



DATE: MAR 14, 1989
CASE NO. 88-INA-261

IN THE MATTER OF

CHARLES SEROUYA & SON, INC.,
Employer

on behalf of

ANDRE ANTOINE,
Alien

Harry Spar, Esq.
New York, NY
For the Employer

BEFORE: Litt, Chief Judge; Brenner, DeGregorio,
Tureck, and Schoenfeld,
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 Bette F. Roy'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

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

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 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 administrative - judicial 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

On April 2, 1986, Employer, an importer of chandeliers, furniture and giftware, filed an application for alien employment certification to enable the alien to be hired for the position of furniture assembler. The qualifications for the position, as set forth in Form ETA 750A, were a minimum of eight years grade school education. No other requirements were stated (AF 12).

In conjunction with the application, Employer submitted a statement indicating that the alien had been employed by Employer in the job described since August, 1983 (AF 5). Employer further stated:

At the time that Mr. Antoine was hired in August, 1983, I was able to train him. However, our business has grown to be extent that I no longer have the time necessary to train a worker for this position should that be necessary. Since I have no other employee who is qualified to train a new furniture assembler, Mr. Antoine's services are essential to the continued operation of my business.

(Id.). In addition, Employer requested a waiver of the job order and further advertising requirements (AF 6).

On August 1, 1986, Employer was advertised by the New Jersey Division of Employment Services ("Employment Services") that the job opportunity did not meet the prevailing wage, and thus in order to satisfy Federal requirements for alien labor certification the wage offer should be increased to meet the prevailing wage. In addition, a withdrawal of the waiver request should be submitted and a second recruitment conducted (AF 11).

In accordance with the Employment Services' notification, the wage offer was amended and a second recruitment conducted (AF 12-17). Responses from five applicants were received. Employer indicated that three applicants failed to keep appointments for interviews, and two others were rejected "because they did not have the aptitudes nor could they do the work required for the job" (AF 25; see also AF 43). Employer was requested by Employment Services to further explain its reasons for determining that the two U.S. workers did not qualify as

[t]he employer was not requiring any experience for the job (Refer to 750A Item #14) and it appears that aliens did not have experience and aptitude for the job prior to being hired by the employer (Refer to 750B Item #15).

(AF 27). Employer responded that while at the time the alien was hired Employer was in a position to train him; but owing to the increased volume of business Employer was no longer in a position to do so. Employer further stated:

As this alien is the only employee now performing the job, and, as there is no one else qualified to train another, the further operation of the furniture part of his business is dependent upon the continuous employment of Andre Antoine (AF 28).

Following the Employment Services' transmittal of the file to DOL, a Notice of Findings ("NOF") was issued on January 14, 1988. The Certifying Officer noted that according to Form ETA 750A there was no experience required for the job, and thus Employer's rejection of applicants for lack of "aptitude", "ability" or "skills" is not considered a lawful, job related reason for rejection. Employer was informed that if specific ability, aptitude or skills are required in order to perform the job, Employer must "quantify his requirements in terms of the number of years or months experience required and amend Item 14 [of Form ETA 750A] accordingly"; fully document why it is not feasible to train a U.S. worker for the position; and state a willingness to readvertise if required (AF 36-37).

In rebuttal, Employer stated it rejected the two applicants because it found that they "did not have the aptitude or skills which would have enabled them to be trained". Employer added that experience is not required but that a capability to perform the job is. Employer stated that it cannot quantify this requirement because aptitude and ability cannot be quantified by years or months. Employer also reiterated its explanation as to why Employer was in a position to train the alien at the time of hiring in 1983 but can no longer do so, *i.e.*, increased business volume and no other furniture assembler employed to train an inexperienced employee, and its assertion that the alien is thus "essential" to the operation of the business (AF 38-39).

A Final Determination denying certification was issued on March 1, 1988 (AF 41-42). The denial was based upon the Certifying Officer's determination that

sole requirements of aptitude and/or ability are unacceptable because they do not provide a measurable standard by which the labor market can be properly tested and such requirements preclude us from determining when and where the alien acquire[d] the aptitude and ability required.

(AF 41). Certification was denied in accordance with Section 656.21(b)(7) "[s]ince employer failed to adequately document lawful, job related reasons for rejection of the two applicants referred"^{2/}

A Motion for Reconsideration was filed on behalf of Employer on March 30, 1988 (AF 43-44). In an accompanying affidavit Employer certified that:

1. Three potential applicants called to make appointments for interviews. Appointments were made for all three. Two of the individuals cancelled the appointment and the other one never showed up.
2. The other two applicants, who showed up for the interview, were shown the work area and had the duties and responsibilities for the assembly of delicate European furniture explained to them. I offered to train them but they indicated no desire to be trained, and after they left they never called back about the position.

(AF 43).

The record contains a "Memo to File" dated March 31, 1988, in which an employee of the U.S. Department of Labor, Immigration Unit, documented a phone conversation with Employer's attorney advising him that the information contained in the affidavit submitted on motion for reconsideration was not furnished in rebuttal and thus "if he wished, he should proceed with appeal to Board" (AF 45).

In the case of Harry Tancredi, 88-INA-441 (December 1, 1988) (en banc), the Board held that Certifying Officers have the authority to reconsider Final Determination prior to their becoming final. As stated in the regulations, the Certifying Officer's determination is not final until 35 days after its issuance.^{3/}

In this case the Final Determination was issued on March 1, 1988. In a letter dated March 30, 1988, within the prescribed 35 day time period and thus prior to its becoming final, Employer filed a motion for reconsideration (AF 53). In response to that motion, the file contains a memo by a member of the Certifying Officer's staff dated March 31, 1988 (AF 45)

^{2/} Section 656.21(b)(6), requiring employer to document its job requirements are the minimum necessary and that it has not hired nor is it feasible for employer to hire workers with less training and/or experience, was cited in the NOF as well. However, the Certifying Officer determined that, since Employer's rebuttal attempts to document lawful, job related reasons for rejection of the two applicants referred, a response to this second basis for denial "was not required".

^{3/} The regulations specifically provide that a request for review of a denial may be made in writing to the Chief Administrative Law Judge, Department of Labor, within 35 days of the date of denial, but that if a request for review is not made within the specified time, the denial shall become the final determination of the Secretary. §§656.25(g)(iv); 656.26(b).

referencing Employer's counsel's letter and Employer's accompanying affidavit, and indicating that she "advised him that this info was not furnished in rebuttal of January 20, 1988, and that if he wished, he should proceed with appeal to Board".

As the motion for reconsideration was filed prior to the Certifying Officer's determination becoming final, the Certifying Officer had the authority to review his determination. See Tancredi, supra. Moreover, the Board indicated in Tancredi that the Certifying Officer must issue a ruling stating whether the motion is granted or denied. A review of the file indicates that the motion was neither formally granted nor denied. A hand written memo to the file documenting a telephone call by a member of the Certifying Officer's staff is insufficient.

Accordingly, in order to afford the Certifying Officer the opportunity to review and decide the motion for reconsideration, we vacate her denial of certification and remand this case for further consideration. The Board expresses no opinion on the merits of Employer's motion.

ORDER

The Certifying Officer's denial of certification is vacated, and the case is remanded for further consideration.

JEFFREY TURECK
Administrative Law Judge

JT:jb