U.S. Department of Labor

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

DATE: February 1, 1989
CASE NO. 88-INA-243

IN THE MATTER OF

ADRY-MART, INC.
Employer

on behalf of

JOSE A. TORRES
Alien

Appearance:

Rebecca L. Holt, Esquire
For the Employer

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

JEFFREY TURECK
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 any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

In November 1985, Adry-Mart, Inc., a California-based chain of retail discount stores, hired the alien, Jose Anthony Torres, as a Warehouse Supervisor (AF 145), the position for which labor certification is sought (AF 123). The Employer described the job duties as follows:

> Will supervise and coordinate activities of stock clerks regarding ordering, shipping, receiving, storing, inventorying, and issuing inventory of the store at branch warehouse. Prepares reports of stockroom and warehouse inventory. Advises clerks regarding care, preservation and storage of merchandise required. Advises concerning use of equipment. Traces history of merchandise to determine discrepancies between inventory and stock-control records and recommends immediate action to resolve discrepancies. Reports all slow moving merchandise. Supervises four stock clerks. Checks shipping and receiving invoices to verify accuracy of receiving clerks, shipping clerk and other clerical personnel. Coordinates flow of shipment of stock in and out of warehouse. (Id.).

The Employer required either one year of experience in the job offered or two years in the related occupation of stock clerk in a retail warehouse (id.). In addition, the Employer listed as special requirements familiarity with the retail inventory systems of a retail warehouse and the ability to use a forklift, lifting up to 25 pounds when necessary (id.). The position was advertised at an hourly rate of $6.50 (id.), but was amended on September 16, 1986, to $11.90 per hour (see AF 125).

On the application, the Alien said that before he became a Warehouse Supervisor, he had worked for the Employer for more than two years as a stock clerk (AF 145).

In his July 6, 1987 Notice of Findings ("N.O.F.") (AF 102-104), the Certifying Officer (C.O.) said that the Employer must specify the lawful, job-related reasons for not hiring each U.S. worker who applies, pursuant to 20 C.F.R. §656.21(j)(1),[1] and that five U.S. applicants appear to meet the minimum requirements for the job. The C.O. said that the Employer's

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[1] Although the C.O. cited Employer for violating §656.21(j)(1), that section merely requires an employer to file a detailed report of its recruitment for the position with the local job service. There is no contention that Employer failed to file such a report in this case. The C.O. should have cited §656.21(b)(7) regarding the alleged violation, that Employer rejected U.S. workers for unlawful reasons.

recruitment response was a blanket-type statement that merely said the various applicants were not qualified (see AF 103), and that the Employer had not demonstrated conclusively that those applicants cannot perform the basic job duties in a satisfactory manner through a combination of education/training/experience, as set out in section 656.24(b)(2)(ii) (AF 103).

In its Rebuttal of August 10, 1987 (AF 96-101), the Employer responded regarding each candidate considered by the C.O. to be potentially qualified. Taking the position that familiarity with the retail inventory systems of a retail warehouse is essential, the Employer said that four of the five candidates mentioned lacked the requisite retail warehouse experience. The Employer declined to interview any of the four applicants, who had extensive non-retail warehousing experience, on the ground that they were "deficient in one or more of the areas which we deem critical to successful performance in this position" (see AF 100). Finally, the Employer reported that the fifth applicant, whom it considered qualified because of his related experience as the manager of shipping/receiving for a retail department store, was scheduled for back surgery, and accordingly, would be unavailable (AF 99-100).

The C.O. issued his Final Determination on September 11, 1987 (AF 93-95). In it he found that the Employer's response itself does not show conclusively how U.S. workers cannot perform the job duties in a satisfactory manner through a combination of education, training, or experience. The C.O. added that by stressing the importance of the job requirements, the Employer has "considerably narrowed a broad field, so that applicants with general experience are excluded from a job which they seemingly could handle with little training". The effect of this emphasis, according to the C.O., is to preclude U.S. workers from the job opportunity (AF 94).

On October 16, 1987, counsel for the Employer filed a Request for Appeal and supporting brief (AF 1-93).

DISCUSSION

Under §656.21(b)(7), certification will be denied if an employer rejects a U.S. worker for other than a lawful, job-related reason. It is the C.O.'s position that the five U.S. applicants specified in the N.O.F. are qualified for the position of Warehouse Supervisor, and therefore were unlawfully rejected.

This Board has held that where an employer's job requirements are not found to be unduly restrictive, a U.S. applicant who does not satisfy all the job requirements is not qualified for the position, and may lawfully be rejected in accordance with §656.21(b)(7). Concurrent Computer Corp., 88-INA-76 (August 19, 1988) (en banc); Hong Kong Royale Restaurant, 88-INA-60 (October 17, 1988). Since the Employer's minimum job requirements were not alleged to be unduly restrictive, and since the only available applicants do not have the retail warehouse experience listed as a special requirement by Employer, these applicants were properly rejected for this position. In regard to the only apparently qualified applicant, Kelly Chandler, this Board has repeatedly held that it is the status of job applicants at the time of recruitment that is controlling. See, e.g., ENY Textiles, Inc., 87-INA-641 (Jan. 22, 1988), slip

op. at 4. Although correctly stating this principle, the C.O. nonetheless found Chandler to be available because at the time he issued the N.O.F. -- six months after the recruitment period -- Chandler should have recuperated from his surgery and could now be available. This speculation on the part of the C.O., voiced for the first time in the Final Determination, is insufficient to invalidate Employer's uncontested rebuttal to the N.O.F. that Chandler was not available.

Since there were no U.S. workers both qualified and available for the position, certification should have been granted. Therefore, the C.O.'s denial of certification is reversed.

ORDER

The Final Determination of the Certifying Officer denying labor certification is reversed, and certification is granted.

For the Board:

JEFFREY TURECK
Administrative Law Judge

Judge Guill, joined by Judge Schoenfeld, concurring.

While I agree with the majority's disposition in this matter, I write separately to specify my reasons for reversing the C.O.'s denial.

The C.O. concluded that because U.S. applicants Lee, Romero, and Westberg had ample warehouse experience they could quickly and easily have learned the "retail" aspects of the warehouse job offered. As such the C.O. should have realized that the requirement of "familiarity with the retail inventory systems of a retail warehouse" may have been unduly restrictive and in violation of §656.21(b)(2). Had he made this determination, Employer would have had to justify as a business necessity the requirement that an applicant be familiar with a retail system. To satisfy this burden, Employer then may have had to show that each of these applicants could not, with a minimum of on the job orientation, perform the "retail" aspects of the job offered.

Judge LAWRENCE BRENNER, dissenting.

Background

I believe that the majority, in understandably striving to apply precedential rules by which cases can be more easily and uniformly decided, goes too far in this case by rigidly failing to allow any flexibility. In doing so, the majority ignores one section of the regulations, 20 C.F.R. §656.24(b)(2)(ii).

The Employer rejected three otherwise apparently qualified and available U.S. applicants, Lee, Romero and Westberg, on the basis of their resumes because the resumes did not show the applicants met the requirement of "familiarity with retail inventory systems of retail warehouse" (Employer's rebuttal, AF 99-101). The C.O.'s Notice of Findings stated that these three applicants (and two others) appeared to meet the requirements for the job (AF 103). The C.O. also stated that the Employer had not conclusively demonstrated that the U.S. applicants cannot perform the basic job duties in a satisfactory manner through a combination of education, training and experience, citing section 656.24(b)(2)(ii) (AF 103).[1] The C.O. adhered to these findings in the Final Determination summarizing the experience of Westberg and Lee, but not Romero, as "specific examples" (AF 94-95). As noted by the majority, the C.O.'s Final Determination added that by stressing the importance of the job requirements, the Employer has "considerably narrowed a broad field, so that applicants with general experience are excluded from a job which they seemingly could handle with little training". The effect of this emphasis, according to the C.O., is to preclude U.S. workers from the job opportunity (AF 94).

Mr. Westberg had been employed by M.G.M. Studios for 22 years, as storeroom and warehouse supervisor (AF 113). As the Employer noted (AF 99), Mr. Westberg had ordered all materials for the entire job operations for the studio; had supervised five people in receiving, stocking, and issuing those materials; and had supervised and completed the annual inventory (see AF 114). Yet the Employer rejected Mr. Westberg on the basis of his resume alone, on the ground that his lack of familiarity with retail inventory systems in a retail warehouse was critical (AF 99).

The Employer rejected Timothy Lee, also on the basis of his resume alone, although Mr. Lee had seven years experience as a warehouse supervisor for a company specializing in electric parts, more than three years experience as the warehouse manager for an import and export bonded warehouse, and more than three years experience as a stock manager for a company specializing in importing and exporting oriental food items (AF 105). The Employer declined to interview Mr. Lee, based on a "clear lack of relevant experience" (AF 100), and pointed out that Mr. Lee "does not indicate that he is at all skilled in using a fork lift or that he has the ability to lift up to 25 pounds of weight" (Id.).

Mr. Romero was employed by AT & T for almost nine years as a warehouseman, working in shipping/receiving, order selecting, inventorying, and stockkeeping. His resume stated that he was trained in all phases of a large manufacturer's warehouse that supplies retail outlets as well as the western states Bell system, and that his training and experience includes

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[1] 20 C.F.R. §656.24(b)(2)(ii) provides that:

> The Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed ...

inventorying, training new employees and the use of power equipment. Most recently he worked as a warehouseman for five months for a retail and wholesale Dairy (AF 108). The Employer rejected Mr. Romero without an interview, saying that he had a "clear lack of familiarity with inventory systems of a retail warehouse" (AF 101).

Opinion

In my view, it cannot be determined from their resumes whether or not Westberg, Lee or Romero meets the specified job requirement of familiarity with retail warehouse inventory systems. Romero's resume claims years of retail and wholesale warehouse experience with AT & T (and some months with a Dairy's retail and wholesale warehouse). Although it would have been better for the C.O. to again name Romero in the Final Determination, Romero may be considered with the rejected available applicants the C.O. does name in the Final Determination as "specific examples", Westberg and Lee, to show the Employer's lack of interest in interviewing U.S. applicants who may meet the job requirements. Westberg's and Lee's extensive experience as warehouse supervisors, although not in retail warehouses, may have provided them with familiarity with warehouse inventory systems similar to the Employer's system. Where, as here, a resume shows that a U.S. applicant meets the major job requirements, and it is unclear whether the applicant meets one of the detailed, subsidiary job requirements, I would hold that an employer is obligated to interview or otherwise obtain other information to determine whether the applicant meets the job requirements.

Unfortunately, the Board has held that in the absence of additional information or a reasonable request by the C.O. that an applicant be interviewed, an employer may passively ignore a U.S. applicant whose resume and response to the advertisement fails to show that the applicant meets every specified minimum requirement for the job.[2] Anonymous Management, 87-INA-672 (Sept. 8, 1988). The C.O., under the holding in Anonymous Management, in his Notice of Findings in this case could have asked Adry-Mart to interview Westberg, Lee and Romero. Of course by then eight months had passed since the time of recruitment and it might have been too late to contact one or more of the applicants; this is one of the defects of Anonymous Management.[3] In any event, the C.O. did not do so. Indeed, the C.O. cautioned that his Notice of Findings was not to be considered a request for the Employer to attempt to re-contact the rejected U.S. applicants (AF 104).

Limited as I am by the rigidity Anonymous Management brings to this case, I turn to the rigidity with which the majority has decided the instant case. The majority holds that Westberg,

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[2] Unless the C.O. has expressly challenged a job requirement as unduly restrictive.

[3] This case provides a reductio ad absurdum example of the application of Anonymous Management. As noted, Adry-Mart also rejected Lee because his resume did not show he could lift 25 pounds, which was a stated, and apparently reasonable, requirement for this job. Even if this had been the only reason given by the Employer for rejecting Lee, under Anonymous Management Adry-Mart was under no obligation to ascertain at the time of recruitment whether an otherwise qualified applicant could lift 25 pounds.

Lee and Romero may lawfully be rejected (i.e. for "job-related" reasons) under section 656.21(b)(7) for failing to show in their resumes that they meet the requirement of familiarity with retail warehouse inventory systems. Since the C.O. did not find this requirement unduly restrictive, that is the beginning and end of the majority's rationale, citing Concurrent Computer Corp., 88-INA-76 (Aug. 19, 1988) (en banc).

I will assume, arguendo, that these three U.S. applicants do not in fact meet the requirement of familiarity with retail warehouse inventory systems. Moreover, I will assume that this requirement is not unduly restrictive; it appears job-related and reasonable, and I will assume that in general, retail warehouse employers would require their warehouse supervisors to have this skill. Like the majority, I also would apply the rule of Concurrent Computer, supra, (see also Harris Corp., 88-INA-293 (Jan. 5, 1989) (en banc), but only as a general rule and not as the end of the analysis: Ordinarily, an applicant who does not meet all the specified job requirements (unless the requirements are found to be unduly restrictive) is not qualified for the job. This would be enough for an employer to establish a prima facie case that a U.S. applicant was properly rejected. However, I would allow the C.O., pursuant to section 656.24(b)(2)(ii), the opportunity to show that a U.S. applicant who does not meet all the specified requirements is nevertheless qualified to perform the job in a normally acceptable manner by a combination of education, training and experience which compensates for the requirements which the applicant lacks. I would require the C.O. to be clear and specific, and to supply evidentiary support in order to carry the C.O.'s burden of going forward with such evidence. The greater the importance and number of the requirements lacking in an applicant, the harder it would be for the C.O. to overcome an employer's prima facie case. I believe that in practice, an employer conducting an unbiased recruitment would consider whether an applicant who lacks a requirement has other compensating attributes. Moreover, my approach applies section 656.24(b)(2)(ii) in pari materia with section 656.21(b)(7) and the case law of Concurrent Computer and Harris Corp. The majority's approach gives no effect to section 656.24(b)(2)(ii).

I note that I also would take this approach in the converse situation, to the benefit of employers seeking alien labor certification. The Board has labeled as the general rule the proposition that a U.S. applicant who meets an employer's specified education, training and experience requirements is qualified for the job in terms of his or her education, training and experience. Veterans Administration Medical Center, 88-INA-70 (Dec. 21, 1988). However, I would allow an employer to overcome this general rule if it proves by specific evidence that an applicant who meets the specified requirements nevertheless would not be able to perform the job in a normally acceptable manner. To be clear, I would not permit an employer to reject such an applicant due to a failure to meet requirements which the employer should have specified, e.g. education, training and experience requirements. But, for example, I would allow a hospital to reject a U.S. surgeon who met the requirements, but, as shown by specific convincing evidence, was not familiar with state-of-the-art procedures. See Veterans Administration, supra (Judge Brenner's concurrence).

The Board acknowledged this approach in its discussion in Fritz Garage, 88-INA-98 (Aug. 17, 1988), a case which cited with apparent approval section 656.24(b)(2)(ii). The employer there had argued that a U.S. mechanic who had the required auto repair experience,

which experience included work on Volkswagens, was incompetent to repair Volkswagens because he could not answer most of the employer's questions about Volkswagen engines and repairs. The board found Fritz Garage's statement to be vague and unsupported, and therefore unconvincing as a reason for finding the U.S. applicant unqualified. The Garage never supplied the specific questions and answers. Had it done so, and explained why the questions were material to the job and how the answers were wrong, I would have decided such a case differently.

For the reasons stated, I would remand this case to the C.O. to allow him to ask the Employer what type of inventory system it uses. I would also allow the C.O. to attempt to locate Westberg, Lee (assuming he can lift 25 pounds and operate a forklift) and Romero, to obtain evidence of whether any of them have experience with warehouse inventory systems similar enough to the Employer's system to provide them with the knowledge to supervise the Employer's warehouse using its system, either immediately or in a brief normal orientation period necessary for virtually any new employee. If the C.O. could not now contact these three rejected applicants, he should grant certification.

Were I not bound by Anonymous Management, I normally would affirm the denial of labor certification in a case such as this one, due to the Employer's failure to interview applicants who, based on their resumes, may have met the requirements. However, here, where the C.O. prohibited the Employer from attempting to cure this defect by re-contacting the applicants, I would not do so. The C.O. should stop his practice of including in the Notice of Findings an implied prohibition against an Employer recontacting a U.S. applicant. Later unavailability after the recruitment period of a qualified U.S. applicant cannot, of course, cure an unlawful earlier rejection of that applicant by an employer. However, an employer is free to try to verify that a rejected U.S. applicant in fact was unqualified or unavailable, as originally contended by employer, at the time of the original rejection by the employer.

LAWRENCE BRENNER
Administrative Law Judge