U.S. Department of Labor

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

DATE: NOV 23 1988
CASE NO. 87-INA-742

IN THE MATTER OF

GENNARO'S RISTORANTE,
Employer

on behalf of

PIER ANGELO RAMPONI,
Alien

Mark A. Ivener, Esq.
Los Angeles, CA
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and
Brenner, DeGregorio and Tureck,
Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This application was submitted by the Employer 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"). The Employer requested review from U.S. Department of Labor Certifying Officer Paul R. Nelson's denial of a labor certification application pursuant to 20 C.F.R. §656.26.[1]

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 a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available 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; and (2) the employment of the alien will not adversely

[1] All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations 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 a 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 ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case

On October 3, 1986, the Employer, Gennaro's Ristorante, filed an application for alien employment certification to enable the Alien, Pier Angelo Ramponi, to fill the position of Head Chef, Italian Cuisine. The duties of the position as stated by the Employer (see AF 19) include preparing gourmet Italian cuisine from appetizers to desserts, selecting and developing recipes for daily special offerings, general supervision and coordination of the kitchen including ordering, garnishing, portioning and utilizing food stuffs, ensuring smooth operation of the kitchen and satisfaction of restaurant patrons, and preparing, carving and boning meats as required. The Employer's requirements for the position as stated on the application for alien employment certification are three years of experience in the job offered, demonstrated ability to prepare gourmet Italian food and specialty items (to include sauces, homemade pastas and pastries), demonstrated ability to prepare new recipes and menu items daily (from appetizers to desserts), experience in ordering and in volume restaurant trade operations, and supervisory experience in a restaurant kitchen (id.).

On April 24, 1987, the Certifying Officer ("CO") issued a Notice of Fintings ("NOF") (AF 15-17) stating that two U.S. applicants, John Vargas and Edward Ribeiro, appear to meet the minimum requirements of the job, and the Employer has not conclusively demonstrated that the applicants cannot perform the basic job duties in a satisfactory manner. The CO further found that the applicants were rejected because they did not have experience in "Northern Italian Cuisine", a requirement not in the advertisement or the Form ETA 750A. The Employer submitted a Rebuttal on May 27, 1987 (AF 9-14). On June 12, 1987, a Final Determination was issued by the CO denying certification on the ground that the Employer failed to specify lawful job-related reasons for rejecting U.S. workers as required by §656.21(j)(1)(AF 6-8).[2]

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[2] Although in both the NOF and the Final Determination the CO cited Employer for violating §656.21(j), that section merely requires an employer to file a report with the State Office detailing the results of its recruitment. The CO should have cited §656.21(b)(7), which requires employers to document that U.S. workers have been rejected for lawful, job-related reasons. Employer does not appear to have been prejudiced by this error.

Discussion

Section 656.21(b)(7) requires an employer to adequately document that U.S. workers applying for the job opportunity were rejected solely for lawful job-related reasons. In his NOF, the CO appeared to discount Employer's unchallenged job requirements of three years of experience in the job offered -- a head chef of Italian cuisine -- and demonstrated ability to prepare gourmet Italian food. He noted that both of the applicants he found qualified had "experience" preparing a variety of cuisines, including Italian, and could "easily learn specific recipes . . . required by individual restaurants." (AF 7).

The CO has missed the point. The question is not whether the applicants have ""experience"; the question is whether they meet the specific job requirement of three years of experience as a head chef of Italian cuisine. We agree with Employer that the applicants do not have the requisite experience. There is no evidence that either of the applicants has three years of experience preparing Italian food. Vargas clearly lacks the requisite experience (see AF 30-31, 51-53); and, as Employer noted, Ribeiro's experience appears to be more in management than cooking, with some but not a great deal of experience with Italian food (AF 32, 56-63). Since the CO did not find the experience requirement to be excessive, that job applicants may have some experience is insufficient to qualify them for the position. See, e.g., Concurrent Computer Corp., 88-INA-76 (Aug. 19, 1988) (en banc). Likewise, although the CO noted that Vargas and Ribeiro could "easily learn specific recipes . . . ", who would they learn them from? Is the head chef supposed to learn how to cook from his subordinates?

In arriving at his decision, it is apparent that the CO failed to consider that not all chef positions are the same. As he noted, "[b]oth applicants are well qualified in the chef field . . . . " (AF 7) (emphasis added). But this is not a run-of-the-mill chef's job. Rather, as Employer has contended, and has shown both through its menu (AF 22-25) and the salary the position pays ($50,000.00 a year), "Gennaro's" is a restaurant serving specialized, gourmet food at relatively high prices. Under these conditions, both Employer and its customers are entitled to a chef who meets Employer's unchallenged requirements, not one who merely has familiarity with Italian cooking.

Finally, the CO contended, both in the NOF and the Final Determination, that Employer rejected Vargas and Ribeiro because they had no experience in Northern Italian cooking (AF 7), which was not a job requirement. This misstates Employer's position. What Employer did state was that, since neither Vargas nor Ribeiro had three years of experience as a head chef preparing Italian cuisine, they would be unable to prepare gourmet Italian food including the Northern Italian food in which the restaurant specializes (see AF 30-31).

Since none of the job applicants meet the minimum requirements for the job, certification should have been granted.

ORDER

The determination of the Certifying Officer denying alien employment certification is reversed, and certification is granted.

JEFFREY TURECK
Administrative Law Judge