

U.S. Department of Labor

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



DATE: NOV 3 1988

CASE NO. 88-INA-14

IN THE MATTER OF

ALLIED CONCERT SERVICES, INC.
Employer

on behalf of

HREINN PIO LINDAL
Alien

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

NICODEMO DeGREGORIO
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. § 656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. 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) (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 and (2) the employment of the alien will not adversely 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 20 C.F.R. Part 656 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 (“AF”) and written arguments of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On December 29, 1986, Allied Concert Services, Inc. (Employer) filed an application for alien employment certification in behalf of Mr. Hreinn Pio Lindal (Alien). Employer is a promotional agent, and seeks to employ Alien as a singer of “opera, lieder and other classical music in the tenor voice range in Italian, German, French, English, Latin and Scandinavian languages in opera productions, concerts, church services and in other performances.” (AF 31)

On March 4, 1987 a Notice of Findings issued. The Certifying Officer proposed to deny the application for labor certification on the ground, among others, that Employer had failed to document that Alien's work experience in the past twelve months required, and that his intended work in the United States would require, exceptional ability, in accordance with the regulation at 20 C.F.R. 656.21a(a)(1)(iv). (AF 23) On May 11, 1987 Employer submitted rebutting evidence. On August 7, 1987 the certifying officer denied labor certification, finding the rebuttal evidence insufficient to meet the requirements of the regulation.

Both Employer and the Associate Solicitor for Employment and Training have filed briefs, which have been duly considered.

Discussion

I

The applicable regulation reads as follows:

(iv) If the application is for an alien represented to have exceptional ability in the performing arts, the employer shall document that the alien's work experience during the past twelve months did require, and the alien's intended work in the United States will require, exceptional ability; 20 C.F.R. 656.21a(a)(1).

An employer may document such exceptional ability by means of documents attesting to the current widespread acclaim and international recognition accorded to the alien, and receipt of internationally recognized prizes and awards for excellence; published material by or about the alien; documents attesting to the outstanding reputation of theaters and other establishments, or of repertory companies and other organizations, in which or with which the alien has performed; evidence of earnings; and playbills and starbills. 20 C.F.R. 656.21a(a)(1)(iv).

The regulation presents an apparent anomaly. It requires documentation of work requiring exceptional ability, to support an application for an alien represented to have exceptional ability. In common usage, “exceptional ability” does not have the same meaning in the two contexts. Singing opera, for instance, requires exceptional ability, at least in the sense

that the requisite ability is uncommon. Yet, an oper singer may be an ordinary, average performer. In the first case, the phrase in question implies a comparison with the population at large, while in the second case it implies a comparison with other members of the same class.

Considering the regulation as a whole, and its purpose, we believe that the ultimate fact to be proven is that the alien has exceptional ability; and that the various kinds of documentation mentioned in the regulation are suggested as possible methods of proof. Thus, performance in a theater with outstanding reputation tends to prove outstanding ability, on the theory that such an establishment would not engage an individual with lesser ability. In sum, in order to prove that an alien has exceptional ability in a performing art, an employer must prove that the alien has uncommon, extraordinary ability as compared with the other artists in the same field. Cf. Section 656.21a(a)(1)(iii) (if an application involves a job for a college teacher, the alien must be shown to be more qualified than any U.S. job applicant).

II

Applying this standard to the facts of the case at hand, we conclude that the denial of labor certification must be affirmed. Looking at the Alien's work experience during the 12 month period preceding the application, as the regulation requires, we find a schedule of performances in small cities, mostly in high school auditoria, as well as a review of an October 14, 1986 performance, which appeared in the Park Rapids Enterprise. AF 18, 19. Looking further back, as the certifying officer did, we find reviews of performances at several churches, a high school auditorium, and a Hotel Ballroom during the 1983-86 period. AF 42-66. Finally, we have considered the fact that the Alien appeared at Carnegie Hall on November 12, 1987. But this one appearance by itself does not tell us how he compares in artistic ability with other singers of opera and classical music. In fact, there is no specific information of record with regard to this appearance, e.g., whether the Alien sang opera or songs, alone or as part of an ensemble, or the amount of compensation received. In sum, we conclude, with all due respect for the Alien, that the record of this case does not reflect the exceptional ability that Employer claims. Accordingly, the denial of labor certification must be affirmed.

ORDER

The determination of the Certifying Officer denying labor certification is AFFIRMED.

NICODEMO DeGREGORIO
Administrative Law Judge

ND/tjp