



DATE: MARCH 31, 1989
CASE NO. 88-INA-411

IN THE MATTER OF

BEN THOMAS DESIGN
Employer

on behalf of

MARIKO KIMURA
Alien

Appearance: Kelly A. Chaves, Esquire
For the Employer

BEFORE: Litt, Chief Judge; Brenner, Guill, Schoenfeld,
Tureck, and Williams
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.

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

The Employer, Ben Thomas Design, located in Houston, Texas, applied for labor certification on behalf of the Alien, Mariko Kimura, for the position of Market Research Analyst (AF 156-57). The duties of the position, as stated in the ETA 750A, included cultural and research projects designed to assist U.S. firms in selling products in Japan, prepare copy text in both English and Japanese as well as doing commercial artwork, visual layout, mechanical production, and camera process work. The requirements of the position were a B.A. in Intercultural Communications.

The C.O., on December 16, 1987, filed a Notice of Findings (N.O.F) in which he proposed to deny labor certification (AF 141). Citing section 656.20(c)(8), the C.O. stated that the Employer did not have a tax number assigned by the Texas Employment Commission and that the Secretary of the State of Texas did not show a listing for the Employer. The C.O. required the Employer to provide information demonstrating that it was in operation at the time of application, continues to be in operation and that it has a valid job opening for any qualified U.S. worker.¹

The Employer submitted rebuttals dated January 19 and March 17, 1988, in which he stated that he has been in business for approximately twenty years (AF 12). He stated that while he does not have a tax number, he has been using the name "Monarq" and has a tax number under that name (AF 11). The Employer also submitted a plethora of physical evidence in the form of books, pamphlets, drawings, advertisements and calendars which are claimed to be the work of the Employer.

On April 25, 1988, the C.O. issued a Final Determination in which the application for labor certification was denied (AF 6-7). The C.O. stated that neither the Texas Employment Commission nor the Texas Secretary of State's office had any listing under the name "Monarq." Moreover, the C.O. found the Employer's submission of artwork inadequate since some of the designs carry, at most, the name of "Ben Thomas" as the designer and fail to prove that the Employer has an established business where U.S. applicants can reach him or his secretary's office. Finally, the C.O. stated that the Employer failed to provide invoices or other correspondence to prove that he is in a position to hire a subordinate.

¹ The C.O. also proposed to deny certification on the ground that the Employer unlawfully rejected U.S. applicants. After the Employer's rebuttal, this basis for denial was not reiterated in the Final Determination and thus is not an issue before this Board.

The Employer filed a Request for Review dated March 16, 1988 (AF 3-4) and submitted a brief dated September 21, 1988. The C.O. did not file a brief.

Discussion

The issue presented for disposition in this case is whether the Employer meets the definition of an "employer" under section 656.50. Section 656.50 defines an employer as "a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States."

The C.O. alleges, in both the N.O.F. and the Final Determination, that the Employer has failed to demonstrate that it is an ongoing business which has a valid job opening for U.S. workers. In support of his contention, the C.O. states that the Employer has failed to provide a valid tax number (AF 7). The C.O. also concluded that the commercial artwork submitted by the Employer in rebuttal only verifies that Ben Thomas, personally, has designed the artwork, but fails to demonstrate that the Employer is an "established business" where applicants can reach him or his office's secretary (AF 6).

The Employer argues, and we agree, that there is no requirement in the regulations that an employer be an "established business" nor that an employer have a secretary (Brief at 6). The plain language of section 656.50 states that an employer means a "person" as well as other more structured business entities such as a corporation. Indeed, this Board routinely adjudicates labor certification applications brought by private persons seeking domestic workers. Likewise, the fact that the Employer did not have a tax number on file with the Texas Employment Commission or the Secretary of State is not dispositive. There is no indication that an individual employer would have to be registered with those entities. However, the C.O. is free to inquire whether Ben Thomas' business, under any trade name, has an employer tax number, and if not, to explain.

While an employer, under section 656.50, may be an individual, that individual must still meet the other definitional requirements of an employer, namely that he or she "proposes to employ a full-time worker." In the instant case, the C.O. concluded in his Final Determination that the Employer failed to submit invoices or other correspondence which prove that the Employer was in a position to hire a full-time worker (AF 6). The sole relevant evidence submitted (before the C.O.) by the Employer was the numerous drawings, advertisements and pamphlets which, according to the Employer, demonstrated that the Employer had a valid job opening. This evidence, however, is insufficient. Of the numerous pieces of commercial art claimed to be the work of the Employer, only three pieces (two calendars and a book) bear his name as designer. These three pieces, in themselves, fail to prove that the Employer is in a position to hire a full-time worker. The multitude of other pieces, moreover, contain no objective indications that the work is that of the Employer. Thus, we are unable to find that the Employer has demonstrated that he proposes to hire a full-time worker.

While the Employer has failed to prove his status as an employer under 656.50, given the confusion engendered by the C.O. in his N.O.F and Final Determination, we cannot affirm the denial of certification. First, the C.O., in the N.O.F. cited section 656.20(c)(8) as the basis for denial, a section which is not related to the ability of the employer to provide full-time employment. While the C.O. did raise the full-time employment issue in the text of the N.O.F., the Employer devoted considerable space in his rebuttal in attempting to prove the bona fide nature of the job offered (AF 70-135).

Additionally, as stated above, the C.O. erred in focusing on the Employer's lack of registration with two state entities and lack of a secretary. The N.O.F. requested the Employer to "document" that it has a job opening for a qualified U.S. worker, but suggested that the focus was lack of a tax identification number. The C.O., in the Final Determination, however, stated that the Employer failed to provide invoices or other correspondence to prove that he is able to provide full-time employment.² Thus, only after the Final Determination was the Employer made aware of the specific information desired by the C.O. In the circumstances, the C.O. should instead have issued a second Notice of Findings asserting, his further problems.

Considering the confusing nature of the N.O.F. and the Final Determination, and the resulting inability of the Employer to prove its ability to provide full-time employment, we remand this case to the C.O. with the following instructions. The C.O. is to allow the Employer the opportunity to demonstrate that he is an operating business able to hire a full-time worker for the job offered, and if the Employer is unable to demonstrate such ability the C.O. must issue a Notice of Findings informing the Employer of his deficiency. If the C.O. determines that the Employer does demonstrate such ability then the C.O. is directed to grant certification.

ORDER

The Certifying Officer's denial of labor certification is VACATED and the case is REMANDED to the Certifying Officer for further proceedings consistent with this opinion.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/DC/gaf

IN THE MATTER OF:

² We note that the Employer provided work invoices with its Brief but that we are prohibited from considering new evidence submitted for the first time on appeal to this Board. Sections 656.26(b)(4), 656.27(c).

Ben Thomas Design
88-INA-411

SCHOENFELD, Administrative Law Judge, Dissenting.

Because I am of the opinion that Employer was on actual notice that the Certifying Officer's Notice of Finding requested him to provide evidence that the job opportunity was a bona fide job opening and failed to provide that evidence, I would not remand but would affirm the denial of certification.

If this were a case in which an Employer was misled by an ambiguous Notice of Findings, a separate opinion would not be called for. I believe, however, that Employer in this case actually knew what the Certifying Officer thought was deficient in its application and failed to supply any rebuttal evidence relevant to the essence of the Certifying Officer's Notice of Finding.

In this case, the majority interprets the Notice of Findings in such a way as to unnecessarily create an ambiguity, miscasts Employer's rebuttal deleting references which demonstrate Employer's understanding of the gravamen of the Certifying Officer's allegation and finds "confusion" regarding an issue which is peripheral.

After acknowledging Employer's failure to rebut the Certifying Officer's essential allegation, the majority's choice to remand seems to be based upon two considerations; the Certifying Officer's citation to and reliance on §656.20(c)(8) which supposedly created "confusion" and his error in "focusing" on the lack of a State tax registration in the name of Employer. As a result of both of these "errors," according to the majority, Employer was not informed of what documentation it should have supplied in rebuttal until the issuance of the Final Determination. It is this underlying theory of the case with which I disagree strongly enough to dissent.

This Board has held consistently that a Certifying Officer's grounds for proposing to deny labor certification must be set forth in the Notice of Findings so that an employer has a fair opportunity to rebut the allegations or cure the defects. In re Downey Orthopedic Medical Group, 87-INA-674 (March 16, 1988) (en banc). Indeed, we have stated that Certifying Officers must specify the regulations asserted to have been violated as well as how the Employer violated those regulations. In re Flemah Inc., 88-INA-62 (Feb. 21, 1989) (en banc). It necessarily follows that where an Employer, in its rebuttal, demonstrates that it clearly understood the nature of the "alleged violation" set forth in the Notice of Findings it has, in fact, had a full and fair opportunity to rebut that Notice. In such cases, an ambiguity which might have been found if the Notice of Findings were read in a vacuum, becomes nothing more than a harmless error.

The Notice of Finding, in its entirety, as it relates to the Certifying Officer's concern for the existence of a bona fide job opening reads as follows;

The employer does not have a tax number assigned by the Texas Employment Commission. Furthermore, the Office of the Secretary of State of Texas does not show a listing for the employer. The employer must document that it was in operation at the time of the application and continues to be in operation and that it has a valid job opening for any qualified U.S. worker.

(AF 141)

A fair reading of the above could be as a request for Employer to provide three distinct proofs, i.e., first, that it was in operation at the time of the application; second, that it continues to be in operation; and, third, that it has a valid job opening for any qualified U.S. worker. The two sentences preceding the request for documentation describe the evidence upon which the Certifying Officer based his belief that there might not be an operating business or a valid job opening.

Although Employer's two rebuttals are identified by the majority, only one is briefly described. It is enlightening to describe them both in more detail. The rebuttal of January 19, 1988 (AF 10-11), on the stationery of "Ben Thomas Design," is an affidavit signed by Ben Thomas and consists of 8 paragraphs. The first paragraph is introductory, identifying the document. Paragraphs two through seven, inclusive, provide arguments as to why it believes it lawfully rejected several U.S. applicants. The final paragraph states;

I do not have a tax number. I have been using the name "Monarq" and I have a tax number in that name. I am not a corporation. I have been in this business for about 20 years. I am a "little guy," but I have been in business the whole time. Copies of some of my work are enclosed.

Were this the only rebuttal, I might be inclined to agree with the majority. Employer, however, through counsel identified as board certified in immigration and nationality law by the Texas Board of Legal Specialization, filed an additional rebuttal dated March 17, 1988. The stated purpose of the second rebuttal is as follows;

Now, my client wishes to supplement his response, at least so much of it as relates to your "findings" that suggest that the employer is not a legitimate business organization or is not in operation or does not have a valid job opening.

(AF 12). This second rebuttal goes on to identify work done by Ben Thomas for about twenty years and encloses samples of such work. Counsel then states; "Ben Thomas is real. I trust these items help demonstrate that fact for you, to your satisfaction." Reading both rebuttal documents together in the light most favorable to Employer, there is virtually no attempt to show that there was a valid job opening separate and apart from the material and argument showing that Employer is a legitimate business organization and that it has been in operation for many years.

As I view these documents, Employer, after restating the three items sought by the Certifying Officer, responded to only two. I would thus hold that Employer knowingly ignored the Certifying Officer's essential allegation that there was no valid job opening.

The majority acknowledges both the nature of the Certifying Officer's essential allegation and the fact that Employer did not rebut that allegation. With regard to the allegation, the majority states,

The C.O. alleges, in both the N.O.F. and the Final Determination, that the Employer has failed to demonstrate that it is an ongoing business which has a valid job opening for U.S. workers.

With regard to the failure of the rebuttal, the majority recognizes that while "the Employer devoted considerable space in his rebuttal in attempting to prove the bona fide nature of the job offered" the "sole relevant evidence submitted by Employer" is "insufficient" to demonstrate that Employer had a valid job opening.

The majority, in essence, remands to the Certifying Officer because he noted in the Final Determination two types of evidence Employer could have submitted to prove its job opening to be bona fide. The Final Determination, contrary to the implication sought to be advanced by the majority, did not base the denial on the failure of Employer to produce the specific documents mentioned for the first time by the Certifying Officer in the Final Determination. Rather, the denial was based on the failure of Employer to demonstrate that it was an on-going concern thus having a valid job opening.

The majority finds itself "confused" because the Certifying Officer mentioned different types of documentary evidence in the Notice of Findings (State tax number and identification as a business) from that mentioned in the Final Determination (invoices or other correspondence). There is no showing however, that Employer was "confused" or in any way misled to its detriment. Employer's rebuttals demonstrate that it understood the Certifying Officer's concern as to whether a valid job opening existed. The "issue" of "confusion engendered by the C.O." thus lies with the majority, not Employer.

Finally, even if the Certifying Officer cited an unrelated regulation (§656.20 (c)(8)) in the Notice of Findings, Employer was not misled as to the allegation he had to rebut.

In sum, I do not agree to remand a case where, as here, Employer's rebuttal acknowledged then failed to fulfill a request by the Certifying Officer to demonstrate that it had a bona fide job opening on the basis that an after-the-fact scrutiny by this Board finds the "suggested focus" of the Notice of Findings to be on a particular type of documentary evidence.