U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 07 September 2004

BALCA Case No.: 2003-INA-177
ETA Case No. P2001-MA-01311339

In the Matter of:

STAPLES INC.,
Employer,

on behalf of

KUNTAL GANDHI,
Alien.

Appearance: Daniel Maranci, Esquire
Boston, Massachusetts
For the Employer and the Alien

Certifying Officer: Raimundo Lopez
Boston, Massachusetts

Before: Burke, Chapman, and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

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 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 March 23, 2001, the Employer, Staples, Inc., applied for labor certification to enable the Alien, Kuntal Gandhi, to fill the position of Financial Analyst. (AF 17). The job requirements were a Master's degree in Business Administration and the rate of pay was listed as $67,000 per year. (AF 47). The Employer requested a Reduction in Recruitment ("RIR").

On March 8, 2002, the CO issued a Notice of Findings ("NOF"), noting that the Employer had experienced or would soon experience a reduction in workforce. Accordingly, the Employer was advised to demonstrate that the job for which certification was sought was not affected by this reduction and that none of the employees subjected to this reduction were qualified to fill the job. (AF 13). The Employer was instructed to provide the following information: the number of layoffs, the specific positions laid off, and whether any of the displaced workers were qualified for the vacant position. The Employer was also instructed to identify the total layoffs among financial analysts or similar positions, each person laid off from these positions, and the number of workers employed in these positions. Further, the Employer had to explain whether employees laid off from similar positions were considered for the opening. If these employees were not considered, the Employer was instructed to explain why. If they were considered, the Employer was ordered to explain why these employees were not hired for the vacant position.

The Employer was also asked to address hiring restrictions. In the absence of such restrictions, the Employer was instructed to disclose how many openings it had for financial analysts or similar positions. The Employer was asked whether budget cuts had affected these positions. Finally, the Employer was asked to explain and to document

any additional efforts to identify qualified individuals affected by reductions in other departments within the company. (AF 13).

On April 2, 2002, the Employer submitted its rebuttal in which it denied initiating any hiring freezes or wage reductions. The Employer averred that it continued to conduct recruitment events at colleges and universities and employed "industry standard methods" to recruit lateral hires to fill new positions. (AF 10). The Employer acknowledged that 104 employees were laid off at its corporate offices but denied that any of these employees held positions identical to or similar to the vacant position. However, the Employer did not elaborate on this assertion or provide the requested documentation. The Employer stated that it "routinely and consistently reviewed the credentials of former employees who were part of workforce reductions, to ascertain if they might meet the minimum objective requirements for the position." (AF 11). Again, the Employer did not explain this process or provide documentation of its methods.

On August 16, 2002, a Final Determination ("FD") was issued in which the CO denied certification. The CO denied certification because the Employer had not documented the specific positions subject to the layoffs, and the Employer had failed to explain why none of the laid-off workers were qualified to fill the vacant position. Further, the CO found that the Employer had not documented its efforts to identify whether any of its laid off employees were qualified to fill the vacant position. (AF 9). On September 18, 2002, the Employer requested review of the denial of labor certification and the matter was docketed in this Office on April 21, 2003. (AF 1).

DISCUSSION

The Employer argues that the NOF was inappropriately issued. In support of that assertion, the Employer cites a memorandum issued by Dale Zeigler, Chief of the Department of Labor's Division of Foreign Labor Certification. (AF 6-7). This memorandum identifies two "look back" periods for employer-specific layoffs in relation to Reduction in Recruitment: "six months prior to filing the application or in the six months prior to processing." (AF 6-7). The memorandum does not define "processing,"

but the Employer asserts that the "processing" date should be August 1, 2001 – the date on which the application was received in the regional office. (AF 3). The Employer does not cite any legal authority for this interpretation. However, the memorandum further states that "if the CO has reason to believe that the employer applicant laid off workers within the last six months, a letter [in the form of an NOF] should be sent requesting the employer to provide additional information concerning the layoffs." (AF 7). This indicates that "processing" should be understood as the date that the NOF is issued. In this case, the NOF was issued on March 8, 2002 and the lay-offs occurred on January 29, 2002. Therefore, the NOF was properly issued.

We note that the Request for Review contains material explaining the Employer's efforts to fill the vacant position with laid-off employees who held similar positions. (AF 4). This information was not previously submitted to the CO. Since it was not part of the record upon which the denial of certification was based, it cannot be considered by the Board. *See* 20 C.F.R. §§ 656.26(b)(4), 656.27(c); *24 Hour Fuel Corp.*, 1990-INA-589 (Aug. 31, 1992). Evidence first submitted with a Request for Review will not be considered. *La Prairie Mining, Ltd.*, 1995-INA-11 (April 4, 1997).

As indicated, the Employer's rebuttal failed to provide the information requested in the NOF about its reductions in force and its efforts to identify former employees qualified to fill the vacant position. An employer's failure to provide documentation reasonably requested by the CO will result in a denial of labor certification. *Eli's Trims, Inc.*, 1994-INA-404 (Jan. 25, 1996). As such, the CO properly denied the Employer's request for 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 with a mandate 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.