



DATE: DECEMBER 16, 1988
CASE NO.: 88-INA-344

IN THE MATTER OF

GERATA SYSTEMS AMERICA, INC.
Employer

on behalf of

RODERICK CHESTER ASH
Alien

Appearance: Robert E. Slatius, Esquire
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and
Brenner, DeGregorio, Guill, Schoenfeld, and Tureck,
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, Gerata Systems America, Inc., filed the application for labor certification on behalf of the Alien, Roderick Chester Ash, for the position of Computer Software Engineer on April 28, 1986 (AF 7). The requirements for the position, as stated by the Employer, included a B.S. degree in computer science and six months experience in the position.

The procedural history of this case is quite lengthy. The Certifying Officer (C.O.) issued her first Notice of Findings on July 7, 1987, and found that the Employer unlawfully rejected qualified U.S. workers (AF 58-61). In its rebuttal dated July 27, 1987, the Employer submitted information stating that the U.S. applicants were not qualified for the position (AF 62-78). On October 10, 1987, the C.O. issued a second Notice of Findings (AF 83). In this Notice of Findings the C.O. stated that the Employer had failed to establish "employer identity" as required by the definition of "Employer" in section 656.50. In its second rebuttal dated November 18, 1987, the Employer submitted information attempting to prove its status as an ongoing business (AF 84-92).

The C.O. issued her third Notice of Findings on December 2, 1987, and found that the Employer had again failed to prove its identity as a functioning "employer", and also its ability to offer a full-time, permanent position (AF 93-94). On December 7, 1987, the Employer filed its rebuttal and submitted evidence attempting to prove its status as an ongoing business as well as its ability to offer full-time, permanent employment (AF 96-104). The C.O., in her January 15, 1988 Final Determination, denied the application for labor certification on the latter ground (AF 105-107). The Employer requested review on February 19, 1988, and submitted a memorandum in support of labor certification on the same date (AF 117-119). The C.O. did not file a brief on appeal.

Discussion

The C.O. in her second Notice of Findings found that the Employer had not proven its "employer identity", meaning its existence as a business (AF 83). The C.O. cited the definition of "Employer" under section 656.50 which states that "Employer" means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment." The C.O. noted that the Employer's telephone number is an answering service which states that the Employer's location is solely for mail and phone facilities and is not office or business space. The C.O. requested the Employer to document that the Employer exists as a business through evidence of business contracts, day-to-day operations, clients and income.

The Employer, in its rebuttal, submitted a contract dated March 10, 1987, between the Employer and Auburn Computer Group, Inc. (AF 84-92). The contract provided that the Employer would perform services pursuant to a work order for Auburn. The work order provided that the Alien work from March 10, 1987 to March 10, 1988, at the rate of \$44.00, increasing to \$47.00 per hour.

In her third Notice of Findings the C.O., stating that the contract with Auburn was only for a year in duration, did not accept the contract as sufficient indicia of permanent, full-time employment (AF 93-94). The C.O. noted that the definition of "Employment" under section 656.50 "means permanent full-time work by an employee for an employer other than oneself." The C.O. requested the Employer to document its ability to offer a permanent, full-time job. The C.O. also reiterated its finding that the Employer had failed to prove its status as an ongoing business.

In its rebuttal the Employer submitted a copy of its 1986 corporate federal income tax, which stated a gross income of \$101,000 (AF 101). The Employer also submitted a contract dated January 2, 1987, between itself and SRS Network, Inc. (AF 97-100). The contract stated that the Employer would provide services to SRS at "various sites, as designated" at the payment rate "stipulated on contract addendum" (AF 99). The contract also stated that working hours are "to be determined" and the contract was not signed by a representative of the Employer. No addendum to the contract was submitted by the Employer. The Employer also submitted a lease for a premises and stated that telephone service would shortly be connected (AF 95-96, 104).

In her Final Determination the C.O. accepted the Employer's lease agreement as sufficient evidence to satisfy the employer definition requirement (AF 105-107). The C.O., however, denied certification on the ground that the Employer failed to prove the existence of a permanent full-time position. The C.O. refused to accept the contract with SRS as sufficient evidence of a permanent full-time position because the Employer did not sign the contract and, in any event, the Employer failed to demonstrate that a permanent full-time position would exist as a result of the contract. Moreover, the C.O. stated that no information was submitted to establish that the Employer has actually performed any of the services pursuant to the year old contract and that the Employer's 1986 tax return does not resolve the issue.

The Employer has failed to prove that it is offering permanent full-time employment as required by the definition of "Employment" in section 656.50. The C.O., in her third Notice of Findings, requested the Employer to document its ability to offer a permanent full-time position (AF 94). In response, the Employer submitted a contract between itself and SRS (AF 97-100). This contract is inadequate to prove the existence of a permanent, full-time position. As the C.O. noted, the contract was not signed by the Employer. Moreover, the contract's terms do not supply key information such as the value of the contract, the amount of work to be done, the location of the contracted work or the duration of the project. While the contract speaks of an addendum, no addendum was submitted. Finally, as the C.O. points out in her Final Determination, there is no indication that any work has been performed pursuant to the contract.

Likewise, the other information submitted by the Employer fails to establish the existence of a permanent full-time position. The Employer's income tax return merely states the Employer's 1986 income (AF 101). The Employer fails to explain how the income level translates into the availability of a permanent full-time position. The Auburn contract submitted by the Employer in response to the second Notice of Findings is also insufficient (AF 85-90). While the contract did provide employment for the Alien at a stated rate per hour, the contract was for only one year, has since expired, and was silent as to how many hours per week the Alien was to work, and hence is insufficient to to prove either permanent or full-time employment.

Therefore, based on the above, we find that the Employer has failed to prove that it is offering "Employment" as defined by section 656.50.

ORDER

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

For the Board:

LAWRENCE BRENNER
Administrative Law Judge