

U.S. Department of Labor

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



DATE: SEP 30 1988
CASE NO. 87-INA-740

IN THE MATTER OF

YEDICO INTERNATIONAL, INC.,
Employer

on behalf of

FARHAD SHAMLOO,
Alien

Angelo A. Paparelli, Esq.
Los Angeles, CA
For the Employer

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

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

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) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer Paul R. Nelson's denial of a labor certification application pursuant to 20 C.F.R. §656.26.¹

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: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available 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; and (2) the employment of the alien will not adversely

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

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 Part 656 of the regulations 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 a 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 any written arguments of the parties [see §656.27(c)].

Statement of the Case and Discussion

The employer, an importer and wholesaler of household, gift and crystal merchandise (AF 89), filed an application for alien employment certification to enable the Alien to fill the position of Budget Accountant. The duties of the position, to be performed under the supervision of a Certified Public Accountant, include reviewing financial activities, income and expenses; creating and maintaining budget and inventory-control systems; reviewing schedules of tariffs and import duties; advising management on optimal use of resources and capital; and preparing financial statements and reports (AF 39). The Employer's requirements for the position are a master's degree or equivalent in Accounting, and two years of experience either in the job offered or in the related occupation of Auditor (id.).

In a Notice of Findings ("NOF") issued on April 14, 1987, the Certifying Officer ("CO"), citing responses to questionnaires from two job applicants, Cloes and Capili (see AF 34, 35), found that there was no evidence that they were ever contacted by Employer, and indicated that Employer failed to establish that these applicants were rejected for lawful job-related reasons (AF 32-33).² The Employer filed a timely rebuttal statement and related documentary evidence to establish that it had contacted all of the applicants responding to its recruitment for the job, and that both Cloes and Capili indicated that they were not interested in the position. Among the evidence provided by Employer were itemized telephone bills listing calls to telephone numbers identified by Employer as belonging to each of the applicants except Cloes (AF 13).³ Employer alleged telephoning Cloes as well, but noted that this call did not appear on its bill because it is in the same calling zone (AF 9). As further evidence that these calls occurred as alleged, Employer cited "Interview Sheets" describing these phone calls which it had submitted to the State Employment Development Department (EDD) on October 3, 1986 (see AF 43, 51-58). Included

² The CO did not challenge Employer's rejection of the six other job applicants.

³ Although Employer completed its call to applicant Raven's home (see AF 13), Employer's "Interview Sheet" for that call indicates that it spoke only with Mrs. Raven (see AF 58).

in these "Interview Sheets" was a report of a call to Cloes on September 15, 1986 (AF 53), the same day the phone calls to the other applicants were made, indicating that he did not want to work for a company doing such a relatively small volume of business (AF 53)

As further evidence of Employer's thoroughness, the one applicant not directly contacted by phone was sent a follow-up mailgram (see AF 17); and all of the applicants were sent letters stating why they were being rejected for the job (see AF 23-30). Finally, in response to the NOF, Employer sent mailgrams to both Cloes and Capili restating its reasons for previously rejecting them for the jobs, requesting confirmation of the earlier phone calls, and asking them to phone Employer to set up personal interviews (see AF 18-22). No response to these mailgrams was received.

Despite all of this evidence indicating that Employer had contacted each applicant at least twice, the CO chose to credit Cloes and Capilis responses to DOL questionnaires that they were never contacted by employer. We hold the CO's weighing of the evidence in this case to be irrational.

First, the applicants' responses to the questionnaires were prepared almost five months after the recruitment period ended, whereas all of Employer's documentary evidence and its initial narration of the responses to its recruitment were contemporaneous with the events described, and were filed with the EDD shortly thereafter. All other things being equal, contemporaneous evidence is more probative than evidence recalling events which occurred months earlier. The CO failed to take the more contemporaneous nature of Employer's evidence into account.

Second, the CO failed to discuss the fact that two other job applicants responded to DOL's questionnaires, and both indicated that they were contacted by Employer (see AF 36-37). In fact, the questionnaire from Ralph Delimont indicates that he would have been offered the job had he not asked for more money than the job paid (see AF 36). That is the same reason Employer gave for rejecting Mr. Delimont (see AF 44). Considering all of the supporting documentary evidence regarding its recruitment of the eight applicants, it appears unlikely that Employer contacted Lee and Delimont but did not contact Cloes and Capili. It is more likely, as Employer suggested (see AF 10), that Cloes and Capili are in error.

Third, the evidence submitted by Employer, including the itemized telephone bills, the "Interview Sheets" summarizing the telephone calls with applicants, and the follow-up letters, would establish without question that Employer contacted all of the job applicants. Although not stated directly by the CO, by refusing to credit this overwhelming evidence -- relying instead on two brief responses to questionnaires prepared months after the events in issue -- he can only be inferring that Employer's evidence is not genuine, i.e., that the ""Interview Sheets" summarize non-existent telephone calls and the follow-up letters were never mailed to the job applicants.

We wish to state that this Board does not operate under a preconception that employers routinely engage in fraud or other willful misconduct in attempting to obtain alien labor

certification. Due to the serious nature of such allegations, including possible criminal prosecution (see §656.31), where a Certifying Officer intends to find that evidence submitted by an Employer is not genuine, this Board expects such a finding to be expressly made and adequately supported by probative evidence. Absent such evidence, it is irresponsible to allege, whether directly or by implication, that an employer engaged in fraudulent conduct in attempting to obtain certification. It is also irresponsible under any condition to make such a serious charge only by implication. An employer should be afforded the opportunity to confront such a charge head-on.

Given all of the other evidence in this case, the questionnaire responses of Cloes and Capili fail to provide a basis for implying that Employer's documentary evidence was not genuine.

In conclusion, we hold that the evidence of record could support only one finding -- that Employer contacted all of the job applicants, including Capili and Cloes, and rejected them for lawful job-related reasons. Therefore, the CO's determination denying certification is reversed.

ORDER

The final determination denying alien labor certification is reversed, and certification is granted.

JEFFREY TURECK
Administrative Law Judge