U.S. Department of Labor

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

DATE: NOVEMBER 24, 1987
CASE NO. 87-INA-540

IN THE MATTER OF

MMMATS, INC.
Employer

on behalf of

JUAN ANTONIO NOLASCO
Alien

Appearances

Gene S. Devore, Esquire
For the Employer

Before: Litt, Chief Judge, Vittone, Associate Chief Judge,
and Brenner, DeGregorio, Fath, Levin and Tureck Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

This proceeding was initiated by the above-named Employer who requested review, pursuant to 20 C.F.R. section 656.26, from the determination of a Certifying Officer of the U.S. Department of Labor denying an application for labor certification which the Employer submitted 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).

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.

The procedures governing labor certification are set forth at 20 C.F.R. §656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656.21 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 [hereinafter AF], and any written arguments of the parties. 20 C.F.R. §656.26(e).

Statement of the Case

The Employer, MMMATS, Inc., filed the application on behalf of the Alien, Juan Antonio Nolasco, for the position of solderer, production line. In its application for labor certification, the Employer included in the job offer the requirement that the applicant have one month experience as a solderer on a production line (AF 27). The Employer hired the Alien, in January 1985, for the same position as the one for which labor certification is now sought. The Alien had no experience when hired.

In his December 18, 1986 Notice of Findings (AF 13-19), the Certifying Officer (C.O.) denied the Employer's application for labor certification because the Employer did not advertise the minimum acceptable job requirements in violation of section 656.21(b)(6).

The Employer's rebuttal (AF 4-8) consisted of cites to eight cases in support of its contention that the applicable statutes, regulations and administrative law do not compel an employer to train a U.S. worker for the subject position (AF 5).

In his April 22, 1987 Final Determination (AF 2-3), the C.O. rejected the Employer's Rebuttal and, therefore, denied labor certification for the reason that "the Employer has not advertised the minimum acceptable job requirements as demonstrated, i.e., no experience." The Employer requested review of this denial and filed a brief in support of review.

Discussion

Section 656.21(b)(6) states that:

> An employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer (Emphasis added).

In its Rebuttal (AF 5-8) and Appeal Brief (Brief, pp. 2-5), the Employer cited numerous decisions in support of its position. We are not bound by ALJ decisions issued before the establishment of this Board. In any event, those decisions are not persuasive as applied to this case. Furthermore, the Employer is incorrect when it says in its Rebuttal, and repeats in its Appeal Brief, that "the Department of Labor must specifically prove and present evidence that the Employer specifically tailored this job for the Alien" (AF 5; Brief, p. 2).

The general rule is that labor certification will be denied under section 656.21(b)(6) when the alien has been employed in the position for which certification is sought and has gained experience which is required by the job offer while working for the employer in that position. The exception requires the employer to document that it is now not feasible to hire workers with less training or experience than that required by the employer's job offer.

The Employer concedes that, at the time of his original hiring, the Alien had less than the one month of experience now required (Brief, p. 3). Furthermore, all of the Alien's experience has been gained while working for the Employer in the position for which certification is sought. The Employer has tried to come within the exception by contending, without any documentation, that it is not feasible to hire workers with less experience or training than that required by the job offer because of the growth developments and expansion efforts of the Employer in South Florida (Brief, p. 5). This bare statement of infeasibility is inadequate to invoke the exception. The Board notes, in addition, that this point was not even raised by the Employer before the C.O., as required by section 656.26(b)(4).

The Employer was willing to originally hire the Alien without experience and has not documented that it is now infeasible to hire a U.S. worker without that experience. Therefore, the Employer has failed to establish that its stated minimum experience requirement is its actual minimum requirement, in violation of 20 C.F.R. §656.21(b)(6).

ORDER

The Final Determination of the Certifying Officer is AFFIRMED and the application for labor certification is denied.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge