



DATE: DEC 21 1988
CASE NO. 88-INA-70

IN THE MATTER OF

VETERANS ADMINISTRATION MEDICAL CENTER
Employer

on behalf of

ISSAM T. SHALHUB
Alien

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

NICODEMO DeGREGORIO
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 written arguments of the parties. 20 C.F.R. § 656.27(c)

Statement of the Case

On October 24, 1986 the Veterans Administration Medical Center (Medical Center) filed an application for alien employment certification to enable Dr. Issam T. Shalhub (the Alien) to fill the position of staff urologist. The minimum requirements for the satisfactory performance of the job were stated on the application to be as follows: (1) Medical Degree in medicine; (2) Five years of internship/residency; (3) Work experience required for American Board of Urology Certification or Eligibility to apply for such certification; and (4) Board certification eligibility or actual certification in Urology. (AF 89) On January 30, 1987 the Certifying Officer issued a Notice of Findings, proposing to deny labor certification on the ground that the Medical Center had not documented lawful job-related reasons for not hiring three United States physicians, Drs. Ruben Ramirez, Bernardo Lederman, and Howard Pomeroy. (AF 60). On July 15, 1987 the Medical Center filed a rebuttal, asserting that Dr. Ramirez was not available for interview, and that the other two doctors were not qualified for the position of staff urologist on several grounds. (AF 13-38) On October 9, 1987 the Certifying Officer denied labor certification, on the grounds that Dr. Pomeroy and Dr. Lederman both met the minimum requirements set by the Medical Center, and that the reasons given for the refusal to hire them were not lawful. (AF 10). On November 5, 1987 a request for review of the denial was submitted. On February 22, 1988 counsel for the Alien filed a brief which has been duly considered. No brief has been filed on behalf of the Certifying Officer.

Discussion

This case turns on the single question of what standards may be used to determine whether U.S. applicants for a job offered to an alien are qualified for it. The form used to apply for labor certification requires an employer to “State in detail the MINIMUM education, training, and experience for a worker to perform satisfactorily the job duties described in item 13 above.” (AF 89) This Board has held that where the job requirements stated on the application are not found to be unduly restrictive, an applicant who does not meet the requirements is not qualified for the job. In the Matter of Concurrent Computer Corp., 88-INA-76 (August 19, 1988); In the Matter of Hong Kong Royale Restaurant, 88-INA-60 (Oct. 17, 1988). The converse is also true. An applicant who meets those requirements is qualified for the job in terms of his or her education, training and experience. In the Matter of Fritz Garage, 88-INA-98 (August 17, 1988); In the Matter of Vanguard Jewelry Corp. 88-INA-273 (Sept. 20, 1988) In particular, a job applicant may not be rejected for failure to satisfy job requirements which were not listed on the application form. In the Matter of D.N.A., Inc., 88-INA-18 (May 9, 1988). Cases may arise where certain job requirements may be implied, and treated as if they had been stated in terms, on the theory that the requirements were not stated precisely because they are obvious and likely

to be met by any one who would apply for the job. Proficiency in English language furnishes an example. But the case at hand is governed by the general rule.

The curricula vitae of Drs. Pomeroy and Lederman show that both physicians meet the job requirements stated by the Medical Center on the application for labor certification. Both hold certification in urology. (AF 33, 34). At any rate, they were not rejected for failure to meet those requirements. Dr. Pomeroy and Dr. Lederman were rejected because: (1) they had received their urology residency training at three or four institutions, which was considered less desirable than a single integrated training program in one location; (2) Dr. Pomeroy “could not demonstrate the competence needed to serve effectively as the primary surgeon on complex open urological cases”, nor familiarity with the latest state-of-the-art urodynamics procedures and equipment; and (3) Dr. Lederman's private practice background was not sufficient to prepare him for the Medical Center's complex urological surgical problems. (AF 25, 26, 32, 19)

On appeal, the Alien's counsel insists that the job duties must be considered part of the minimum requirements of a job, so that if an employer documents that an applicant could not perform the requisite duties, the rejection of the applicant is based on a lawful, job-related ground. We put aside the question whether a certifying officer could do his job of determining availability of qualified U.S. workers, if an employer were allowed to use vague, judgmental, and undisclosed standards for determining the qualifications of job applicants. We need only point out that the form used to apply for a labor certification clearly distinguishes between job duties and the requirements necessary to perform satisfactorily those duties. On the authority of the cases cited above, the Certifying Officer in this case was justified in judging the qualifications of the two physicians by the standards the Medical Center set forth on its application for labor certification. These do not include any requirements regarding unity of training program, continuity of experience, quality of private practice, or familiarity with state-of-the-art procedures beyond those expected of any board-eligible urologist.

We have examined the cases cited by the Alien's counsel. The cases predate the establishment of this Board, and are not binding on it.

In conclusion, we agree with the Certifying Officer that the Medical Center has rejected two U.S. applicants on impermissible grounds, contrary to 20 CFR 656.21(j)(1). It may be that the Alien is better qualified, and we fully appreciate the Medical Center's desire to employ the best qualified urologist. But the search for the best must be conducted within the national boundaries. When an employer tries to go outside, it encounters the public policy of the United States that U.S. workers, if qualified, must be preferred over alien workers, even though better qualified.

ORDER

The determination of the Certifying Officer denying labor certification is affirmed.

NICODEMO DeGREGORIO
Administrative Law Judge

Washington, D.C.

ND/tjp

In the Matter of VETERANS ADMINISTRATION MEDICAL CENTER, 88-INA-70 Judge
LAWRENCE BRENNER, Concurring.

Dr. Pomeroy's alleged lack of competence to be the primary surgeon on complex open urological cases, if demonstrated, would have sufficed as a valid reason for rejection if the requirements had included ability to do open surgery as the primary surgeon. Even if we were, arguendo, to read into the requirements under a necessary implication exception to the general rule, the requirements for such surgical ability and for familiarity with state-of-the-art procedures, the Employer has not sustained its burden of providing specific objective support for its conclusions that Dr. Pomeroy fails to satisfy these requirements. Finally, there is no arguable support for finding it acceptable for the Employer to reject Dr. Ledeman based on his failure to satisfy experience criteria which were not set forth as requirements.

LAWRENCE BRENNER
Administrative Law Judge