U.S. Department of Labor

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

DATE: MAY 26, 1989
CASE NO. 88-INA-333

IN THE MATTER OF

BRUCE A. FJELD
Employer

on behalf of

MANUEL IGNACIO
Alien

Appearances: William Newell Siebert, Esq.
For the Employer

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

LAWRENCE BRENNER
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

The Employer, Bruce A. Fjeld, filed the application for labor certification on behalf of the Alien, for the position of landscaper (AF 13). The job duties were described as follows:

> Plants, transplants plants and trees. Fertilizes, fumigates when necessary. Trims plants, trees, shrubbery. Creates borders around edges of plants and trees using power trimmer. Also uses riding mower and trencher: steep areas. Assist in the installation of pipes for sprinklers. Basic knowledge of sprinkler repair.

The Employer listed the minimum job requirements as six months in the job offered or one year in the related job of landscape laborer.

In the Notice of Findings, dated October 30, 1987 (AF 9-11), the Certifying Officer (C.O.) denied the Employer's application for labor certification. Pursuant to §656.24(b)(2)(ii), the C.O. found that there was an able, willing, qualified and available U.S. applicant; namely, Ian Stone. The C.O. found the Employer's unsuccessful attempts to contact the applicant by telephone at his residence to be inadequate. Accordingly, the C.O. directed the Employer to document the lawful, job-related reasons for not hiring the U.S. applicant. 20 C.F.R. §656.21(b)(7).[1] Pursuant to §§656.1 and 656.2(e), the C.O. notified the Employer that, absent such documentation, he considers a qualified U.S. worker to have been available at the time of the initial referral and consideration.

In its Rebuttal, dated November 20, 1987 (AF 7-8), the Employer advised the C.O. of its repeated attempts to recontact the U.S. applicant, notwithstanding the C.O.'s directive.

On December 24, 1987, the C.O. issued his Final Determination, in which he denied certification on the grounds that the Employer remains in noncompliance with the matters raised in the Notice of Findings. The Employer requested review of this denial (AF 1-3) and filed a brief in support of review.

Discussion

Sections 656.1 and 656.2(e) provide that certification should be denied unless it is established that "(t)here are not sufficient United States workers, who are able, willing, qualified

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[1] The C.O. mistakenly cited §656.21(j)(1) in his Notice of Findings (AF 10). In view of the correct citations of related sections, this constitutes harmless error.

and available at the time of application for a visa and admission into the United States and at the time and at the place where the alien is to perform the work."

In the present case, the Employer does not dispute the C.O.'s finding that the U.S. applicant, Ian Stone, is qualified to do the job offered. This appears to be borne out by Mr. Stone's resume (AF 19-20). Instead, the Employer seeks to establish that the U.S. applicant is not available.

In support of its position, the Employer represents that it tried repeatedly day and evening, to call the U.S. applicant at his home telephone number during the recruitment period, but nobody answered the phone (AF 15). Subsequently, several months later (i.e. after the Notice of Findings was issued), the Employer again sought to contact him at the home telephone number listed on Mr. Stone's resume, but ultimately found out that he no longer lived at that number. Finally, the Employer called Mr. Stone directly at work and spoke to him. When the Employer finally spoke to the U.S. applicant, Mr. Stone explained that although he had been very unhappy with his job when he had applied at the beginning of the year, circumstances had changed and he was no longer looking for another job (AF 8).

The Employer's brief suggests that its failure to attempt to call the U.S. applicant at work was due to its sensitivity. As noted by the C.O. in his Notice of Findings, since Mr. Stone's resume indicates he was employed, he may not have been available for home calls at the times Employer telephoned him (AF 10). Moreover, if the Employer was hesitant to call the applicant at work, it could have written the U.S. applicant at the home address provided on the resume (AF 19). Bay Area Women's Resource Center, 88-INA-379 (May 26, 1989). Furthermore, the fact that approximately eight months later the Employer found out that Mr. Stone "does not live at this number" (AF 8), does not establish that he was unavailable when he initially applied. Cf. Sizzler Restaurants International, 88-INA-123 (Jan. 9, 1989) (en banc) (applicant's telephone was disconnected from time of proper recruitment period and C.O. failed to discuss Employer's rebuttal).

Finally, we find that even though Mr. Stone was no longer intersted in the job offered in November 1987 (AF 8), this does not cure the Employer's failure to take reasonable steps to contact Mr. Stone during the January through March 1987 recruitment period. See e.g., Dove Homes, 87-INA-680 (May 25, 1988) (en banc); Arcadia Enterprises, Inc., 87-INA-692 (Feb. 29, 1988).

Since the evidence shows that Mr. Stone was a potentially able, willing, qualified and available worker, we uphold the C.O.'s decision to deny certification based on the failure of the Employer to interview him or offer him the job during the recruitment period.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/MP/gaf