



DATE: April 5, 1989
CASE NO. 88-INA-392

IN THE MATTER OF

BARBARA HARRIS,
Employer,

on behalf of,

DINA ESTRADA,
Alien.

Appearance: Rolfe E. Tandberg
On behalf of Employer

Before: Litt, Chief Judge; Vittone, Deputy Chief Judge; and
Brenner, DeGregorio, Guill, Schoenfeld and Tureck
Administrative Law Judges

MICHAEL H. SCHOENFELD
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 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.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 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 ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE AND DISCUSSION

On March 10, 1987, Barbara Harris ("Employer"), filed an application for alien labor certification to enable Dina Estrada ("Alien"), to fill the position of live-out houseworker (AF 12-13).

On December 24, 1987 the Certifying Officer issued a Notice of Findings ("NOF") stating an intention to deny the application (AF 8-10). Although not clearly stated in the NOF, it appears that the Certifying Officer proposed to deny the application on the grounds that; Employer provided no evidence of her efforts to contact applicants; Employer's newspaper advertisement ran for only two (as opposed to the required three) days; Employer failed to specify lawful job-related reasons for rejecting two applicants who, in the opinion of the Certifying Officer, could perform the job (AF 9-10).

Employer's timely Rebuttal, dated December 29, 1987, challenged all three allegations of the NOF (AF 5-7). Employer enclosed with the rebuttal a copy of its June 18, 1987 Recruitment Report to the California Employment Development Department (AF 15-22). Employer pointed out that she had tried to telephone the only two applicants, finding one phone disconnected and the other unanswered for six days. Nonetheless, Employer stated that she had sent a note to each applicant and received no response. Finally, copies of classified job advertisements published on three successive days were submitted.

In the Final Determination, issued on March 18, 1988, the Certifying Officer, as far as is relevant, stated only, "The (Recruitment) report gives no time of contact at all" and that "[a]bsent evidence to the contrary, the two applicants are found able and available to perform the position" (AF 4).

Employer timely requested review (AF 1). Neither party has filed a brief before us.

The Final Determination in this case flounders on three counts. First, perhaps due to the clarity of the evidence submitted in rebuttal, the Final Determination does not repeat the assertion that the ad ran for only two days. An assertion made in the NOF, responded to in Rebuttal, and not repeated in the Final Determination, is deemed to be successfully rebutted and thus not an issue before us. 20 C.F.R. §656.25(g)(2)(ii) (1988). Second, to the extent that the Final Determination sought to allege that Employer's recruitment efforts were untimely, the Certifying Officer sought to raise an issue not stated by the NOF. A final denial cannot be based on an alleged violation which the employer has not had an opportunity to rebut. In re Downey Orthopedic Medical Group, 87-INA-674 (March 16, 1988) (en banc). Third, the Certifying

Officer, in the Final Determination, simply ignored Employer's explanation as to her unsuccessful efforts to contact the only two applicants. See, In re Qunicy School Community Council, 88-INA-81 (February 21, 1989) (en banc). Even if the final determination is somehow read to allege that Employer failed properly to document her inability to contact applicants, the Certifying Officer gave no evidence or reason to doubt Employer's reasonably specific statements as to her efforts. Thus, Employer's statements constitute documentation. In re Gencorp, 87-INA-659 (January 13, 1988) (en banc).

Because employers must be afforded a fair and reasonable opportunity to rebut it is incumbent on Certifying Officers "to identify which sections or subsections of the regulations allegedly have been violated and state with specificity how the Employer violated that section or subsection." In re Flemah, Inc., 88-INA-62 (February 21, 1989) (en banc). Specific statements of alleged violations in the NOF enable and encourage employers to file clear responses in rebuttal. The interests of administrative due process are, however, ill served where, as here, a Certifying Officer issues an NOF which is, at best, unclear and confusing then follows with a Final Determination which simply ignores Employer's rebuttal or seeks to add new reasons for denial.

In this case, the Certifying Officer failed to respond to a single argument made by Employer in its rebuttal. Moreover, the evidence as a whole establishes that Employer has met the requirements for alien labor certification in that the job opportunity was advertised as required and the only two US workers who applied were shown to be unavailable. We thus reverse the Certifying Officer and grant certification. See, In re Qunicy School Community Council, *supra*.

ORDER

The Final Determination denying certification is reversed and certification is GRANTED.

MICHAEL H. SCHOENFELD
Administrative Law Judge

MHS/MKG/mc