U.S. Department of Labor

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

DATE: April 19, 1989
CASE NO. 88-INA-48

IN THE MATTER OF

COKER'S PEDIGREED SEED COMPANY,
Employer

on behalf of

HOWARD LEWIS GABE,
Alien

L.F. Walentynowicz, Esq.
Buffalo, NY
For the Employer

BEFORE: Litt, Chief Judge; and Brenner, Tureck, Guill and Williams,
Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter "the Act"). Certifying Officer ("CO") Benjamin Bustos denied the application, and Employer requested review pursuant to 20 C.F.R. §656.26 (1988).[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 affect the wages and working conditions of United States workers similarly employed.

---

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

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) (1988)]. Neither party filed an appeal brief.

Statement of the Case

On March 7, 1986, Employer filed an application for alien employment certification to enable the Alien to be hired for the position of Senior Soybean Breeder (AF 186). In its application (Form ETA 750-A), Employer listed Bay, Arkansas as the place where Alien would work (AF 186, Box 6). However, the job duties indicated that the employee also would work in Brazil and other parts of South America (see AF 188). The minimum requirements for the position were listed as a Ph.D. in Plant Breeding with six years experience in the job offered or in the related occupation of Plant Breeding. Employer also specified that "[i]t is desirable for the candidate to have a working knowledge of the Spanish and Portuguese languages, and to have a familiarity with Southern Hemisphere Countries." (AF 189). The job duties described on the 750-A included developing new varieties of soybeans; developing and directing winter testing and winter increase programs in Brazil; managing the soybean breeding department; directing personnel; using equipment and preparing expense and capital budgets; assisting marketing by providing technical information to salesmen and customers; and assisting in the development of South American markets for licensing varieties to third parties.

In the Notice of Findings ("NOF") dated January 23, 1987, the CO denied Employer's application for labor certification because the requirement of knowledge of Spanish and Portuguese was unduly restrictive and not documented as a business necessity, in violation of §656.21(b)(2), and because the Employer rejected four qualified U.S. workers -- John Q. H. Nguyen, Fazal Fahman, Eric A. Kuenaman, and Leo A. Duclos -- for non-job-related reasons, in violation of §656.21(b)(7).

Employer submitted a timely rebuttal on May 29, 1987 (AF 27-33). The rebuttal included a letter from its Vice President-Finance which describes the South American operations and in particular the Brazilian and Argentinian operations (AF 33), as well as the employee's role in those areas. The rebuttal expresses Employer's position as to why the two foreign languages are necessary. Employer also gave detailed reasons for rejecting the four U.S. applicants whom the CO found qualified (AF 29-30).

In the Final Determination ("FD") dated September 14, 1987 (AF 24-25), the CO rejected Employer's rebuttal and denied labor certification. As grounds for the denial, the CO stated that since Employer listed the location where Alien was to work as Arkansas, neither foreign language is required (AF 24). The CO reasoned that neither the job description nor the special requirements mention that

Employer owns nurseries in Southern Hemisphere countries. The CO also found that Employer rejected two U.S. workers who were clearly qualified even with the restrictive language requirement (AF 25). But these applicants were not identified.

Employer requested review, stating the CO's determination was unsupported by the evidence.

Decision and Conclusion

Under §656.21(b)(2)(i)(C) of the regulations, an Employer must establish that a language requirement other than English is justified by business necessity.

To establish business necessity under §656.21(b)(2)(i), an Employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of Employer's business and are essential to perform, in a reasonable manner, the job duties as described by Employer. In re Information Industries, Inc., 88-INA-82 (February 9, 1989) (en banc). Employer has clearly met this standard by showing that a significant good part of the job in issue must be performed in Brazil and Argentina, and requires the employee to communicate in the native languages of these countries. Moreover, contrary to the CO's argument, that part of the job duties would take place in South America was noted by Employer in the application for certification.

Therefore, Employer has established the business necessity of its Portuguese and Spanish language requirements.

The second ground for denial, according to the FD, was that there were two U.S. workers who clearly qualified for the position even with the restrictive language requirements (AF 24-25).

Not only did the CO fail to identify the U.S. workers he had in mind, but he failed to respond to any of the evidence and arguments raised by the Employer on rebuttal in regard to the qualifications of the four U.S. workers named in the NOF. Employer's rebuttal established, prima facie, that the four applicants were not qualified for the job.

Since the Employer has successfully challenged both issues raised by the CO, we find that the foreign language requirements for the position were justified by business necessity, and that no qualified U.S. workers applied for the position. Accordingly, the Final Determination denying certification is reversed.

ORDER

The Final Determination denying certification is reversed, and certification is granted.

JEFFREY TURECK
Administrative Law Judge

JT/jb