Secretary; unless the time for rebuttal is extended within the rebuttal period, the Certifying Officer loses jurisdiction after the 35th day; and since the Secretary's decision is final and complete, the Board of Alien Labor Certification Appeals has no authority to reopen the matter, enlarge the time for filing rebuttal, or modify the final decision of the Secretary contained in the Notice of Findings. Given these principles, the decision of the Board remanding the case for consideration of untimely evidence overrules the final decision of the Secretary. This is an unseemly posture for an agent in relation to its principal.

In my view, the Notice of Findings denying labor certification is the unalterable law of the case. The Board has no function in this case.

GEORGE A. FATH  
Administrative Law Judge