

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW  
Washington, D.C. 20001-8002



DATE ISSUED: MAY 12, 1992  
CASE NO: 90-INA-241

IN THE MATTER OF:

DAVID HOWARD OF CALIFORNIA  
Employer

on behalf of

CARLOS HUMBERTO CRISTALES  
Alien

Appearances: Suyen Hunter, Representative  
For the Employer

Michele W. Curran, Esq.  
For the Certifying Officer

Michael Rubin, Esq.  
Robert C. Bell, Jr., Esq.  
Amicus Curiae for the International Ladies'  
Garment Workers' Union, AFL-CIO

Before: Brenner, Clarke, De Gregorio, Glennon,  
Groner, Guill, Litt, Romano, and Williams  
Administrative Law Judges<sup>1</sup>

LAWRENCE BRENNER  
Administrative Law Judge

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<sup>1</sup> Judges Glennon and Groner did not participate in the consideration of this Decision and Order.

## **DECISION AND ORDER**

This matter arises from a request for administrative judicial review of a United States Department of Labor Certifying Officer's denial of labor certification.<sup>2</sup> 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 the Appeal File (AF), and written arguments of the parties. See 20 C.F.R. § 656.27(c).

### **Statement of the Case**

On September 23, 1988, the Employer, David Howard of California, submitted an ETA-750 for the Alien, Carlos Humberto Cristales, to fill the position of Garment Sample Cutter (AF 35). The job duties are as follows:

Cuts material to company standards, works with materials and must have full knowledge of polyester knits and/or synthetic knits to name a few. Works with approximately 15 different materials each season of the year. Places marker (sample) on top of selected material, traces sample and cuts around marker achieving the garment sample by using hand scissors. Cuts samples for dresses, jackets, skirts and pants for various fit sizes. Bundles all cut pieces and transfers them to the sewing department to be completed. Must work very carefully with materials.

(AF 35). The job requires forty hours per week 8:00 a.m. to 4:00 p.m. at \$7.90 per hour with time and a half for overtime.

In addition, two years of experience in the job offered is required (AF 35). The job also includes special requirements that the applicant "[m]ust work Monday thru Friday. Willing to work Saturdays, if requested by employer. Must show legal right to work in U.S." (AF 35).

On November 16, 1988, the Certifying Officer (CO) issued a Notice of Findings proposing to deny labor certification. Specifically, the CO requested that the Employer attempt to recruit U.S. workers from the International Ladies' Garment Workers' Union (ILGWU or Union) pursuant to 20 C.F.R. § 656.21(b)(4), which "has asked for the opportunity to refer U.S. workers to current job openings" (AF 29-32). On December 21, 1988, the Employer submitted its rebuttal letter stating that it had fully complied with the recruitment regulations but:

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<sup>2</sup> Labor certification for aliens is governed by section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14), and Title 20, Part 656 of the Code of Federal Regulations, 20 C.F.R. Part 656. Unless otherwise noted, all regulations cited in this Decision and Order are contained in Title 20, Part 656.

We are being asked to find applicants through the Union. We cannot now understand this decision since our company does not have a Union and we have never contacted them to recruit workers in the past.

(AF 27).

The CO issued a Final Determination on December 30, 1988 denying labor certification (AF 25-26). The CO concluded that labor certification could not be issued as the Employer refused to take the "opportunity to find U.S. workers for the job" through the ILGWU (AF 26).

By letter dated January 30, 1989, the Employer requested review of the Final Determination (AF 22). In its request, the Employer states:

Our appeal is based on the fact that Mr. Nelson has imposed an unfair condition upon our company. Our company is non-union and we hope to keep it that way. To require the David Howard Company to work with a union in filling this job opening is, of course, an invitation to the union to become involved with all of our hiring practices.

(AF 22).

On September 28, 1989, the CO withdrew his denial of labor certification and issued a Supplemental NOF stating that "it is evident that the Employer either did not understand our previous Notice of Findings, or the Notice was not clear" (AF 19). The CO requested that the Employer reconsider its decision not to recruit through the ILGWU and noted the following:

At the time the ILGWU asked for the opportunity to refer workers to labor certification applications, Steven Nutter, ILGWU Regional Director, was asked whether referrals would be made to non-union firms. He stated that he would rather see his members working for non-union firms than be unemployed.

There is no expectation that the member, if available, and if hired by the employer, would engage in any union organizing activity at the non-union employer's place of business.

(AF 19).

The Employer submitted its letter of rebuttal on October 26, 1989 (AF 16-17), stating:

Please be advised that I understood your Notice of Findings completely, but be aware that our company has never contacted any union for hiring personnel. This company wants to keep this policy in effect.

\* \* \*

Again, please be aware that the David Howard Company has never used any union to recruit employees.

\* \* \*

Moreover, we do not want to take the risk of employing someone from the ILGWU because he might dive into our affairs, exciting our workers to engage in the union activities.

(AF 16-17). The CO issued his second Final Determination on November 14, 1989, wherein labor certification was denied because the Employer failed to attempt to seek referrals through the ILGWU as directed by the CO pursuant to 20 C.F.R. § 656.24(b)(2)(i) (AF 11-13). The Employer filed a Request for Review by letter dated November 29, 1989 (AF 6), and the matter was docketed before the Board on April 10, 1990. On May 8, 1990, the Employer filed his Statement of Position arguing that the CO's request that it contact the Union was "not only unreasonable, but unjust" as it "is a dissembled way of opening the door of our business to the Union."

Due to the novelty of the issue presented, the Board decided to consider the case en banc without a prior panel decision. By Notice and Order dated February 11, 1992, the Board requested that the Employer file a Statement of Intent to Proceed and invited the filing of supplemental and amicus briefs from interested parties. By letter dated February 20, 1992, the Employer filed a written Statement of Intent to Proceed with the Board. A supplemental brief was subsequently filed by the Solicitor on behalf of the CO, and the International Ladies' Garmet Workers' Union, AFL-CIO filed an amicus curiae brief.<sup>3</sup>

### **Discussion and Conclusions**

The issue presented for consideration by the Board in its February 11, 1992 Notice and Order is as follows:

Whether 20 C.F.R. § 656.21(b)(5) limits a Certifying Officer's discretion to require an employer to recruit for an opening through a local union. In other words, if an employer documents that union recruitment is not normal and customary in the area or industry, may the Certifying Officer, nevertheless, require union recruitment pursuant to 20 C.F.R. § 656.24(b)(2)(i).

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<sup>3</sup> Evidence in the form of an affidavit from Steven Nutter of the ILGWU and correspondence which was not in the record upon which the CO's denial was based cannot be considered on appeal. 20 C.F.R. §§ 656.26(b)(4) and 656.27(c). See O'Malley Glass & Millwork Co., 88-INA-49 (Mar. 13, 1989). See also, e.g., Cappricio's Restaurant, 90-INA-480 (Jan. 7, 1992).

The regulation at 20 C.F.R. § 656.21(b)(5) provides that "[i]f unions are customarily used as a recruitment source in the area or industry, the employer shall document that they were unable to refer U.S. workers." 20 C.F.R. § 656.21(b)(5). The regulation at 20 C.F.R. § 656.24(b)(2)(i) requires that "[t]he Certifying Officer shall determine if there are other appropriate sources of workers where the employer should have recruited or might be able to recruit U.S. workers." 20 C.F.R. § 656.24(b)(2)(i).

The Employer argues that it does not customarily recruit through the Union and further maintains that any worker from the ILGWU would engage in unionizing activity at the Employer's place of business. Consequently, the Employer asserts that recruitment through the Union is improper in this case.

The CO argues that 20 C.F.R. § 656.21(b)(5) does not limit recruitment through the union to those cases in which it is customary; rather, it is reasonable to request such recruitment where, as here, the Union provides an additional source of U.S. workers and has indicated a willingness to refer workers to non-union jobs. Indeed, the CO argues that 20 C.F.R. § 656.24(b)(2) imposes a duty "to insure that there are no U.S. workers available for the job." CO's Brief (CB) at 6. Citing *Intel Corp.*, 87-INA-570 (Dec. 11, 1987) (en banc), the CO argued that his request was not arbitrary as he has "knowledge of an additional source of U.S. workers who are familiar with the industry and qualified for the job opportunity." CB at 10.

The ILGWU likewise argues that the CO's request that the Employer seek referrals through the Union was proper. It asserts that 20 C.F.R. § 656.21(b)(5) requires that the Employer attempt to recruit through the Union if it is a customary source of workers in the area or industry and states the following:

[20 C.F.R. § 656.21(b)(5) ] appears in the section of the regulations governing an employer's obligation to document industry recruitment efforts (and) has nothing to do with the separate and independent authority of the Certifying Officer under 20 C.F.R. § 656.24(b)(2)(i) to require additional recruitment efforts if the employer's initial voluntary efforts are unsuccessful.

ILGWU Brief (IB) at 14. In addition, although the ILGWU concedes that the Act's 1990 amendments requiring union participation are not retroactive, it nevertheless urges that "they express anew a strong policy in favor of the broadest possible input from any and all sources concerning worker availability and other labor market issues." IB at 15.

The rulemaking history of Part 656 provides that "[t]he regulations at 20 C.F.R. Part 656 set forth the factfinding process designed to develop information sufficient to support the granting or denial of labor certification." 45 Fed. Reg. 83,926 (1980). The purpose of the regulations "is to assure an adequate test of the availability of U.S. workers to perform the work" 45 Fed. Reg. 83,926. The provisions at 20 C.F.R. § 656.21 form the core of the "factfinding process" and guide the employer as to the required, minimum documentation to support a finding that the labor market was adequately tested. Thus, the plain language of section 656.21(b)(5) requires that, if unions serve as a customary

source of recruitment in the area or industry, then the employer must document that the union was "unable to refer U.S. workers."

In its rebuttal, the Employer asserts that it does not customarily seek referrals from the Union.<sup>4</sup> Assuming that union recruitment is not customary in the Employer's "area or industry," then the provisions at 20 C.F.R. § 656.21(b)(5) are inapplicable and the Employer would normally not be required to attempt recruitment through the Union. Section 656.21(b)(5), however, does not limit a CO's authority to consider whether an attempt at union recruitment is nevertheless necessary pursuant to 20 C.F.R. § 656.24(b)(2)(i).

Indeed, Intel Corp., 87-INA-570 (Dec. 11, 1987) (en banc) indicates that the CO has the authority to require additional recruitment efforts under 20 C.F.R. § 656.24(b)(2)(i). In that decision, the Board held that the CO may "require additional advertising or recruiting (upon) offering a reasonable explanation of why the employer's advertisements and/or recruitment were inadequate and how the additional recruitment efforts recommended by the Certifying Officer would be appropriate."

Under the facts of this case, the CO has documented that the ILGWU is a source of U.S. workers in the Employer's industry which has requested to refer workers to the non-union Employer. To effectuate the Act's purpose of assuring an adequate test of U.S. worker availability, it is reasonable for the CO to require recruitment through the union pursuant to the provisions of 20 C.F.R. § 656.24(b)(2)(i). Indeed, the plain language of section 656.24(b)(2)(i) temporally follows the Employer's required recruitment efforts under section 656.21, as it states that the CO "shall look at the documented results of the Employer's and the job service office's recruitment efforts, and shall determine if there are other appropriate sources of workers." 20 C.F.R. § 656.24(b)(2)(i). It is determined, therefore, that the CO reasonably requested that the Employer attempt to recruit U.S. workers through the union.

The Employer's assertions that recruitment through the ILGWU in this instance would be tantamount to "an invitation to the union to become involved with all of our hiring practices" or that an ILGWU referral may "delve into our affairs, exciting our workers to engage in union activities" is misplaced. Requiring the Employer to attempt to recruit through the Union for purposes of obtaining permanent labor certification for Carlos Cristales does not translate into a requirement that the Employer recruit through the Union or that the Union participate in its hiring practices outside the labor certification process. Disfavor of unions or union workers does not relieve an employer of regulatory requirements to conduct a fair test of the labor market.

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<sup>4</sup> The fact that this particular Employer does not customarily recruit through the Union is scant evidence for purposes of section 656.21(b)(5) which addresses union recruitment in the "area or industry." However, as the CO cites a violation of 20 C.F.R. § 656.24(b)(2)(i) and does not allege that union recruitment is customary, the Board declines to decide this issue here. See also C.F.R. § 656.21(b)(4).

Since the Employer has failed to inquire through the Union for referrals at the request of the CO, labor certification was properly denied.

### ORDER

IT IS **ORDERED** that the Certifying Officer's denial of labor certification is **AFFIRMED**.

Washington, D.C.

For the Board:

LAWRENCE BRENNER  
Administrative Law Judge

Joel R. Williams, Administrative Law Judge, dissenting:

The rules of construction generally applicable to statutes are applied also in construing regulations. KCMC, Inc. v. Federal Commerce Commission, 600 F.2d 546, 549 (5th Cir.1979). It is a principle of statutory construction that individual sections of a single statute should be construed together. Erlenbaugh v. United States, 409 U.S. 239, 243, 93 S.Ct. 477, 480 (1972) And, as held in Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 107, 64 S.Ct. 890, 894 (1944):

"However, inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. \* \* \* Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" (citation omitted)

In light of these principles, I maintain that §656.24(b)(2)(i) does not operate as a separate standard by which to judge the effectiveness of an employer's recruitment efforts. Rather, it must be construed in conjunction with the recruitment efforts that an employer is required to make under § 56.21(b). Furthermore, all parts of §656.21(b) must be construed together with its specific terms taking precedence over its general terms. Sections 656.21(b)(4) & (5) both deal with recruitment through unions. However, clearly §656.21(b)(4) is the more general of the two as it deals with various sources of recruitment. Section 656.21(b)(5) on the other hand deals only with recruitment through labor unions and only requires that an employer use this recruitment source if it is customary to do so in the area or industry. Consequently, it is my view that the Employer in the instant case was only obligated to recruit through a labor union if it is customary to do so in the Los Angeles area for its industry.

If the Employer had rejected a qualified job applicant because of his or her union membership, I would agree to deny certification on the basis of an unlawful rejection of a U.S. worker. That is not the issue here, however. The CO never addressed §656.21(b)(5) in his NOF and, consequently, the Employer was never given the opportunity to rebut by showing that union recruitment was not

customary for his industry in the area. Nevertheless, as the CO conceded in his brief that union recruitment was not customary, I would grant certification in this case.