



DATE: March 24, 1989

CASE NO. 88-INA-211

IN THE MATTER OF:
CITBANK SOUTH DAKOTA
Employer

on behalf of,
KIRK DAVID ANDREW
Alien.

Appearance: Laurie S. Grossman
For the Employer

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

MICHAEL H. SCHOENFELD
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 Employer on behalf of the abovenamed 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

Citibank South Dakota ("Employer"), filed an application for labor certification on May 12, 1987, on behalf of David Andrew Kirk ("Alien") for the position of senior manager, software (AF 31-32). Minimum education, training and experience requirements were specified by Employer for the job as were other special requirements.

On November 9, 1987, the Certifying Officer issued a Notice of Findings ("NOF") (AF 30) in which she stated that the Employer had not met several requirements of 20 CFR Part 656. After timely rebuttal argument was submitted by Employer on December 10, 1987 (AF 20-26), a Final Determination was issued on January 22, 1988 which again denied certification based, inter alia, on a violation of §656.21(b)(1). The Certifying Officer stated that Employer failed to document good faith efforts made to recruit U.S. workers prior to its filing the Application.

DISCUSSION

The violation of §656.21(b) cited by the Certifying Officer concerns Employer's failure to document a good faith effort to recruit U.S. workers prior to filing its application. There is no question that Employer did not provide the documentation requested by the C.O. in the NOF.

In its brief before us Employer argues that even though it is not required by the regulations to submit any documentation at all, it made a good faith effort to document its prior recruitment activities. We disagree with Employer on both points.

First, §§656.21(b) and 656.21(b)(1) explicitly require Employer to document its prior recruitment efforts. The regulations state:

(b) Except for labor certification applications involving occupations designated for special handling (see Section 656.21(a) and Schedule A occupations (see Sections 656.10 and 656.22), the employer shall submit, as a part of every labor certification application, on the Application for Alien Employment Certification form or in attachments, as appropriate, the following clear documentation: (emphasis added)

(1) If the employer has attempted to recruit U.S. workers prior to filing the application for certification, the employer shall document the employer's reasonable good faith efforts to recruit U.S. workers without success through the Job Service System and/or through other labor referral and recruitment sources normal to the occupation: . . .

Employer incorrectly quotes §656.21(b)(1) as reading that an employer "may submit" the documentation in question. (emphasis in Employer's brief) Quite simply, the above language of the regulation, in effect at all times relevant to this matter, is obligatory not discretionary.

We note that the rather labyrinthine history of this regulation since 1976 reveals that the word "may" appeared in the regulation for a period of less than twenty days. We are thus at a loss as to how this particular version of the regulation came to be quoted and relied upon by Employer in its brief. Nonetheless, the regulation as applicable to Employer unequivocally requires it to supply the specified materials.

Second, we find that Employer failed to submit the documentation specified by §656.21 (b)(1)(i) which states:

(i) this documentation shall include documentation of the employer's recruitment efforts for the job opportunity which shall:

(A) List the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocation, trade or technical schools; labor unions; and/or development or promotion from within the employer's organization;

(B) Identify each recruitment source by name;

(C) Give the number of U.S. workers responding to the employer's recruitment;

(D) Give the number of interviews conducted with U.S. workers;

(E) Specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and

(F) Specify the wages and working conditions offered to the U.S. workers.

Employer stated in rebuttal that it had used the services of a professional recruiter in attempting to fill the position; that five applicants' were referred by the recruiter; and that after preliminary interviews all U.S. applicants were rejected, either because they were insufficiently qualified or because they were unwilling to relocate to South Dakota. No further details were given.

Employer maintains that "when a reputable employer such as [itself] provides a statement evidencing its recruitment efforts - such as was provided in the instant application - that such statement should be given due weight as coming from a credible source." Neither the Act nor the regulations, however, provide any exemption from any provision thereof for "reputable employers" and, in any event, the record does not establish that Employer here could be so classified.

We give due weight to the statement of facts provided by Employer and find it entirely credible. We believe Employer did no more or no less than what it said it did. What it did, however, fails to meet the criteria set forth in the regulations. In particular, Employer failed to specify the lawful job-related reasons for not hiring each U.S. worker interviewed. It also failed to specify the wages and working conditions offered to those U.S. workers.

Third, and finally, while acknowledging that it has not provided the information required by the regulations, Employer appears to argue that it has met its burden by suggesting both to the Certifying Officer and then to this Board that the information regarding the five rejected U.S. applicants for the position might be found with the professional recruiter. Employer explained in rebuttal that information pertaining to this phase of recruitment for the position was no longer available in its files due to a corporate policy to destroy such information after one year. Employer suggested that if the Certifying Officer needed more information concerning these applicants, she might wish to contact the professional recruiter. It is not the responsibility of either the Certifying Officer or this Board to perform evidence-gathering tasks for an employer to meet its burden of producing the documentation required of it by the regulations. Moreover, Employer's suggestion to the contrary does not constitute a good faith effort on its part to supply the documentation.

In conclusion, we find that Employer has failed to comply with the provisions of §656.21(b)(1). Because all relevant provisions must be complied with, we find it unnecessary to address the remaining violations cited by the Certifying Officer. The successful cure or rebuttal of the other violations would not enable us to grant certification.

ORDER

The determination of the Certifying Officer denying certification is AFFIRMED.

MICHAEL H. SCHOENFELD
Administrative Law Judge

MHS/MKG/mc