U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 September 2004

BALCA Case No.: 2003-INA-254
ETA Case No.: P2002-CA-09519481/JS

In the Matter of:

ASPIRE PUBLIC SCHOOLS,
Employer,

on behalf of

LOIDA TALAMBAYAN,
Alien.

Appearance: Dan Korenberg, Esquire
Sherman Oaks, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the Aspire Public Schools' ("the Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision 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. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On January 19, 1999, the Employer filed an application for labor certification on behalf of the Alien, seeking to fill the position of Teacher (K-1). The Employer required four years of college education, with a major in Special Education, Psychology, or Education, and two years of experience in the job offered or a related occupation. (AF 38). The Employer filed a request for Reduction in Recruitment ("RIR").

On December 23, 2002, the CO issued a Notice of Findings ("NOF") proposing to deny labor certification. (AF 33-36). The CO found that the Alien was not legally eligible to perform the job for which the Employer sought certification, in violation of 20 C.F.R. § 656.20(c)(7). The CO noted that although the Employer's application made some mention of a temporary emergency credential, there was no indication of the duration of such credentials. The CO requested documentation showing that the Alien "possesses a credential or emergency or temporary credential." If the Alien had only a temporary or emergency credential, the Employer was instructed to "provide a statement from the appropriate licensing authority . . . which shows how long the duties of teacher, k-1, can be performed without a standard California teaching credential."

The Employer filed its rebuttal on January 27, 2003. (AF 56-63). With its rebuttal, the Employer submitted a copy of the Alien's October 11, 2002 application for a temporary county certificate for August 19, 2002 through August 20, 2003. (AF 61). The Employer also submitted documentary evidence that the Alien had possessed a temporary teaching credential valid from August 21, 2000 through August 21, 2001. (AF 62).

On February 3, 2003, the CO issued a supplemental Notice of Findings ("SNOF"), concluding that the documentary evidence submitted by the Employer in its

initial rebuttal showed that the Alien's temporary credential had expired. (AF 30-31). The CO requested that the Employer "[s]how if the beneficiary of this application has continued in the job of teacher during the period when the temporary credential had apparently expired." He also required the Employer to show when the Alien will be eligible to obtain permanent credentials. Finally, the CO asked that the Employer "[s]how that the credential applied for on October 2, 2002 has been awarded."

On March 6, 2003, the Employer requested an extension of time to file its rebuttal. The Employer explained that the Alien was awaiting the results of the California Basic Educational Skills Test (CBEST). The Employer stated that an extension would "afford the employer the opportunity to calculate with more certainty the time required to complete the certification process, as well as to determine the status of the currently pending temporary credential." (AF 27-28). On March 14, 2003, the CO granted the Employer an extension of time to file its rebuttal. (AF 33).

The Employer filed a rebuttal on April 14, 2003. (AF 20-32). Citing *Perla Tate*, 1990-INA-195 (Dec. 4, 1992) (*en banc*), the Employer contended that its application did not violate 20 C.F.R. § 656.20(c)(7). The Employer asserted that although the Alien did not possess the required license, she could work as a teaching assistant until the credentials were obtained. Further, the Employer added that the Alien was scheduled to re-take the teaching exam that weekend.

The CO issued a Final Determination ("FD") denying certification on April 24, 2003. (AF 17-19). Reviewing the evidence submitted by the Employer, the CO noted that the Employer's rebuttal indicated that the Alien would be working as an assistant teacher while re-taking the CBEST in order to obtain an emergency credential. The CO stated that based on the evidence submitted by the Employer, it was impossible to determine whether the Alien would be qualified to assume the job duties of a teacher at any specific time in the future. Noting that the Employer had not shown whether the job duties of a teacher could be performed without any credential, or how long those duties

could be performed with a temporary credential, the CO concluded that the Employer failed to adequately rebut the findings in the NOF. Accordingly, certification was denied.

On May 15, 2003, the Employer filed a Request for Review. (AF 1-3). The Employer again cited *Perla Tate*, arguing that licensure is not a prerequisite for certification in all cases and that the Employer would not be in violation of 20 C.F.R. § 656.20(c)(7) should certification be granted. Distinguishing *Perla Tate*, the Employer contended that the process to become a licensed teacher is not long and drawn-out. Rather, it is ministerial and could be completed prior to the completion of immigration procedures.

On September 5, 2003, the Employer filed a Statement of Position, describing the process for obtaining an emergency teaching credential in California. The Employer asserted that the Alien had recently taken the required exams and had the specified permit.

DISCUSSION

In its Statement of Position, the Employer made, for the first time, several assertions regarding the certification process for teachers in California. Many of these statements are of a factual nature and thus constitute new evidence which was not previously submitted to the CO. The Board cannot consider this material, as our review is based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c). Evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Furthermore, where an argument made after the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989). Several of the Employer's statements regarding the emergency credential process are tantamount to an untimely attempt to rebut the NOF. The CO requested information regarding the temporary certification process in both the initial and the supplemental NOF. The

Employer's rebuttals did not respond to these requests and its undocumented assertions regarding this process were made for the first time in its Statement of Position. These assertions are therefore tantamount to an untimely attempt to rebut the NOF and we cannot consider them in rendering a decision in this matter.

Under 20 C.F.R. § 656.20(c)(7), a job offer filed on behalf of an alien must clearly show that the job opportunity's terms, conditions, and occupational environment are not contrary to federal, state or local law. When the job offer is for a position which requires possession of a license under state law, the regulation is applicable. However, if the alien will not work in the position until she completes the required training and obtains the applicable license, then state law is not violated. While "an alien's lack of a required license to perform the job offered is not a *per se* bar to obtaining labor certification," the regulation mandates that a job opportunity be current. Thus, the employer must document that the required license is obtainable "within a proximate time of the alien's entry into the United States through the completion of a ministerial process." *Perla Tate, supra* (holding that a residency program for physicians was not ministerial in nature and was not "proximate" to the alien's entry because it required three years to complete).

The Employer asserts that it is not required to show that the Alien possesses a teaching credential because under *Perla Tate*, licensure is not a prerequisite to certification. While lack of a required license is not a *per se* bar to obtaining certification, an employer who seeks certification for an unlicensed alien must also show that completion of the licensing process is ministerial and involves a relatively short process. The Employer makes a conclusory statement that the process for obtaining a teaching credential is ministerial and can be completed before the close of immigration procedures.

We reject the Employers argument, as the process for obtaining a teaching credential is not ministerial in nature. Based on the Employer's assertions, the Alien must pass the CBEST examination before qualifying for her teaching credential. A

licensing procedure which requires the successful completion of such an exam can hardly be called "ministerial" in nature. In fact, the Employer stated that the Alien was going to re-take the exam, indicating that she did not pass the exam on the first attempt. The Employer did not present evidence showing that the Alien possessed the necessary credentials for the position. The CO therefore properly denied the RIR. However, the CO denied the application outright, which was in error.

Twenty C.F.R. § 656.21(i) provides that a CO "may" reduce or eliminate an employer's recruitment efforts if the employer successfully demonstrates that it has adequately tested the labor market with no success at least at the prevailing wage and working conditions. The purpose of the RIR regulations is to expedite applications in occupations where there is little or no availability of U.S. workers. Twenty C.F.R. § 656.21(i)(5) provides that "unless the Certifying Officer decides to reduce completely the recruitment efforts required of the employer, the Certifying Officer shall return the application to the local (or State) office so that the employer might recruit workers to the extent required in the Certifying Officer's decision." The CO, in this case, issued an FD denying certification. This is in error, as upon ruling on and denying an RIR request, the CO should return the case to the local office for processing. *See Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003). Accordingly, this case is remanded to the CO to remand the case to the State Workforce Agency for further processing.

ORDER

The Certifying Officer's denial of reduction in recruitment is **AFFIRMED.** The Final Determination denying labor certification, however, is **REVERSED** and this matter is **REMANDED** with instructions to remand the application to the State Workforce Agency for regular labor certification processing.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

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 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

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

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