U.S. Department of Labor

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

DATE: JUN 14 1989
CASE NO. 88-INA-54

IN THE MATTER OF

WORLD BAZAAR,
Employer

on behalf of

PI-LING HSIEH LEE,
Alien

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; Guill, Associate Chief Judge; and Brenner, Tureck, and Williams
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 Benjamin Bustos' 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 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)].

Statement of the Case

The Employer, World Bazaar, seeks labor certification on behalf of the Alien Pi-Ling Hsieh Lee. The job offered is Assistant Manager of a retail novelty store. The rate of pay is $12,000 per annum based upon a 40-hour week. The Employer requires a high school diploma and six months of experience in the job offered or six months of related retail experience. Additionally, applicants must be willing to work a flexible schedule Monday through Sunday between 9:00 A.M. and 9:00 P.M. (AF 73).

In his Notice of Findings ("NOF"), the Certifying Officer ("CO") denied certification because United States applicant Abimbola Ladejo, among others, was rejected for reasons that were not lawful and job related (AF 26). The CO ordered the Employer to contact Mr. Ladejo and the other applicants by certified mail and to consider them for employment (id.).

On rebuttal, the Employer submitted an interview form dated March 4, 1987 indicating that it found the United States applicant overqualified for the position advertised (AF 16). Specifically, the Employer found that Mr. Ladejo had a Bachelor of Science degree in engineering and a Masters of Business Administration degree in finance and management (AF 9). The Employer also found that Mr. Ladejo had held positions in the past which paid $25,000 to $30,000 a year (id.).

The Employer also submitted an unsigned, undated "Pre-Employment Interview List of Interrogatories" which it alleges was completed by Mr. Ladejo (AF 21). The form contained 42 questions. The applicant did not answer two of these questions: "Do you intend to remain with this Company at least six months?"; and "Have you answered all questions truthfully?". Based upon the above, the employer argued on rebuttal that its rejection of Mr. Ladejo, based on its finding that he was overqualified, and that he would remain in the job only until he found a better position, was for lawful and job-related reasons (AF 9).

The CO found, in his Final Determination, that United States applicants who meet the Employer's actual minimum requirements cannot be rejected because they are overqualified, or because the Employer feels that they would only stay in the job until something better is found (AF 6). Accordingly, the CO found that Mr. Ladejo had been rejected for reasons that were not lawful and job-related, and denied the application for labor certification (AF 6).

In its request for review, the Employer argues that Mr. Ladejo's failure to answer the two questions on the "Pre-Employment Interview List of Interrogatories" establishes that he was not seeking permanent employment.[2]

On July 6, 1988, the Board issued an Order requesting the parties to file briefs addressing the following questions:

a. Is it lawful for an employer to reject a U.S. worker for a job for which alien labor certification is being sought because that worker is overqualified for the job?

b. Is it lawful for an employer to reject an otherwise qualified U.S. worker for a job for which alien labor certification is being sought because the U.S. worker intends to leave that job as soon as a better job opportunity comes along?

c. In the event the answer to question (b) above is"yes", is it lawful for an employer to assume that an overqualified U.S. worker for a job for which alien labor certification is being sought will leave that job as soon as a better job opportunity comes along?

In response to this Order, both parties filed briefs. They agreed that, by itself, overqualification is not a lawful, job-related reason for rejecting a U.S. worker. They also agreed that it is impermissible for an employer to assume that an overqualified U.S. worker will leave the job as soon as a better one comes along. Rather, it is Employer's position that, based on the facts of this case, it was reasonable for Employer to conclude that the U.S. worker was not seeking permanent employment. The CO counters that "virtually all employees would leave a job for a better opportunity . . . " (see Brief on Behalf of the Certifying Officer, at 10), and that the U.S. worker's failure to commit to remain at the job for at least six months is not grounds to reject an otherwise qualified applicant.

Discussion

We agree with the CO that the failure of the applicant to commit himself to remain in the job for at least six months is an insufficient basis to conclude that he is not interested in a permanent position. Although under §656.50 of the regulations, "Employment" is defined as "permanent full-time work . . . ", "permanent" does not necessarily mean forever. Rather, it can mean "meant to last indefinitely" (American Heritage Dictionary 924, 2d Coll. Ed. 1982); and "indefinite" is defined as "vague . . . [l]acking precise limits . . . . " (Id. at 654). Accordingly, it is the Employer's burden to demonstrate that the applicant has a present intent to leave the job at a reasonably specific time in the foreseeable future, and that the amount of time spent in the job would be unreasonable given the occupation in the context of the employer's business. There is no basis in this record to make such a finding. That the applicant would not agree beforehand to

---

[2] Issues raised for the first time before the Board will not be considered.

remain in the job for at least six months does not mean that he was going to leave in six months, merely that he was keeping his options open. Therefore, Employer has failed to prove that the applicant's employment would not have been permanent.

Moreover, the Employer has not demonstrated that, given the complexity of the position and the amount of training involved, six months is a reasonable time to require an applicant to stay in the position. We recognize that certain jobs may require such lengthy periods of on-the-job training, or involve other factors peculiar to that business or industry, that a commitment of a minimum period of employment is not inherently unlawful. However, no such factors are present in this case.

Since the Employer has not established a lawful, job-related reason for rejecting the applicant, the denial of certification will be affirmed.

ORDER

The CO's denial of alien labor certification is affirmed.

JEFFREY TURECK
Administrative Law Judge

JT:jb