



DATE: NOVEMBER 24, 1987
CASE NO. 87-INA-547

IN THE MATTER OF

JACKSON & TULL ENGINEERS
Employer

on behalf of

ANTHONY L. NWAGBARA
Alien

Appearances

Robert L. Oswald, 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, Jackson & Tull Engineers, filed the application for labor certification on behalf of the alien, Anthony L. Nwagbara, for the position of Structural Engineer in its Construction Engineering firm. The Employer described the job as "directs planning, designing and review of plans for structures involving stress analysis. Designs structure to meet load requirements" (ETA Form 750 Part A; AF 21, 28). The Employer stated the minimum requirements as a Bachelor's Degree in Civil Engineering and three-months training in Structural Engineering (Id.).

The Employer hired the alien, who earned a Bachelor's Degree in Civil Engineering in 1981, as a structural engineer in February 1982. According to the alien's application, he had no prior experience (ETA Form 750 Part B; AF 24).

The Employer advertised three consecutive days in the Washington Post (AF 25-27) and posted an advertisement at its place of business for ten consecutive days (AF 28). None of the four candidates who responded had training in structural engineering and only one had a Bachelor's Degree in Civil Engineering; the Employer said it was unable to contact this last applicant at the telephone number given.

After considering the Employer's recruitment documentation, the Certifying Officer (C.O.) denied the Employer's application on December 4, 1986, on the grounds that the Employer's present requirements do not represent its actual minimum requirements for the job, as required by 20 C.F.R. §656.21(b)(6) (AF 8-9). The C.O. said that the alien did not have, at the time of hire, the qualifications the Employer now desires, i.e., the three months of training. In his Notice of Findings, the C.O. said that the Employer could rebut the finding by: (1) deleting the requirement, or (2) submitting evidence which clearly shows that the alien at the time of hire had the required training, or (3) submitting documentation that it is not presently feasible from the standpoint of business necessity to hire a worker with less than the qualifications the Employer now desires. The C.O. specified that the Employer must submit independent documentation to support any assertion regarding (2) or (3) (AF 9).

In response to the Notice of Findings, the Employer submitted a letter in which it said that when the alien was hired, the company had a training program for entry-level structural engineers and that all entry-level engineers were required to complete that training program. The Employer asserted that, because its business had declined substantially since 1982, it could no

longer afford to train its entry-level engineers, but offered no substantiation of its asserted business necessity (AF 7). The Employer also noted that the alien had undergone approximately four months of training as a civil engineer in Alabama before being hired by the Employer, but provided no documentation of this additional training (AF 6).

In his Final Determination, issued on April 17, 1987, the C.O. again denied certification, on the grounds that the Employer had submitted no independent documentation supporting a business necessity to hire already-trained structural engineers. The C.O. noted that the three-month training previously offered appeared to be comparable to the orientation offered by an employer to any new employee, and added that there was no documentation supporting the alien's alleged prior four months of training (AF 5).

The Employer requested review of this denial, submitting its argument in support of review in a letter dated May 18, 1987 (AF 1). The Employer did not file a brief.

Discussion

It is the position of the Employer, as contained in the request for review (AF 1-2), that the alleged failure to submit independent data reflecting the alien's training prior to hire is not adequate grounds on which to deny the application. The applicable regulation, 20 C.F.R. §656.21(b)(6), states that an employer shall document that it has not hired workers with less training or experience than it now requires, whereas the Employer maintains that the regulations do not state that the Employer must document its requirements for the job opportunity (AF 1-2). The Employer also argues that its own statements regarding its business decline and the impossibility of training a new worker, which were written on the Employer's "own stationery" and which could be attested to only by the employer, render any request for independent documentation meaningless (Id.).

The regulations, at 20 C.F.R. §656.21, set forth steps which must be taken to demonstrate that the Employer has complied with the regulations regarding the labor certification process. Were the Board to agree with the Employer's position that it has no affirmative obligation to provide the requested documentation, the Board would be draining the regulations of much of their meaning.

At the core of the deficiencies found in the instant case is the Employer's non-compliance with 20 C.F.R. §656.21(b)(6). The C.O. found that the Employer had not documented the business necessity for now requiring a new employee to have three months of prior training, when the alien had been hired without that experience. It is true that the regulations do not indicate what constitutes such documentation. What is clear, however, is that the Employer has provided no documentation whatever of its alleged declining business conditions. Accordingly, we find that the Employer has not complied with the regulations.

Alternatively, under 20 C.F.R. §656.21(b)(6), the Employer must document that it has not hired workers with less training or experience for jobs similar to that involved in the job opportunity. The Employer hired the alien in 1982, and in his ETA Form 750 Part B, the alien

did not indicate any prior experience (AF 24). In its rebuttal, the Employer stated that the alien had approximately four months of prior training (AF 6). The C.O. correctly found in his Final Determination that the Employer had not complied with the Notice of Findings' request for documentation of the alien's prior training. As there is no such documentation provided, the Employer has failed to establish that the alien was hired in 1982 with less training than it now requires.

The Employer bears the burden of establishing that it has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or 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 has not met that burden.

ORDER

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

For the Panel:

LAWRENCE BRENNER
Administrative Law Judge

LB/JF/gaf