



DATE ISSUE: April 24, 1989

CASE NO. 87-INA-683

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

LEBANESE ARAK CORP.,  
Employer

on behalf of

GARBIS KURKJIAN  
Alien

Richard D. Rogen, Esq.  
For the Employer

Darryl A. Stewart, Esq.  
For the Certifying Officer

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

NAHUM LITT  
Chief Judge:

DECISION AND ORDER

This matter arose from an application for labor certification submitted by the Employer 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 review pursuant to 20 C.F.R. §656.26 (1988).<sup>1</sup>

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

---

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

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 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 the 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.

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 the Appeal File (A1-A58), and any written arguments of the parties. See §656.27(c).

#### Statement of the Case

The Employer, Lebanese Arak Corp., filed an application for alien labor certification on behalf of the Alien, Garbis Kurkjian, to fill the position of Blender of alcoholic and nonalcoholic syrups. (A23). The job duties included blending ingredients in order to produce syrups, alcoholic and non-alcoholic, (viz., milberry, mandarine, sour cherry, pineapple, jallab, menthe, lemon, orange, rose, tamarine, sous, orange blossom water, fruit cocktail), to be mixed with water or liquor for consumption purposes. (A23). The Employer required two years of experience in the job offered. (A23).

One U.S. applicant, George Diaz, was referred as a result of the Employer's recruitment efforts. (A43). The Employer rejected Mr. Diaz for lacking the minimum experience for the position. (A39). In addition, the Employer stated that Mr. Diaz was "discharged from his previous employment for excessive tardiness and absenteeism." (A39).

On October 27, 1986, the CO issued a Notice of Findings. (A15). According to the CO, the requirement of 2 years experience in the job offered was unduly restrictive under §656.21(b)(2), and the Employer was required to either delete the requirement or justify it as arising from business necessity. (A16). The CO stated that the standard occupational preparation time for a syrup maker pursuant to the Dictionary of Occupational Titles is 3 to 6 months. (A16). The CO also found that the U.S. applicant, Mr. Diaz, through a combination of education, training, and experience, was qualified for the position. The CO included a questionnaire signed by Mr. Diaz indicating that he was interviewed, but not offered the position, and that he thought he was not hired because the Employer was interviewing two other people. (A18). According to the CO, Mr. Diaz "is qualified to perform the basic (unrestricted) job; being discharged from previous experience is not, per se, a job-related reason for rejecting an applicant." (A16). The Employer was required to demonstrate a good faith effort to consider and hire a qualified U.S. worker. (A16).

On January 12, 1987, the Employer submitted rebuttal. (A11). The Employer reduced its requirements for the position to 6 months experience in the job offered, and readvertised. (A25-A38). According to the Employer 4 U.S. applicants were referred as a result of the recruitment. Raul Olague was rejected as lacking experience in "producing the syrups manufactured by our company. His experience in the field is limited to that of a Flavor Maker as opposed to that of a Syrup Maker. In addition, he admitted he never worked with alcoholic syrups." (A11). Three other U.S. applicants were rejected as either uninterested or unavailable. (A11-A12).

On March 3, 1987, the CO issued a second Notice of Findings. (A8). The CO stated that since the Employer rejected a U.S. applicant for not possessing experience "producing the syrups manufactured by our company," such a requirement is unduly restrictive and must be either deleted or justified as arising from business necessity. (A9). Absent the restrictive requirement, U.S. applicant, Olague, is qualified. According to the CO, two other U.S. applicants, Aubert and Jones, were qualified; however, the Employer's lack of a good faith effort to recruit "allowed them to lose interest in the position, there is every indication they were interested and available at time of response." (A9). Finally, the CO stated that the Employer "made no effort to re-consider applicant Diaz as directed by NOF; this applicant is fully qualified." (A9). As in the first Notice of Findings, the Employer was required to demonstrate a good faith effort to consider and hire a qualified U.S. worker. (A9).

The Employer submitted rebuttal on March 27, 1987. (A5). With regard to its recruitment efforts, the Employer stated that it sent certified letters to the referred applicants within 6 days of receiving the resumes. (A5). Mr. Olague was not personally interviewed until January 10, 1987, because the letter was returned as unclaimed, and Mr. Olague had to be contacted by telephone. (A5). In addition, Mr. Aubert did not respond to the Employer's letter, and when telephoned, Mr. Aubert's mother-in-law indicated that he was not interested in the position. (A6). Mr. Jones did not keep a scheduled appointment, and the Employer determined that the telephone number given by Mr. Jones belonged to the Salvation Army. (A6). With regard to the qualifications of Mr. Olague, the Employer stated that Mr. Olague's experience was limited to that of a flavor maker as opposed to a syrup maker. (A6). The Employer also stated that Mr. Diaz was rejected for lacking experience as a syrup maker. (A6). According to the Employer, experience in producing its syrups is essential. (A6). The Employer's products are regulated by Stated authorities; if a mistake is made in preparing the syrups, serious health hazards may arise to those ingesting the products, and safety hazards may arise to co-workers because the bottles in which the syrups are contained may explode. (A6). In support, the Employer submitted its licenses and permits. (A53-A55). The Employer concluded that neither Mr. Olague nor Mr. Diaz had experience with alcoholic syrups. (A6).

On June 2, 1987, the CO issued a Final Determination denying labor certification. (A3). The CO stated that the requirement of familiarity with his product is unduly restrictive. According to the CO, the Employer has not documented that California Food and Beverage requires it to have a blender who is familiar with his particular product, as required by the second Notice of Findings. (A4). The CO also found that U.S. applicants were rejected for other than lawful, job-related reasons. According to the CO, the Employer did not submit convincing

evidence that Aubert and Jones were unavailable. The Employer also did not submit convincing evidence to show that Diaz and Olague were unqualified. The CO stated that the Employer has not "shown that the mixing of alcoholic syrups is any different from non-alcoholic syrups. . . ." (A4).

On June 26, 1987, the Employer requested review. (A1). In its request and in its brief on appeal, the Employer argued that knowledge of the manufactured products is essential since the products are regulated by the California Food and Beverage authorities, and that hiring an individual who lacks such knowledge will result in improperly prepared syrups potentially causing great harm to the public as well as loss of the Employer's right to manufacture. (A2). The Employer also believed that it has made a good faith effort to recruit qualified U.S. workers to fill the position. (A2).

The Certifying Officer, on appeal, argues that the Employer has failed to demonstrate that a knowledge of producing the syrups it manufactures is so essential to the operation of its business that its absence would undermine the essence of the job opportunity. The CO also argued that U.S. applicants rejected for lacking a requirement which is found to be unduly restrictive, are rejected for other than lawful, job-related reasons.

#### Discussion and Conclusion

The CO denied certification, in part, on the ground that the Employer's requirements were unduly restrictive. The Employer required 6 months experience in the job offered. In the Notice of Findings, the CO stated that the standard occupational preparation time for the position of syrup maker pursuant to the D.O.T. is 3 to 6 months. Under §656.21(b)(2)(i), a job opportunity has been described without unduly restrictive requirements where the requirements are those defined for the job in the D.O.T. Accordingly, the Employer's requirements of 6 months prior experience in the job offered is not unduly restrictive.

The CO challenged the Employer's job requirements as unduly restrictive in response to the Employer's reason for rejecting U.S. applicant, Mr. Olague. The CO's objection centers around his determination that the Employer is requiring experience with its specific products. The Employer's complete statement with regard to its rejection of Mr. Olague indicates that the Employer rejected Mr. Olague as lacking prior experience in the job offered. The Employer stated that Mr. Olague's "experience in the field is limited to that of a Flavor Maker as opposed to that of a Syrup Maker. In addition, he admitted he never worked with alcoholic syrups." (A11). Viewing the statements as a whole, it appears that the Employer rejected Mr. Olague for lacking prior experience mixing alcoholic syrups, i.e., he was rejected for lacking prior experience in the job offered as opposed to to lacking prior experience with the Employer's specific products. Accordingly, the job opportunity has been described without unduly restrictive requirements.

The CO denied certification on the grounds that the Employer rejected U.S. applicants for other than lawful, job-related reasons. According to the CO, the Employer has not shown that the mixing of alcoholic syrups is any different from non-alcoholic syrups, and therefore, has not

shown that Mr. Diaz and Mr. Olague were unqualified. We have held that "where an employer's job requirements are not found to be unduly restrictive, a U.S. applicant who does not satisfy all the job requirements is not qualified for the position, and may lawfully be rejected. . . ." In Re Adry-Mart, Inc., 88 INA 243 (Feb. 1, 1989).

After its recruitment efforts, the Employer stated that neither Mr. Diaz nor Mr. Olague had prior experience in the job offered. Mr. Diaz's resume does not indicate that he has any experience mixing alcoholic syrups, and according to the Employer, Mr. Olague admitted to not having experience mixing alcoholic syrups. Contrary to the CO's conclusion, the reasons stated by the Employer, in the rebuttal to the second Notice of Findings, establish that mixing alcoholic syrups is different from mixing non-alcoholic syrups. Since the Employer has demonstrated that the U.S. applicants do not meet the minimum requirements for the position and such requirements are not found to be unduly restrictive, the Employer has rejected the U.S. applicants for lawful, job-related reasons.

The CO also denied certification on the ground that U.S. applicants, Aubert and Jones, were rejected for other than lawful, job-related reasons. According to the CO, the Employer had not submitted convincing evidence to demonstrate that applicants Aubert and Jones were unavailable. According to the Employer, Mr. Aubert did not respond to the Employer's letter, and Mr. Jones failed to keep a scheduled appointment, and reasonable efforts were made to contact the U.S. workers thereafter. The Employer's statements in rebuttal to the Notice of Findings demonstrate that the U.S. applicants were initially unavailable. Accordingly, the Employer has adequately documented lawful, job-related reasons for rejecting applicants Aubert and Jones.

Since the Employer has demonstrated that its requirements for the position were not unduly restrictive and that each U.S. applicant was rejected for lawful, job-related reasons, the CO improperly denied labor certification.

#### ORDER

The Final Determination of the Certifying Officer is hereby REVERSED, and the application of labor certification is GRANTED.

NAHUM LITT  
Chief Judge

NL:AS