



DATE: MARCH 20, 1989  
CASE NO. 88-INA-93

IN THE MATTER OF

SUNILAND MUSIC SHOPPES  
Employer

on behalf of

LESLAW SOKOLOWSKA WOSZCZAK  
Alien

Appearance: S. Peter Capua, Esquire  
For the Employer

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

LAWRENCE BRENNER  
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 any written arguments of the parties. 20 C.F.R. §656.27(c).

### Statement of the Case

On October 8, 1985, the Employer, Suniland Music Shoppes, filed an application for labor certification on behalf of the Alien, Leslaw Sokolowska Woszcak, for the position of music teacher (AF 52). The job duties included: teaching individuals or groups instrumental music; instructing students in music theory, harmony, score and sight reading, composition, and music appreciation; and, specifically, instructing pupils in piano and organ playing. The Employer required three years of high school education, and five years of experience in the job offered.

In his January 13, 1987 Notice of Findings, the Certifying Officer (C.O.) proposed to deny certification (AF 34-41). In pertinent part, the C.O. stated that the Employer had failed to document that U.S. applicants had been rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(7). Furthermore, the C.O. found that the job opportunity was not clearly open to qualified U.S. workers, as provided in 20 C.F.R. §656.20(c)(8). The Employer submitted a rebuttal letter on February 16, 1987, together with an Affidavit, in which it stated that there were "no suitable workers ready, willing and able to perform the job" (AF 30-33). On April 20, 1987, the C.O. issued a Second Notice of Findings (AF 23-27) in which he reiterated his prior reasons for denying certification, and requested that the Employer provide an explanation as to confusion involving the interviewing of qualified U.S. applicants, whereby the U.S. workers were interviewed at a different store from where the job opening existed. On June 30, 1987, the Employer submitted its rebuttal to the Second Notice of Findings, citing its attempts to re-contact the three qualified U.S. applicants, and concluding "it appears that none of the applicants are interested in working in the position offered" (AF 18-22). On October 22, 1987, the C.O. issued his Final Determination, in which he denied certification, stating that the rebuttal evidence was insufficient to overcome the deficiencies cited in the two Notices of Findings. The Employer requested review of the denial on November 25, 1987 (AF 1-14). The Employer filed an Appeal Brief, and the C.O. submitted a February 8, 1988 letter, in support of their respective positions.

### Discussion

Section 656.21(b)(7) requires an employer to document that U.S. workers who applied for the job opportunity were rejected solely for lawful, job-related reasons. In his initial Notice of Findings (AF 34-41), the C.O. noted that eight U.S. workers had applied and none were considered for the job. The C.O.'s conclusion is borne out by the Job Service questionnaires and recruitment statement (AF 39-42). Their documents establish that of the eight U.S. applicants, only three were interviewed; namely, Marilyn Smith, Salvator Peter Scavone, and Jacqueline London. Ms. Smith was advised that the music teacher "position was in future, tentatively teaching a few part time students." Mr. Scavone was advised that "the position had already been

filled. I was interviewed for any possible future openings." Finally, Ms. London was told that they had not received enough student registrations to warrant the hiring of a new teacher.

In its initial rebuttal, the Employer stated that Suniland Music Shoppes has four locations: South Miami, Hialeah, Plantation, and Kendale Lakes. The Employer stated that the job opening was in the Kendale Lakes store. Mrs. Beverly Willig, wife of Jim Willig, President of Suniland Music Shoppes, attested that she had written letters to the three U.S. applicants seeking interviews, but that none responded. She surmised that they must have been interviewed at one of the locations other than the Kendale Lakes store (AF 32-33).

In response to the rebuttal information, the C.O. issued his second Notice of Findings, and reiterated the bases for denial for labor certification. Furthermore, the C.O. instructed the Employer to "provide an explanation for the confusion of the qualified applicants failing to be interviewed by the employer who filed the labor certification for the job offer" (AF 23-29).

Our review of the record establishes that the form letter purportedly sent to the three U.S. applicants states: "Dear Music Teacher; we are in receipt of your resume of your teaching qualifications. Please call our main office at 13799 S.W. 88th Street, Miami, Fl. (305) 386-0600 for an interview" (AF 28). The letter lists all four locations of the Suniland Music Shoppes. Interestingly, the Kendale Lakes address is identical with the address of the "'Main Offices" (AF 28).

In addition, the C.O. had requested that the Employer provide copies of the individual letters sent to each applicant, rather than the undated, form letter (AF 27,28). In its rebuttal to the second Notice of Findings the Employer failed to explain why the three U.S applicants, who presumably responded to this letter, were interviewed at the wrong location for non-existent jobs. Furthermore, the Employer failed to provide copies of the individual letters which had purportedly been sent to the U.S. applicants. Instead, the Employer issued new letters to the three U.S. applicants, dated June 24, 1987, asking each whether they were still interested in the music teacher position which had been advertised almost ten months earlier (AF 18-21).

The Employer noted that of the three U.S. applicants, only Mr. Scavone responded, and that after a telephone conversation, he decided the position was located too far from his residence, and would interfere with his night-time job as a musician. Accordingly, the Employer surmised that none of the applicants were interested in the position being offered.

In his Final Determination, the C.O. rejected the rebuttal. In summary, the C.O. stated: (1) the Employer failed to explain why the qualified U.S. applicants were interviewed at the wrong location; and, thus, the Employer fails to establish that the position was truly open to qualified U.S. workers; (2) the Employer failed to provide individual letters as documentation of its efforts at the time of recruitment; and (3) the Employer failed to document that U.S. workers were rejected solely for lawful job-related reasons; and its attempt to contact the U.S. applicants ten months after the recruitment period did not cure the defect (AF 17).

We agree with the C.O. It is well settled that reasonable attempts must be made during the recruitment period to contact an apparently qualified applicant. See §656.21(j)(1); Dove Homes, Inc., 87-INA-680 (May 25, 1988) (en banc). Here, three U.S. applicants applied for the advertised position only to be interviewed at the wrong job location. If the Employer wanted to consider an applicant seriously it would have better coordinated its efforts, and referred the U.S. workers to the correct store initially, or at the least from the South Miami store to the Kendale Lakes (Miami) location.

Furthermore, we find that the Employer's belated effort to contact the three U.S. applicants in June 1987, did not cure the Employer's failure to show that they were properly considered in August 1986, as requested by the C.O., and required under §656.21(j)(1). Even if none of the U.S. applicants were interested in the job as of June 1987, this would not cure the Employer's failure to establish that there were no able, willing, qualified and available U.S. workers during the recruitment period (i.e. approximately ten months earlier). See Dove Homes, supra; Arcadia Enterprises, Inc., 87-INA-692 (February 29, 1988). The Employer's contention, on appeal, that the delay was caused by the Job Service of Florida is without merit. Moreover, the Employer inaccurately stated, in its request for review (AF 1) that "(t)his fact was outlined to them in my letter of November 21, 1986." The Employer's letter of that date contained no such statement (AF 57-58).

In view of the foregoing, we uphold the C.O.'s decision to deny certification.

### ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Board

LAWRENCE BRENNER  
Administrative Law Judge

LB/MP/gaf

Jeffrey Tureck, Administrative Law Judge, joined by Michael Schoenfeld, Administrative Law Judge, concurring:

Although I agree with the outcome of this case, I disagree with the majority's citation of §656.21(j)(1) in support of the proposition that "reasonable attempts must be made during the recruitment period to contact an apparently qualified applicant." (See p. 4 supra). Section 656.21(j)(1) merely requires an employer to file a written report containing the results of its recruitment with the local Job Service office. Subsections (j)(1) (i)-(iv) list the information this report must contain. In regard to contacting applicants, an employer accurately reporting the identity of the job applicants interviewed (if any) and the job title of the person conducting such interview, as set out in subsection (j)(1)(iii), and explaining with specificity its lawful reason(s)

for rejecting each U.S. worker interviewed, as set out in subsection (j)(1)(iv), has complied with this section of the regulations. Nothing in §656.21(j)(1) requires an employer to interview or otherwise contact job applicants, whether apparently qualified or not.