U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 04 August 2004

BALCA Case No.: 2003-INA-139
ETA Case No.: P2001-CA-09510160

In the Matter of:

LIDO VEAL AND LAMB, INC.,
Employer,

on behalf of

TUCIDIDES DOMINGO CABRERA,
Alien.

Appearance: Felipe Aguirre, Esquire
Maywood, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Tucidides Domingo Cabrera ("the Alien") filed by Lido Veal & Lamb, Inc. ("the Employer"), pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A)("the Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following 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 ("AF"), and any written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On June 27, 2000, the Employer, Lido Veal & Lamb, Inc., filed an application for labor certification to enable the Alien, Tucidides Domingo Cabrera, to fill the position of Skilled knife butcher, which was classified by the Job Service as Meat Cutter. (AF 72). The job duties were to cut veal and lamb into steaks using knives and hooks; two years of experience as a butcher was required.

In a Notice of Findings ("NOF") issued on November 22, 2002, the CO proposed to deny certification on the grounds that the Employer failed to provide adequate notice of the job opportunity to the bargaining representative of those employees in the job classification for which certification is sought. (AF 67-70).[1]

The Employer filed its rebuttal on December 20, 2002. (AF 37-66). Employer's rebuttal consisted of a cover letter by the Employer's counsel, dated December 20, 2002, a letter by Robin Kinsey, dated December 6, 2002, a letter from the Employer's President, dated December 26, 2002, copies of memoranda and the contract between the union and the Employer, and the Alien's wage statements. (AF 37-65).

The CO found the rebuttal unpersuasive regarding the above-stated deficiency and issued a Final Determination ("FD"), dated January 23, 2003, denying certification. (AF 34-36). The CO stated that the Employer failed to provide notice to the bargaining representative, and that the Employer's rebuttal failed to address the NOF's finding regarding this issue. Accordingly, the finding was deemed admitted. Therefore, the CO determined that the application must be denied. (AF 5).

[1] In the NOF, the CO also questioned whether the offered wage of $8.00 per hour constituted the prevailing wage rate. (AF 68). In the Final Determination, the CO found that the Employer had adequately addressed this issue, noting that both the Employer and the union stated that the offered wage of $8.00 per hour is the union wage rate for the sponsored position, and that this was borne out by the union contracts, memoranda, and the Alien's earnings statements. (AF 35-36).

Under cover letter dated February 25, 2003, the Employer's counsel submitted a letter signed by the Employer's Controller dated February 10, 2003 and copies of memoranda of agreement and the contract between the union and the Employer. (AF 2-33). We note, however, that the Employer had previously submitted copies of the memoranda and contract in its rebuttal. (AF 37-66). Accordingly, the only new submission was the letter from the Controller. (AF 6-7). Neither the cover letter nor the Controller's letter specified whether the Employer sought reconsideration by the CO or a request for review by the Board of Alien Labor Certification Appeals (AF 2, 6-7). However, by letter dated February 28, 2003, the CO treated the foregoing submissions as a Request for Reconsideration, which he denied. The CO then forwarded this matter to the Board and the matter was docketed in this Office on April 10, 2003.

DISCUSSION

A CO is authorized to require further recruitment efforts if s/he finds that such recruitment could produce additional qualified job applicants. *See, e.g., Intel Corp.*, 1987-INA-570 (Dec. 11, 1987)(*en banc*); *Waliua Associates*, 1988-INA-533 (June 14, 1989)(additional advertisement under §656.21(g)); *J.B. Carter Corp.*, 1988-INA-434 (July 17, 1989)(recruitment through local union under §656.21(b)(5).

In the present case, the CO noted that the Employer relied on a union contract to support its wage offer, and reasonably surmised that the occupation for the petitioned job opportunity falls within the purview of a bargaining representative. Accordingly, in the NOF, the CO directed the Employer to provide a notice of job opportunity to the bargaining representative, as a means to solicit responses from able, willing, qualified, and available U.S. workers. The Employer's rebuttal failed to address this issue. (AF 37-66).

Twenty C.F.R. § 656.25(e) provides that an employer's rebuttal evidence must rebut all of the findings in the NOF, and that all findings not rebutted shall be deemed

admitted. A CO's finding which is not addressed in the rebuttal is deemed admitted. *See, e.g., Belha Corp.*, 1988-INA-24 (May 5, 1989)(*en banc*).[2] In view of the foregoing, we find that labor certification was properly denied.

ORDER

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

Entered at the direction of the Panel by:

A

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 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. 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, N.W., Suite 400
Washington, D.C. 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

[2] The Employer's post-Final Determination submission included a statement by the Controller which belatedly sought to address this issue. The crux of the Employer's argument is that the job opportunity was posted in the plant in accordance with the contract, and that notification to the bargaining representative is not required thereunder. (AF 6-7). However, the CO's instructions in the NOF directing the Employer to notify the bargaining representative were not based upon the union contract, but rather to recruit qualified U.S. applicants pursuant to a labor certification application. Accordingly, the Employer's post-Final Determination evidence, if considered, would still not adequately address the above-stated deficiency. Moreover, such evidence is not properly before us, because our review is limited to evidence and argument timely developed before the CO. 20 C.F.R. § 656.24(b)(4); *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*).

full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.