U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 August 2008

BALCA Case No.: 2008-INA-00003
ETA Case No.: P-05119-84378

In the Matter of:

THE AWNING WAREHOUSE,
Employer,

on behalf of

CHERYL CECELIA ASHTON,
Alien.

Appearance: Glenn H. Bank, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Barbara Shelly
Philadelphia Backlog Elimination Center[1]

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of

[1] The Backlog Elimination Centers closed effective December 21, 2007. All further correspondence to the Certifying Officer about this application should be directed to the Chicago Processing Center.

the Code of Federal Regulations ("C.F.R.").[2] This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

The Awning Warehouse (Employer) filed an application on April 30, 2001 for labor certification on behalf of the Alien to fill the position of tailor - textile, apparel & furnishing worker (Occ. Code: 50-6099.99). (AF 86).[3] The Employer and the Alien were both represented by Earl S. David, Esquire. (AF 81, 82). By letter dated December 24, 2001, the Employer requested conversion to "reduction in recruitment" processing. (AF 77). A new ETA 750A was attached, which was date stamped as received on December 28, 2001. (AF 84).

On July 8, 2005, the Philadelphia Backlog Processing Center sent a "Center Receipt Notification Letter" to the Employer informing the Employer that the application had been forwarded to the Processing Center. This letter requested the Employer to notify the Processing Center whether or not it wished to pursue the application. In addition, the letter noted that the declaration of the Employer's title was a required entry on ETA Form 750 Part A or B. (AF 75).[4]

The Employer responded by counsel on August 10, 2005, indicating that the Employer wished to continue processing of the application. (AF 61-73). The Employer's letter noted that Mr. David was no longer practicing law, and that a new

[2] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

[3] In this decision, AF is an abbreviation for Appeal File.

[4] No title was shown on the original, handwritten ETA Form 750A for the person who signed the form for the Employer. (AF 87). A later, typed version of the Form showed this person to be the Employer's president. (AF 91).

attorney, Glenn H. Bank, was entering an appearance on behalf of the Employer and the Alien. The original forms ETA 750-A and B were submitted and, where applicable, amended, initialed and dated. In addition, the Employer submitted new ETA 750 A and B forms, and stated that the original ones, prepared by the previous attorney, were not of high quality and included several omissions or incomplete answers.[5]

The CO issued a Notice of Findings (NOF) on September 28, 2006. (AF 55-58). The CO stated that a review of the file indicated that Attorney Earl David had represented the Employer in this application. The CO noted that Mr. David had been suspended from practicing law by the New York First Judicial District. In addition, the U.S. Department of Justice suspended him from practicing before the Board of Immigration Appeals, the Immigration courts, and the Department of Homeland Security. The CO therefore requested the Employer to indicate whether it wished to withdraw the application, remove Mr. David as attorney and continue processing without representation, or identify a new representative and continue processing the application. In addition, the CO stated that in view of the circumstances that led to Mr. David's suspension, additional information was required to determine if the application represented a bona fide job opportunity open to qualified U.S. workers. The CO listed nine specific items of documentation or information that must be provided. The ninth item stated, "If you are represented by new counsel, please submit an updated G-28 form. **Please note that representation by new counsel does not cure the above finding.** You must still provide the information requested in Items 1 – 8 above." (emphasis in original). The cover to the NOF stated that "[a]ll findings in the Notice of Findings shall be deemed admitted unless they are rebutted." (AF 46). The NOF was addressed and mailed to Mr. David rather than to Mr. Banks.

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[5] The new forms were more complete than the forms originally submitted by the Employer. We note that the original Form 750A contained in the Appeal File dated April 30, 2001 (AF 86) is NOT identical to the form resubmitted with the August 10, 2005 response package. (AF 68). For example, the resubmitted form adds a two year experience requirement which did not appear on the version of the Form contained at AF 86. Box 16 on the original form stated that the supervisor's title was "Pres," but on the resubmitted Form, the title is spelled out as "PRESIDENT." Mr. Banks' cover letter stated that these forms were obtained from "the attorneys who are presently processing mail sent to Mr. David" and that each form had been amended and initialed where applicable.

Mr. Banks clearly received the NOF despite the CO's error in addressing and mailing it to Mr. David, because he submitted rebuttal on behalf of the Employer on October 11, 2006. (AF 45). In the rebuttal, the Employer argued that the NOF was inconsistent with the August 10, 2005 letter. Mr. Banks wrote: "Please advise how you wish to proceed from this point on. It seems the processing of this matter has been unduly delayed due to your administrative error and that had you been aware of my submission of August 10, 2005, the current "Notice" would not have been issued." A copy of the August 10, 2005 letter was enclosed. (AF 45).

The CO issued a Final Determination on March 5, 2007. (AF 39-43). In the Final Determination the CO found that the Employer's rebuttal evidence did not correct the deficiencies raised in the NOF. The CO noted that the NOF clearly stated that ". . . **representation by new counsel does not cure the above finding**. You must still provide the information requested in Items 1 – 8 above." (emphasis in original). The CO concluded that selecting new counsel or removing the suspended attorney's counsel did not demonstrate that the job offered was a bona fide job opportunity. The CO stated that submitting the required items was mandatory in order to continue processing the case. Based on the Employer's failure to provide the information requested in the NOF, items 1 – 8, the CO held that "we can not find the job offered as described on the ETA 750A is clearly open to any qualified U.S. worker or that the job actually exists." Accordingly, certification was denied. (AF 39-43).

By letter dated April 5, 2007, the Employer requested BALCA review, arguing that the NOF was flawed since it was prepared without consideration of the August, 2005 letter which had informed the CO of new counsel. (AF 1-38). The Employer noted that the NOF was addressed to the previous counsel. The Employer argued that this fact established that the NOF raised issues about the validity of the application which would not have been raised if the CO had considered the August 2005 letter. The Employer argued that the NOF did not state that "notwithstanding that more than a year ago, you engaged a new attorney and submitted amended forms, we still have questions about the

validity of the original filing." In addition, the Employer argued that the Final Determination mischaracterized the response to the NOF and did not address the issue of the failure to properly consider the August 2005 letter in the NOF.

The Employer argued that it remained ready, willing and able to provide all documentation required. The Employer argued, however, that the error in ignoring the August 2005 letter tainted the NOF and the Final Determination. The Employer argued: "Errors cannot be corrected by ignoring them and then seeking to shift the burden to the Employer." Since the request for additional information was made on an incomplete record, the Employer concluded it was unfair and unjust to penalize the Employer for raising questions in the rebuttal.

BALCA docketed the appeal on October 19, 2007, and issued a Notice of Docketing on October 24, 2007. The Employer filed a Statement of Position on November 13, 2007.

DISCUSSION

The requirement of a bona fide job opportunity arises out of 20 C.F.R. § 656.20(c)(8), which states that an employer must clearly show that the "job opportunity has been and is clearly open to any qualified U.S. worker." An employer bears the burden of proving that a bona fide job opportunity exists and is open to U.S. workers. *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (en banc); *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (en banc). Where the CO requests a document or information which has a direct bearing on the resolution of the issue and is obtainable by reasonable effort, the employer must produce it. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). An employer's failure to produce documentation reasonably requested by the CO will result in a denial of labor certification. An employer has the burden to satisfactorily respond or rebut to all findings in the NOF. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). Failure to address a deficiency noted in the NOF supports a denial of labor certification. *Id.; see also Prace Fabrication Corp.*, 1993-INA-179 (Mar. 1994) (denying

certification for failure to respond to CO's request for documentation of ability to offer full-time employment).

In the instant case the CO issued the NOF proposing to deny certification based on the fact that attorney David had represented the petitioning employer. Mr. David's involvement raised the question of whether the application presented bona fide employment.

In *Crosslands Transportation Inc.*, 2005-INA-198 and 199 (Jan. 22, 2007), the CO had raised the question of the bona fides of an application in which Mr. David had represented the petitioning employer. In that case, the BALCA panel observed that the reason for concern about Mr. David's participation was that DOL had recently encountered several instances in which attorneys had participated in the filing of numerous fraudulent labor certification applications.[6] The panel also observed that the discipline imposed on Mr. David's was not based on his immigration practice.[7]

Mr. David had been suspended from practicing law before both state judicial and federal immigration authorities. Given the CO's recent experience with attorney involvement in presenting fraudulent labor certification applications, it was reasonable for the CO to question the bona fides of the instant application and to request documentation to establish that it was bona fide.[8]

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[6] *See, e.g.*, *In re Dulce Cuco*, 2002-INA-217 (BALCA Aug. 1, 2003) (ten year suspension for filing multiple false labor certification applications); *USDOL, Office of the Inspector General's Annual Report for Fiscal Year 2002* (Jan. 2003) (noting the problem of fraudulent labor certification petitions filed with DOL on behalf of fictitious companies and corporations, petitions that use the names of legitimate companies and corporations without their knowledge or permission, and immigration attorneys and labor brokers who collect fees and file fraudulent applications on behalf of aliens) (available at www.dol.gov/_sec/media/reports/annual2002/245-254.htm); *USDOJ News Release* (Dec. 11, 2002) (conviction of attorney for filing fraudulent labor certification applications) (available at www.oig.dol.gov/public/media/sgkooritzky.html).

[7] *See In re David*, 3 A.D.3d 174, 771 N.Y.S.2d 125 (N.Y.A.D. 1 Dept. 2004); *In re David*, No. D2004-089 (BIA July 9, 2004) (Board of Immigration Appeals applying reciprocal discipline based on the State of New York decision).

[8] Moreover, as noted in the *OIG Reports*, a practice of attorneys and agents who presented the fraudulent applications was to use the names of legitimate companies without their knowledge, and to forge the name of a manager to sign the application. In the instant case, the Processing Center's July 8, 2005 notice

The CO must make the reasons for the NOF's proposal to deny the application clear to an employer to permit it a reasonable opportunity to attempt to cure any deficiency. *The Standard Oil Co.*, 1988-INA-77 (Sept. 14, 1988) (*en banc*). In this case, the CO indisputably erred by addressing and mailing the NOF to Mr. David even though Mr. Banks had already made an entry of appearance substituting for Mr. David. It is not clear, however, that this error justified the Employer's decision to respond to the NOF solely by pointing out the error and insisting that the NOF would not have been issued if the CO had correctly noted Mr. Banks' appearance.

Rather, the issue of whether the application presented a bona fide job opportunity was raised based on the fact that Mr. David had been the Employer's representative. The NOF clearly indicated that the fact that an employer might obtain new counsel would not be considered a sufficient rebuttal to the NOF. Thus, the Employer's assumption that the NOF would not have been issued if the CO had recognized Mr. Banks' earlier entry of appearance was not well founded. The fact that the Employer obtained new counsel prior to issuance of the NOF rather than after the issuance of the NOF is a distinction without a difference, given the CO's position that obtaining new counsel was not a means by which the Employer could rebut the finding questioning the existence of a bona fide job opportunity. Moreover, it was an unwise gamble to base rebuttal solely on the CO's error in failing to notice Mr. Banks' entry of appearance, given that it meant that the Employer was not timely providing the documentation designated in the NOF as necessary for rebuttal.

In sum, while the NOF erroneously failed to acknowledge the fact that the Employer had obtained new counsel, it clearly gave the Employer notice of the basis upon which the decision to issue the NOF was made. The NOF advised the Employer

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informed the Employer that a title was missing from the name of the person who signed the application on behalf of the Employer. Even the Employer's new attorney recognized that the original application was "not of high quality and included several omissions or incomplete answers."

that further information was required to determine whether the application represented a bona fide job opportunity which is open to qualified U.S. workers. In addition, the NOF clearly stated what additional information was required and explicitly stated, with emphasis added, that "**representation by new counsel does not cure the above finding.**" The Employer has not persuaded us that the concerns raised by the CO regarding the involvement of the initial counsel in this application, who had been suspended from the practice of law, and specifically from the practice before the immigration court, were completely ameliorated by the fact that the Employer had obtained new counsel.

On rebuttal, the Employer did not respond to the requests for additional information or documentation included in the NOF. Thus, the Employer did not submit all the information requested. Since the Employer did not address the CO's findings on rebuttal, the CO's findings are deemed admitted. *Belha Corp*., *supra* .

The instant case was before the CO in the posture of a request for reduction in recruitment. Normally when the CO denies an RIR, such denial should result in the referral of the application for regular processing. *Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003). We have ruled, however, that a remand for supervised recruitment is not mandated if the reason for the denial cannot be cured by a supervised recruitment. *Beith Aharon,* 2003-INA-300 (Nov. 18, 2004). Since the Employer did not submit the requested documentation on rebuttal to establish a *bona fide* job opportunity exists, a remand for supervised recruitment is not warranted.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.