U.S. Department of Labor

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

DATE: 20 November 1987
CASE NO. 87 INA 581

IN THE MATTER OF

LEONARDO'S, Employer

on behalf of

RAFAEL ARREOLA, Alien

BEFORE: Litt, Chief Judge; Vittone, Associate Chief Judge; and Brenner, DeGregorio, Fath, Levin, and Tureck, Administrative Law Judges

GEORGE A. FATH
Administrative Law Judge

DECISION AND ORDER

This proceeding was initiated by the above named Employer who requested review, pursuant to 20 C.F.R. Section 656.26, from the determination of a Certifying Officer of the U.S. Department of Labor denying an application for labor certification which the Employer submitted on behalf of the above named Alien, pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182 (a)(14) [hereinafter, the Act.]

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work (1) there are not sufficient workers in the United States who are able, willing, qualified, and available for employment and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

The procedures governing labor certification are set forth at 20 C.F.R. Part 656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656.21 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File [hereinafter, AF], and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

The employer seeks a labor certification for the alien to fill a job as a bartender at a restaurant which caters to a Mexican and Hispanic trade. The job pays $7.50 per hour for work between the hours of 7 o'clock P.M. and 2 o'clock A.M.. Principally, the bartender "prepares [M]exican and [A]merican drinks - mixes ingredients such as liquor, soda, water, sugar and bitter (sic) to prepare cocktails". The employer stated in his advertisement that the applicant must have three months of experience, and be a non-smoker during working hours. The alien began working for the employer in 1984, and rose to his present job as a bartender from bus-boy.

Two applicants were referred to the employer. Both were experienced, and both had completed bartender's school. On the 12th of July, the employer left town for approximately one month. He failed to delegate recruitment responsibilities to anyone during this period. The Certifying Officer found that the two applicants had been referred to the employer on July 21, but the employer made no attempt to contact them until August 21, 1986. At that point in time, the applicants were unavailable.

NOTICE OF FINDINGS

The Certifying Officer denied certification on grounds: the employer waited more than a month before contacting the two qualified applicants; the employer did not recruit in good faith; the two qualified U.S. workers were rejected for other than job-related reasons.

On rebuttal the employer argued that his trip out of town was necessary, and that it was not taken to avoid following up on recruitment. The Certifying Officer rejected this argument.

On appeal of the notice of findings, the employer makes the same argument, and adds that certification should be granted because the alien has been trying to legalize his status in the United States since 1976.

CONCLUSION

It is evident that the employer is attempting to obtain legal status for the alien in the United States rather than to fill a job for which there is not a qualified U.S. worker. In spite of his protests to the contrary, his failure to contact the two qualified bartenders in a timely manner is seen as a rejection of those applicants. Both applicants were more qualified than the alien for the work offered, and an employer acting in good faith could have hired either of them.

The Certifying Officer correctly found that the employer did not recruit in good faith, and he correctly denied the labor certification.

ORDER

It is ADJUDGED and ORDERED that the finding of the Certifying Officer denying a labor certification for the alien be and is hereby affirmed.

GEORGE A. FATH
Administrative Law Judge