U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

Date: November 26, 1991

Case No.: 89-INA-289

In the Matter of:

LOMA LINDA FOODS, INC.
Employer

on behalf of

BETTY REIDE WU
Alien

BEFORE: Brenner, DeGregorio, Groner, Glennon,
Guill, Litt and Romano
Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

This matter arises from a request for administrative-judicial review of the Certifying Officer's ("C.O.") denial of labor certification under section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14) ("Act"), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). On December 6, 1990, a panel ("Panel") of the Board of Alien Labor Certification Appeals ("Board") issued a decision remanding the case to the C.O. On January 30, 1991, the Board granted the C.O.'s request for en banc review and vacated the Panel's decision.

Background

On May 11, 1988, Loma Linda Foods, Inc. ("Employer") applied for labor certification to enable Betty Reide Wu ("Alien") to fill the position of computer programmer (AF 28-29, 102-103). The California Employment Development Department ("EDD") referred twenty-one U.S. applicants to the Employer: fifteen on October 19, 1988 (AF 86) and six on November 10, 1988 (AF 47). On December 22, 1988, the Employer submitted its final recruitment report to EDD, indicating that all of the U.S. applicants had been considered and rejected (AF 33-36).

On February 16, 1989, the C.O. issued a Notice of Findings proposing to deny certification on the ground that the Employer did not demonstrate a good faith effort to contact the applicants in a timely manner (AF 24).[1] Specifically, the C.O. noted that the Employer's first interview occurred December 6 and that applicants Donald Schneider, Jaynene Vu, Mark Wayman and Walter Wooten were no longer available for the position when they were contacted (AF 24).

The Employer's March 21, 1989 rebuttal explained why the Employer delayed its contact of the applicants (AF 16-22). The C.O. found the explanation to be inadequate and issued his Final Determination denying certification on April 4, 1989 (AF 13-15).

The Employer filed an Appeal Brief on September 5, 1989 ("Appeal Brief"). After the Board vacated the Panel's decision and granted en banc review, the Employer and the C.O. each filed a brief ("Employer's Brief on Review" and "C.O.'s Brief on Review").

Discussion and Conclusions

I. Chronology of Events

Since this case involves a question of timely contact, understanding the chronology of events is crucial. In its December 6, 1990 decision, the Panel made factual findings (Panel Decision at 3-4) which are supported by the evidence and incorporated into the following summary.

The Employer filed its labor certification application on May 11, 1988 (AF 28-29, 102-103). EDD set the recruitment period for U.S. applicants for October 6, 1988 through November 5, 1988 (AF 93). The Employer's Vice President for Finance, Mr. Danny C. Villanueva, was responsible for evaluating the U.S. applicants' qualifications (AF 21).

On October 14, 1988, Mr. Villanueva's father died and Mr. Villanueva departed for Hawaii to attend the funeral (AF 21). His departure occurred during the recruitment period, but before EDD had forwarded any applications to the Employer. On October 19, 1988, EDD sent fifteen resumes to the Employer, including those of Jaynene Vu, Mark Wayman and Walter Wooten (AF 86-87).

On or about November 7, 1988, Mr. Villanueva returned from Hawaii (AF 21). On November 10, 1988, EDD sent six resumes to the Employer, including that of Donald Schneider (AF 47-48).

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[1] The C.O. proposed two other grounds for denying certification: (1) that the Employer evaluated the applicants using an unduly restrictive requirement (AF 24); and (2) that the Employer rejected U.S. workers for non-job related reasons (AF 24-25). Since we dispose of this case based on the Employer's failure to contact the U.S. applicants in a timely manner, we need not assess the validity of the other two grounds.

On or about December 6, 1988, the Employer began to contact the applicants.[2] The contacts began almost seven weeks after the first batch of resumes were forwarded to the Employer, almost four weeks after the second batch, and about four weeks after Mr. Villanueva returned from Hawaii.

On December 22, 1988, the Employer filed its final recruitment report (AF 33-36). Of the twenty-one applicants referred to the Employer, the four whom the C.O. deemed qualified, Ms. Vu and Messrs. Schneider, Wayman and Wooten (AF 14, 24), were not available when the Employer contacted them. The Employer concedes that Ms. Vu was qualified for the programming position (AF 34).

II. Threshold Determination: Timeliness of Contact

Section 656.20(c)(8) requires that a job for which alien labor certification is sought "has been and is clearly open to any qualified U.S. worker." An employer must contact potentially

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[2] The C.O.'s Notice of Findings asserts, and the Employer's Rebuttal affirms, that the first contact occurred on December 6, 1988 (AF 24, 17). The record contains the following evidence, not discussed in the Panel decision, regarding the specific dates and outcomes of the Employer's contacts of Ms. Vu and Messrs. Schneider, Wayman and Wooten:

In its Appeal Brief, the Employer claims to have contacted Ms. Vu on November 30, 1988 (Employer's Appeal Brief at 16). The record does not contain any evidence to support this claim. Assuming that the date is accurate, the contact came approximately one and one-half months after EDD forwarded the applicant's resume to the Employer, and more than three weeks after Mr. Villanueva returned from Hawaii. Ms. Vu notified the Employer that she was no longer interested in the position (AF 34).

On December 5, 1988, the Employer contacted Mr. Schneider (AF 41), more than three weeks after EDD forwarded Mr. Schneider's resume to the Employer, and approximately one month after Mr. Villanueva returned from Hawaii. Mr. Schneider notified the Employer that he was no longer interested in the position (AF 35).

On December 14, 1988, the Employer contacted Mr. Wayman (AF 36), approximately two months after EDD forwarded Mr. Wayman's resume to the Employer, and more than five weeks after Mr. Villanueva returned from Hawaii. Mr. Wayman notified the Employer that he was no longer interested in the position (AF 36).

The Employer tried to contact Mr. Wooten "several times" without success (AF 35). Presumably, the attempts occurred on or about December 6, 1989, the date of first contact cited in the Notice of Findings (AF 24), affirmed in the Employer's rebuttal (AF 17) and accepted by the Panel (Panel Decision at 3).

Based on the record evidence, the Panel's acceptance of December 6, 1988 as the approximate date of first contact (Panel Decision at 3) is reasonable.

qualified U.S. applicants as soon as possible after it receives resumes or applications, so that the applicants will know that the job is clearly open to them. Otherwise, the U.S. applicants may lose interest in the position. Allowing an employer to delay contact would be tantamount to allowing an employer to thwart the policy of preferring qualified U.S. workers over aliens for U.S. jobs.

An employer's compliance with the forty-five day deadline imposed by a job service for completing all recruitment steps and filing a recruitment report does not satisfy the requirement of timely contact. Creative Cabinet and Store Fixture, 89-INA-181 (Jan. 24, 1990) (en banc); Hennessey's Tavern, Inc., 88-INA-531 (Sep. 21, 1989). During the recruitment period, the employer must review applications or resumes, contact applicants, interview applicants, weigh its findings and report to the job service. The reasonableness of the time period before the employer contacts applicants is assessed according to regulatory—not job service—standards.

"As soon as possible" does not embody a specific time limit. It turns on how long an employer requires for a reasonable examination of the applicants' credentials. The reasonableness of the time may depend on a variety of factors, including but not limited to (1) whether the position requires extensive or minimal credentials, (2) whether recruitment is local or nonlocal, and (3) whether many or few persons apply for the position. See, e.g., Ironclad, Inc., 88-INA-477 (Feb. 12, 1990) (professional position). The diligent evaluation of the resumes of physician-applicants may reasonably require more time than the diligent evaluation of the resumes of cashier-applicants.[3]

If an employer demonstrates the reasonableness of the time it spent reviewing resumes or applications prior to contact, then certification should be granted. See, e.g., National Industries for the Severely Handicapped, 88-INA-388 (Feb. 13, 1990); Hoover Electric Company, 88-INA-315 (June 6, 1989). For the contact to be timely, the interval between resume referral and contact must be spent evaluating resumes in the context of a reasonable and diligent pre-contact recruitment procedure. In legal parlance, an employer who makes timely contact is acting in good faith. However, it is important not to become lost in "good faith" jargon, which easily disintegrates into an analysis of the intent underlying an employer's delay. The proper focus is not on the employer's intent, but on the probable effect on U.S. applicants of the passage of time.

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[3] Note again, the job must appear to be clearly open to U.S. applicants. Those seeking professional or nonlocal positions may reasonably expect a longer time to pass before an employer initiates contact than those seeking nonprofessional or local positions, so a longer period before contact will not deter them from pursuing the job opportunity. But, even where a lengthier pre-contact period may be reasonable, an employer who exceeds that lengthier reasonable time will face the denial of certification. See, e.g., Naegle Associates, Inc., 88-INA-504 (May 23, 1990) and Trussway-Fort Worth, 88-INA-163 (Mar. 12, 1990) (certification denied where pre-contact recruitment periods for professional positions were unreasonably long).

In the instant case, the Employer cited four factors inherent in its recruitment procedure to explain the interval before it contacted U.S. applicants. All four are mentioned in Mr. Villanueva's Declaration, attached to the Employer's Rebuttal (AF 21). First, Mr. Villanueva alleges that he was the only individual in his company who was responsible for evaluating the credentials of computer programmer-applicants. Second, he was the only person qualified to evaluate the applicants. Third, he recalled that he had to review "many" resumes. Finally, his desire to be systematic and organized prevented the immediate contact of the applicants.

The Employer's arguments do not support a finding that the recruitment procedure itself accounts for the timing of the contact of U.S. applicants. Even if we accept Mr. Villanueva's assertions that only he was qualified or responsible for evaluating the applicants' credentials, and we accept Mr. Villanueva's three and one-half week absence from work, the Employer has not shown that it spent a reasonable time on pre-contact recruitment. The Employer waited until four weeks after Mr. Villanueva returned from Hawaii to begin contacting applicants. Four weeks is an unreasonably long time to spend to organize the contact of twenty-one applicants. If the case were decided only on the reasonableness of pre-contact recruitment efforts, certification would be denied.

III. Justification or Excuse for Untimely Contact

A rigid reading of section 656.20(c)(8) would preclude any external justification or excuse for a delayed contact, and therefore would require the denial of certification in every instance where an employer deviates from a reasonable recruitment process. Such a reading would honor the policies underlying the regulations: whether or not an employer's justification or excuse is reasonable, delaying the contact of U.S. applicants is a disincentive to those applicants; the job is not clearly open to them.

The Board has declined to adopt such a strict standard. Instead, it has chosen to alleviate hardships on innocent employers by applying two equitable remedies. First, an employer who provides a reasonable justification for its delay is given a second chance to recruit; the case is remanded. Second, an employer who provides a legitimate excuse, showing that it did not contribute to the delay, is granted certification; the C.O.'s denial is reversed. An employer may also rely on a combination of reasonable justifications and excuses.[4] Since justifications and excuses give rise to different remedies, the distinction between the two warrants special attention.

A. Justification

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[4] Of course, if an employer fails to prove that it followed a reasonable and diligent recruitment process, and fails to allege any justification or excuse, then certification must be denied. See, e.g., Moore's Barbecue House, Inc., 89-INA-308 (Jan. 15, 1991); A & E Clinical Veterinary Laboratory, 90-INA-28 (Jan. 2, 1991); Gan Israel School, 90-INA-1 (Oct. 31, 1990); The Velvet Turtle, 89-INA-57 (May 29, 1990); Benjamin Builders, Inc., 89-INA-69 (March 15, 1990).

An employer may demonstrate that factors outside the normal recruitment process, but within the employer's responsibility or control, reasonably prevented it from contacting applicants as soon as possible. The interference may arise from either personal or professional matters; however, to justify a delay, the employer must demonstrate that it handled the interference reasonably.

Evaluating the reasonableness of an employer's justification involves several considerations, including but not limited to the following:

- Could the employer have reasonably anticipated the interference with recruitment?
- Was the interference reasonably avoidable?
- Did the employer make reasonable attempts to mitigate the impact of the interference?
- Did the employer prioritize its competing obligations reasonably?

If an employer offers more than one justification for its delay, the cumulative effect of the alleged interferences may be considered.

If an employer demonstrates that its delay was justified and reasonable under the circumstances, the case must be remanded for new recruitment. Granting certification would frustrate the policies underlying section 656.20(c)(8) since U.S. applicants, unaware of the cause of the delay, would perceive that the job was not clearly open to them. Of course, if an employer fails to demonstrate that its justification is reasonable, then certification must be denied. See, e.g., Foster Electrical Service, Inc., 88-INA-284 (Jun. 30, 1989) (en banc); Garden Crest Convalescent Hospital, 88-INA-502 (Apr. 19, 1990); Lancaster Landscapes, 87-INA-632 (Jan. 12, 1988).

In the instant case, the Employer alleged that several personal and professional matters interfered with its contact of U.S. applicants for the computer programmer position. However, the Employer failed to demonstrate that the matters reasonably justify the delay.

First, in his Declaration, Mr. Villanueva averred that he was the only person qualified or responsible for evaluating the applicants' credentials; that he left town suddenly on October 14, 1988, to attend his father's funeral; and that he did not return for three and one-half weeks (AF 21). The chronology of the case confirms that Mr. Villanueva departed during the recruitment period, but before EDD had forwarded any applications to the Employer. It also shows that Mr. Villanueva did not contact any applicants until almost seven weeks after the first batch of resumes was forwarded to the Employer, almost four weeks after the second batch and about four weeks after Mr. Villanueva retumed from Hawaii.

Clearly, Mr. Villanueva could not have anticipated his father's death. However, the Employer should have anticipated that Mr. Villanueva's absence would interfere with the recruitment of U.S. applicants. There is no record evidence that the Employer attempted to mitigate the impact of Mr. Villanueva's absence, perhaps by making a preliminary contact of

applicants. There is no convincing evidence that Mr. Villanueva was the only person qualified to act for the Employer. Further, there is no record evidence that Mr. Villanueva could not have kept in touch with his office and initiated some contact of applicants during his extended absence from work. Even if we assume that Mr. Villanueva was the only qualified, responsible person, and we assume that three and one-half weeks is a reasonable period of absence and nonaction, the Employer must reasonably justify the four weeks of nonaction after Mr. Villanueva's return.

Second, in his Declaration, Mr. Villanueva averred that upon his return from Hawaii, his regular managerial duties interfered with the contact of U.S. applicants (AF 21). Certainly, he should have anticipated his regular duties and even the increased duties upon his return from an extended absence. Yet, there is no record evidence that he attempted to reduce the impact of his "regular" duties on the Employer's recruitment effort, perhaps by delegating some of his work to other personnel. If the Board were to allow an employer to justify a delay on the ground that regular duties interfered with timely contact, then any employer could retreat to this safe haven and be assured of a remand.

Third, in its Rebuttal, the Employer argues that its impending division into two companies and Mr. Villanueva's preparation to join the new company interfered with the contact of U.S. applicants (AF 17). There is no evidence that the Employer or Mr. Villanueva attempted to reduce the impact of this reorganization on the recruitment effort, perhaps by delegating some authority to other personnel.

Fourth, in its Rebuttal, the Employer argues that its ongoing effort to fill the position which would supervise the new computer programmer interfered with the contact of U.S. applicants (AF 17). In its Appeal Brief, the Employer's counsel speculated that the current supervisor may have been a "lame duck," who was not authorized to recruit (Appeal Brief at 15). Then, in its Brief on Review, the Employer's counsel stated that the supervisory position was vacant, and therefore, the supervisor could not assist in the recruitment of U.S. applicants (Employer's Brief on Review at 4, 7). If the supervisory position was filled, there is no evidence that it was filled by a lame duck. If it was empty, it is irrelevant, since Mr. Villanueva claims full responsibility for the recruitment effort. The task of hiring one supervisor does not justify the four to seven-week delay in contacting applicants for the computer programming position. Again, there is no evidence that the Employer or Mr. Villanueva attempted to mitigate the interference, if any, of hiring a supervisor, perhaps by delegating authority to other personnel.

Finally, in his Declaration, Mr. Villanueva stated that the recruitment instructions from EDD did not mention a deadline for the contact of U.S. applicants (AF 21). In fact, he acknowledged that if he had "been given such notice, it may have been possible to meet such specified deadlines" (AF 21). As noted earlier, the timeliness of contact is determined according to regulatory standards—not according to the recruitment report deadline. The Employer's admission that it could have contacted U.S. applicants earlier further deflates its other justifications for delaying contact; it amounts to an admission that the Employer could have mitigated the impact of outside interferences and, in fact, considered the recruitment of U.S. workers to be a low priority.

Considered cumulatively, the interferences alleged by the Employer do not amount to a reasonable justification for the delay of the contact of U.S. applicants. The Employer did not demonstrate that Mr. Villanueva was the only qualified, responsible interviewer. Mr. Villanueva did not demonstrate that he attempted to mitigate the impact of his three and one-half week absence from work, and the Employer did not demonstrate that it attempted to compensate for his absence. Regular duties cannot serve to justify a delay in contacting applicants. The increased duties following an extended absence or attending a corporate split are reasonably anticipatable, and the Employer offered no evidence that it attempted to mitigate the impact of the interference. Finally, the Employer apparently placed a low priority on its recruitment responsibilities, since by its own admission it may have been able to contact the applicants sooner. Since the Employer failed to demonstrate a reasonable justification, no relief from the denial of certification can be granted on that ground.[5]

B. Excuse

Another equitable remedy may be applied to relieve hardship on an innocent employer if the employer demonstrates that the job service or certifying officer delayed the employer's contact of U.S. applicants.[6] See, e.g., Lee & Chiu Design Group, 88-INA-328 (Dec. 20, 1988) (en banc); La Salsa, Inc., 87-INA-580 (Aug. 29, 1988). If the employer proves that the job service or certifying officer caused the only delay, then the delay is excused, and certification is properly granted. If the employer proves that the job service or certifying officer contributed to the delay, but the employer also contributed to the delay, then certification must be denied unless a reasonable justification is established.

The practice of granting certification despite a delay raises some policy concerns. Although a third-party delay is beyond the employer's responsibility or control, the job still is not clearly open to U.S. applicants. If this were the only policy involved, the remedy for an excused delay would be a remand, just as for reasonably justifiable delays. However, in cases of excuse, a stronger policy controls: the employer and alien should not have to bear the burden of a new recruitment and its attendant delay when the delay in contacting apparently qualified U.S. applicants was beyond its responsibility or control.

Granting certification in cases of excuse has some desirable consequences. It provides a disincentive to job services and certifying officers to contribute to the delay in contact of U.S.

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[5] The Panel accepted the Employer's justifications as reasonable and remanded the case; however, it failed to consider whether the Employer could have reasonably anticipated, avoided or mitigated the impact of any of the circumstances which allegedly prevented the timely contact of the U.S. applicants. Our application of the correct legal standard dictates the opposite conclusion.

[6] In the instant case, the C.O. argues that this should be the only exception to a rigid rule on timely contact (C.O.'s Petition for En Banc Review at 3). We decline to adopt the C.O.'s position.

applicants. Moreover, it does not provide an improper incentive to the employer, who must still follow a reasonable recruitment procedure once it receives the job applications.

Delays may also be excused where a holiday falls within the recruitment period, after the employer received the applicants' resumes but before the applicants reasonably should have been contacted.[7] See, e.g., Fair Weather Marine, Inc., 88-INA-331 (Sep. 21, 1989); South Baylor University, 86-INA-64 (Mar. 11, 1986). In such cases, the holiday period is properly excised from the evaluation of timely contact.

It is important to note that a holiday will support an excuse equal only to the duration of that holiday: many holidays affect only one day of the work week; Thanksgiving may affect two or three days; and the Christmas/New Year season may affect up to a week. When a holiday intervenes, an employer's contact will be considered timely only if it occurs within a reasonable pre-contact recruitment period, augmented by the number of days reasonably affected by the holiday.

The holiday cases are analogous to the job service and certifying officer cases: the scheduling of the recruitment period is beyond an employer's responsibility or control. In fact, in one important respect, excusing delays caused by holidays is less objectionable than excusing delays caused by the job service or certifying officer: applicants are aware of holidays and are likely to expect some delay in contact because of them; therefore, a short holiday delay may not lead applicants to believe that the job is not clearly open.[8]

In the instant case, the Employer offered one excuse for its delay in contacting U.S. applicants: Thanksgiving fell during the recruitment period (Employer's Brief on Appeal at 5, 7). The 1988 calendar reveals that Thanksgiving fell on Thursday, November 24, after the Employer had received all of the applications from EDD and before the Employer had made a single contact. At most, the Thanksgiving vacation would excuse three days of delay, i.e. add three days to the reasonable pre-contact recruitment period. Considered alone, a three-day excuse does not prevent a finding that the Employer unreasonably delayed the contact of U.S. applicants. Therefore, a reversal of the denial of certification would not be appropriate.

As discussed above, the Employer's justifications for untimely contact fall far short of reasonable. That determination is not altered by subtracting three days from the substantial period of delay. Given the combination of unreasonable justifications and a three-day excuse, a remand of the case would not be appropriate. The Employer has violated section 656.20(c)(8) because it has failed to demonstrate that the job was clearly open to any qualified U.S. worker.

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[7] The Panel discussed the delay attributed to Thanksgiving together with the Employer's justifications. Such an analysis is inappropriate, since the remedies for excuses and reasonable justifications are not the same.

[8] For that reason, and because they can be scheduled and controlled, an employer's personal vacations are not entitled to the same deference, and are not excused.

ORDER

Based on the foregoing analysis, the denial of certification must be affirmed.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/SYT

J. Guill, with whom J. Litt joins, dissenting.

I have no quarrel with the majority's position that delay of contact of applicants correlates to the applicants' likelihood to conclude that the job is not open to them. I cannot agree, however, that the delay that occurred in this instance established that the job was not clearly open to all U.S. applicants in violation of 20 C.F.R. § 656.20(c)(8). My disagreement arises from a different assessment of Employer's responses to the circumstances. Although permitting recruitment on equitable grounds must be tempered by the policy consideration that putting U.S. applicants and the government through a second recruitment process is wasteful and inefficient, and must be emphatically discouraged, the majority's decision is merely a pedantic assessment of what should have been done. It gives too little consideration to the impact of a personal tragedy and a major company reorganization.

Furthermore, although I agree that the focus should be on whether the delay had a chilling effect on applicants, I disagree with the majority that questions of intent are degenerative to the analysis—especially when deciding whether an equitable remedy should be invoked. In Creative Cabinet and Store Fixture, 89-INA-181 (Jan. 24, 1990) (en banc), the Board held that an employer's undue delay in contacting U.S. applicants may indicate a lack of good faith in recruitment and result in a presumption of an intent to discourage U.S. workers in violation of sections 656.21(b)(7) and 656.20(c)(8). Ergo, although intent does not enter into the question of whether the presumption is invoked, surely it is relevant when assessing whether an employer has rebutted that presumption. If intent is not important then I am at a loss as to just what the majority is looking for when it requires evidence that the employer tried to avoid or mitigate the delay.

In addition, I see no point to the majority's bifurcated "justifications/excuses" analysis. Specifically, I cannot subscribe to its conclusion that reasonable "justifications" for a delay in contact may be remedied by a new recruitment but "excuses" absolving the employer from responsibility for the delay are resolved by the grant of certification. An employer's good faith alone should not guarantee the granting of certification where there has been an inadequate test of the labor market. Because of that inadequate test, an employer may be blameless and still be not entitled to certification from the Secretary that there are not sufficient U.S. workers able,

willing, qualified and available to perform the work. The appropriate remedy where an employer is excused from its delay, therefore, is to permit re-recruitment, not to grant certification.

Administrative Law Judge De Gregorio, dissenting.

I

20 C.F.R. 656.20 reads, in part, as follows:

> (c) Job offers filed on behalf of aliens on the **Application for Alien Employment Certification** form must clearly show that:
>
> x x x x x
>
> (6) The employer's job opportunity is not:
>
> (i) Vacant because the former occupant is on strike or is being locked out in the course of a labor dispute involving a work stoppage; or
> (ii) At issue in a labor dispute involving a work stoppage;
> (7) The employer's job opportunity's terms, conditions and occupational environment are not contrary to Federal, State or local law; and
> (8) The job opportunity has been and is clearly open to any qualified U.S. worker.
> (9) The conditions of employment listed in paragraphs (c)(1) through (8) of this section shall be sworn (or affirmed) to, under penalty of perjury pursuant to 28 U.S.C. 1746, on the **Application for Alien Employment Certification** form.

The Board holds that paragraph (c)(8) means that potentially qualified U.S. applicants must be contacted as soon as possible after an employer receives their resumes, so that they will know that the job is clearly open to them. The Board emphasizes that the "proper focus is not on the employer's intent, but on the probable effect on U.S. applicants of the passage of time". **Ante**, at 5. Violation of section 656.20(c)(8) is made to turn on whether the job appears to be clearly open to U.S. applicants, and on how long the applicants think it reasonable to wait for a response to their job applications. Ibid. Thus, an employer's violation of the regulation depends on the state of mind of potentially qualified job applicants.

The employer's intent which the Board dismisses as irrelevant I take to be the entire subject matter of a section 656.20(c)(8) certification. This provision simply requires the employer to declare, under penalty of perjury, that he has been, and continues to be, willing and ready to fill the job with a qualified U.S. worker, even if in order to do so the employer has to displace the Alien who is occupying the position. I should have felt confident that the regulation requires only a declaration of the employer's intention with regard to his hiring of qualified U.S. workers. I think it would be a strange thing for the law to require an employer to declare, under

penalty of perjury, how a job will appear to strangers and how long the strangers will want to wait for a response to their applications for the job. But since the majority of the Board believe otherwise, I will add that the administrative interpretation of the section set forth in the Technical Assistance Guide, is in accord with my understanding.[1]

My reading of the regulation implies that an employer may be found to be in violation of section 656.20(c)(8) only if the evidence supports a finding of perjury. Specifically, the evidence must establish that, despite the recruitment process, the employer all along has intended to hire only the alien to whom the job has already been offered. I do not believe that the facts of this case would warrant such a finding.

II

In his brief, the Certifying Officer seeks more than a mere reversal of the panel's decision. He requests more definite guidelines on the issue of timely contact, which would assist both the Certifying Officers and the petitioning employers. Certifying Officer's Brief at 2, 14. In my opinion, the Board has failed to address this concern.

The "as-soon-as-possible" standard of timeliness formulated by the Board is impossible to comply with if it is taken strictly, and mischievous if taken loosely. In the former case, any employer may be challenged to justify a "delay" in contacting U.S. job applicants in accordance with the criteria set forth in the majority opinion. I would not expect many employers to pass this test, especially considering how ordinary it is to deny labor certifications for lack of record evidence the employer was never specifically requested to provide. In the latter case, the standard will only add to the confusion in the existing BALCA law, which prompted the Certifying Officer's request for more definite guidelines.

III

For the foregoing reasons, I am unable to agree either with the majority's opinion or with the disposition of the case on the ground stated by the majority.

NICODEMO DE GREGORIO
Administrative Law Judge

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[1] "(8) The employer's recruitment efforts prior to the filing of an application and the employer's willingness to consider U.S. workers for the job opportunity after filing the application are indications of whether the job was and is clearly open to U.S. workers: Except in applications involving Schedule A and applications requiring special handling, the employer must be willing to conduct required recruitment after filing the application and be willing to interview and consider U.S. workers for the job opportunity even if the alien is currently employed in the job." TAG No. 656, at 36.