



DATE ISSUED: March 21, 1989

CASE NO. 87-INA-530

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

DANBY-PALICIO, DIVISION OF
VILLAZON & COMPANY
Employer

on behalf of

JOSEPH SERGE HAMILTON
Alien

Robert S. Hilliard, Esq.
For the Employer

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

NAHUM LITT
Chief Judge

DECISION AND ORDER

This case arose from an application for labor certification which the Employer submitted on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested administrative-judicial 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

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

time of the application for a visa and admission into the United States and at the place where the alien is to perform such labor, and that 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 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.

The 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 the Appeal File (A1-A63), and any written arguments of the parties. See §656.27(c).

Statement of the Case

On June 17, 1985, the Employer applied for labor certification on behalf of the Alien. The supporting documents indicate that the position was for a Sales Manager for an importer and distributor of tobacco products. The requirements included a high school degree, one year of college, 4 months experience in computer use and programming, and familiarity with use and programming of IBM 34 computer systems. (A2).

The State employment agency transmitted documentation that the prevailing wage for the position of Sales Manager for the size of the Employer's company was \$38,900. (A18).

On November 28, 1986, the CO issued a Notice of Findings stating the following: the Employer's wage offer of \$384.61 per week is below the prevailing wage of \$38,900 per year; the minimum requirements for the position are unclear with regard to education and training, and the alien's qualifications need to be documented regarding the minimum requirements. (A23).

On January 6, 1987, the Employer submitted an amended Offer of Employment and Statement of Qualifications. (A27). The position was described not as a Sales Manager, but as a Special Assistant to the Vice-President. The Employer stated that the position did not include any decision-making responsibilities, and therefore, the salary was not in the range of \$38,900. (A29). The Employer also clarified the requirements for the position to include one year post-high school technical training in computer programming and 4 months experience in the related occupation of data entry clerk or computer operator. (A28). The Employer retained the requirement of familiarity with IBM 34 computer systems. (A28).

On January 27, 1987, the CO issued a Second Notice of Findings. The CO stated that pursuant to §656.21(b)(2), the Employer's requirements of experience in a related occupation without qualifying experience in the job offered, and familiarity with use and programming of IBM 34 computer systems were unduly restrictive; the Employer was required to amend the requirements or justify the requirements as arising from business necessity. The CO further stated that the Employer, after clarifying the minimum requirement, must document that the

Alien meets the minimum requirements. Finally, the CO stated that the Employer's wage offer does not equal the prevailing wage of \$38,900. (A34).

On March 2, 1987, the Employer submitted rebuttal. (A36-A40). With regard to the CO's first finding, the Employer stated that obviously, experience in the actual job offered would be acceptable, even preferable. (A37). The Employer then stated that "the requirements of training, education and experience, as stated, allow the employer flexibility in determining the qualifications of applicants. They permit the employer to make a reasonable and practical testing of the job market." (A37). According to the Employer, there is no requirement that the alien document that he possesses the minimum requirements; such documentation is presented to the Immigration and Naturalization Service when the petition is presented. (A37). With regard to the finding of prevailing wage, the Employer reiterated that it has amended the position description so that a sales manager with decision-making responsibilities is not what is sought. (A37).

On April 15, 1987, the CO issued a Final Determination denying labor certification. (A49). The CO stated that pursuant to 20 C.F.R. §656.21(b)(2), the Employer is required to document that his requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job, and that pursuant to 20 C.F.R. §656.20(c)(3), the Employer's wage offer must equal or exceed the prevailing wage. (A48-A49). The CO explained that the Employer failed to amend the minimum requirements of the Offer of Employment to include experience in the job duties to be performed or in a related occupation or to document business necessity for his requirements. (A48). The CO further explained that taking into account the employer's current job description, minimum requirements, special requirements, and level of supervision, the prevailing wage is \$38,900 per year. (A47).

Thereafter, the Employer requested review. The Employer argues that the prevailing wage should be based on the actual job duties as described. (A63). The Employer also argued that experience in the job offered is qualifying, and that the Alien possesses the minimum requirements. (A62).

Discussion and Conclusion

Under §656.21(b)(2), an employer must document that the job opportunity is being described without unduly restrictive requirements. The job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States; shall be those defined for the job in the Dictionary of Occupational Titles. §656.21(b)(2)(i).

In the instant case, the CO, in the Second Notice of Findings stated that the Employer's requirements of experience in a related occupation without qualifying experience in the job offered and familiarity with IBM 34 computer systems were unduly restrictive. The CO required the Employer to either amend the requirements, or to justify the requirements as arising from business necessity. On this issue, the Employer, in rebuttal, stated that experience in the actual job offered would be qualifying, even preferable. The Employer also stated that "the

requirements of training, education and experience, as stated, allow the employer flexibility in determining the qualifications of applicants. They permit the employer to make a reasonable and practical testing of the job market." (A37). The CO denied certification on the grounds that the Employer failed to amend the application to include qualifying experience in the job offered and failed to document that the requirements arose from business necessity.

The Employer, when given the opportunity, failed to amend the application to reflect that experience in the job offered was qualifying. Although the Employer considered such experience qualifying, it did not specify whether 4 months experience in the job offered, or some lesser length of time, was qualifying. In sum, the Employer's response on this issue was inadequate. Moreover, the Employer, when given the opportunity, failed to either delete the requirement of familiarity with IBM 34 computer systems or establish that the requirement arises from business necessity. In rebuttal to the Second Notice of Findings, the Employer made only a general statement that the requirements, as listed, allow it to make a reasonable and practical testing of the job market. The Employer failed to allege, let alone establish, that the requirement arises from business necessity. Again, the Employer's response on this issue was inadequate.

Since the Employer failed to amend the application to reflect that experience in the job offered was qualifying, failed to establish that the requirement of familiarity with IBM 34 computer systems arises from business necessity, the CO properly concluded that the job opportunity is being described with unduly restrictive requirements in violation of §656.21(b)(2). Accordingly, the denial of labor certification must be affirmed.

ORDER

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

NAHUM LITT
Chief Administrative Law Judge

NL:AS

Judge TURECK, concurs in the result only.