U.S. Department of Labor

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

DATE ISSUED: DEC 20 1990
CASE NO.: 90-INA-53

IN THE MATTER OF THE APPLICATION
FOR AN ALIEN EMPLOYMENT CERTIFI-
CATION UNDER THE IMMIGRATION AND
NATIONALITY ACT

PAPELERA DEL PLATA, INC.,
Employer

on behalf of

JUAN CARLOS LATORRACA,
Alien

PATRICK D. O'NEILL, ESQ.
D.T. LONGO, ESQ.
For the Employer

BEFORE: Litt, Chief Judge; Lipson, and Williams, Administrative Law Judges

NAHUM LITT
Chief Judge:

DECISION AND ORDER

This matter arises from an application for labor certification submitted by the Employer on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (1982). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the 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 there are not sufficient workers 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

---

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

alien is to perform the work; and that the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must apply for labor certification pursuant to §656.21. 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 the Appeal File (A1-A232), and any written arguments of the parties. See §656.27(c).

Statement of the Case

On June 27, 1988, the Employer, Papelera del Plata, Inc., filed an application for alien employment certification to enable the Alien, Juan Carlos Latorraca, to fill the position of sales manager. (A1-A83). The duties are to (1) direct and be responsible for all sales activities in the company and for expansion of markets for the company's products; (2) establish sales territories, quotas, and goals; (3) select, train, develop, manage, supervise, and evaluate sales personnel; (4) analyze sales statistics; (5) review market analysis to develop customers need, volume, potential, price schedules, discount rates and develop sales campaigns; (6) represent the company at trade association meetings and at meetings with suppliers; and negotiate with domestic and overseas clients for the sale and distribution of paper products and related items offered by the company. Two years of college, an associate degree in business administration, and five years experience were required. Special requirements were (1) sufficient knowledge of the market for paper and packaging products in Puerto Rico, the Caribbean and Central and South America to negotiate with suppliers for the purchase of products on a competitive basis and to execute and oversee sales campaigns of the company, and (2) be bilingual in Spanish and English (A21).

On May 9, 1989, the Certifying Officer issued a Notice of Findings (A86-88). The CO first found that pursuant to § 656.21(b)(6) the Employer is required to document that its requirements for the job opportunity are the minimum necessary and that it has not hired and it is not feasible to hire workers with less training and / or experience. The CO then determined that it was not clear that the Alien when hired had the required degree, five years of experience and possessed the special requirements listed. She required Employer to document that Alien had the requirements when hired, why it is not now feasible to hire someone without the required degree, or reduce the requirements (A87).

The CO then found that applicant Rafael R. Rodriguez had 5 years experience in the job offered, appeared to have 120 credits in business administration, and appeared to meet Employer's minimum requirements. Even though this applicant did not have the required degree, the CO stated that since the Alien did not either, this applicant appeared to meet the Employer's actual minimum requirements. The CO found that pursuant to §656.21(b)(7) U.S. workers may only be rejected for lawful, job-related reasons; that §656.21(c)(8) requires that the job

opportunity be clearly open to any qualified U.S. worker; and that pursuant to §656.21(b)(2)(ii) a U.S. worker is considered able and qualified if by education, training, experience, or a combination thereof he is able to perform the duties in a normally accepted manner as customarily performed. The CO found that applicant Rodriguez appeared qualified (A86-A87).

On June 9, 1989, the Employer submitted its rebuttal (A89-A101). It first offered evidence to establish that the Alien met all of the requirements of the job.

Employer next discussed the qualifications of each of the applicants including Rodriguez (A96-A98). With respect to applicant Rafael I. Rodriguez, it stated that the applicant is a member of the family of Employer's most direct competitor and only had sales experience from 1981 to 1984.

The CO issued a Final Determination on July 26, 1989 (A102-A104), agreeing that the Alien met the minimum requirements for the job (A103). The CO then stated that applicant Rafael I. Rodriguez has 6 years of experience and over 120 approved credits in Business Administration and, therefore, concluded that he was qualified for the job offered. The CO found that the applicant was not rejected for lawful, job-related reasons in violation of §656.21(b)(7) (A103).

On October 14, 1989, the Employer appealed (A105-A232). Employer states that the advertisement for the job clearly establishes that Employer seeks a sales manager with experience in the paper products and packaging industry, that the CO has not objected to this requirement, and that four specified applicants, including Rodriguez, do not fulfill this requirement (A232). Employer states that applicant Rafael I. Rodriguez is a family member of a competitor for which he worked and that he does not have the requisite sales management experience of 5 years with an independent company (A231).

DISCUSSION AND CONCLUSION

The CO denied the application in this case for violations of §656.21(b)(7) and §656.21(c)(8). Employer contends that none of the U.S. workers have the required experience the paper products industry. Applicant Rafael I. Rodriguez was rejected because he is a member of the family of a direct competitor of Employer and lacks sufficient experience with an independent company as a sales manager. Employer also contends that none of the applicants are as qualified as the Alien.

Employer uses a family relationship of applicant Rafael I. Rodriguez to a competitor for which he worked as the basis for rejecting him. Considering that the Employer requires experience in the paper products industry, it is not unexpected that an applicant will have gained experience through a competitor.

We also find that a familial relationship with the competitor, standing alone, affords an insufficient basis to reject a U.S. worker. Indeed, this U.S. worker has not worked for the competitor with which he has a familial relationship since 1981 and has had over four years of

subsequent sales management experience with an unrelated employer. Employer has not documented, through affidavits from prior employers or otherwise, that the security of its business would be at risk if the applicant is hired. Therefore, we are unable to conclude on this record that experience connected to family employment with a competitor constitutes a lawful basis for rejecting the U.S. worker. Royal Peddler, 87-INA-679 (Feb. 5, 1988).

The Employer also contends that applicant Rodriguez "does not have the requisite specific sales management experience of 5 years with an independent company." Appeal Brief at 2. However, in the ETA 750, there is no requirement that the five years of experience be acquired with an "independent company." Upon review of the applicant's qualifications, the record shows that he has two years of experience as a Manager Special Account Group for Rodriguez & Sons from 1978-1981 and four years of experience as Vice President Sales for H.R. Muxo Incorporated from 1981-1984 (A60). Therefore, we find that the applicant has six years of sales experience in the paper products industry and meets the stated job requirements.

Finally, Employer argues that the U.S. workers must be as qualified as the Alien. However, U.S. workers need only meet the qualifications and requirements specified in the application and an employer may not reject a U.S. worker because the alien is more qualified. Consequently, we find that qualified U.S. workers were rejected for other than lawful, job-related reasons. Therefore, the CO properly denied certification.

ORDER

The Final Determination of the Certifying Officer denying labor certification is AFFIRMED.

NAHUM LITT
Chief Administrative Law Judge