



DATE ISSUED: April 21, 1989

CASE NO. 88-INA-314

IN THE MATTER OF THE APPLICATION  
FOR AN ALIEN EMPLOYMENT CERTIFICA-  
TION UNDER THE IMMIGRATION AND NA-  
TIONALITY ACT

QUALITY CONCRETE COMPANY  
Employer

on behalf of

HILARIO ASCENCIO MORALES  
Alien

Inez Garcia  
For the Employer

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 Act). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested administrative- judicial 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 labor certification unless the 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

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

time of application for a visa and admission into the United States and at the place where the alien is to perform such work, and that 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 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 an Appeal File (A1-A40), and any written arguments of the parties. §656.27(c).

#### Statement of the Case

On December 18, 1986, the Employer filed an application for alien employment certification to enable the Alien to fill the position of cement finisher. The duties were specified as follows:

Texturizes, smoothes and does all forms of cement finishing and also restoration. Uses various hand and power tools. Also molds expansion joints and edges, and uses pneumatic tools, grinders, screeds, straightedges and floats also uses various decorative substances such as powered steel and colored stone chips according to desired texture of surface. Must have knowledge of cement finishing methods, restoration process and mixing of cement and form setting. (A20).

The employer required three and one half years of experience in the job offered. (A20). There were no educational or training requirements. (A20).

The Employer advertised the job on February 3, 4 and 5, 1987. A response dated February 3, 1987, was received from a U.S. applicant, David Johnson. Mr. Johnson's letter of application stated that he has finished an apprentice course in cement finishing for the City of Los Angeles Public Works Department and worked six years for the Public Works Department, Division of Street Maintenance. According to Mr. Johnson, he worked six years as a cement finisher and mixer attendant and worked two years as an asphalt raker. He indicated that he had experience with the "fresco" and with all tools. (A31).

The Employer stated that in verifying Mr. Johnson's references, the Los Angeles Public Works Department stated that Mr. Johnson had been employed as a general laborer, not as a cement finisher. Further, according to the Employer, Mr. Johnson indicated that he had vocational training as an apprentice cement finisher but has not been employed in that capacity. The Employer concluded that Mr. Johnson does not have experience in the field, and therefore, does not qualify for this position. (A25).

On October 30, 1987, the CO issued a Notice of Findings. (A16). The CO found that pursuant to §656.24(b)(2)(ii), a U.S. worker is considered able and qualified for the job if by education, training, experience or a combination thereof he is able to perform in a normally accepted manner, the job duties as customarily performed, and that pursuant to §656.21(j)(i) the Employer must specify lawful, job-related reasons for not hiring each U.S. worker who applies. According to the CO, the Employer had not conclusively demonstrated that the U.S. applicant, David Johnson, cannot, through a combination of experience and special knowledge, perform the basic job duties. The CO required the Employer to document that the applicant was not qualified, willing or available at the time of initial consideration. The CO added that "[t]his is not to be considered a request for the employer to attempt to re-contact or re-interview the above-applicant." (A18).

In its rebuttal of December 2, 1987, the Employer contended that Mr. Johnson was not interested in the position since he did not reply to either a postcard dated October 30, 1987, or a registered letter dated November 16, 1987. Further, Employer believed that Mr. Johnson does not qualify for this position because of a lack of experience. (A9-A15).

The CO issued a Final Determination on December 24, 1987, denying certification. (A6-A8). The CO found the Employer had failed to satisfactorily rebut the findings that the U.S. worker was able to perform the job duties, under §656.24(b)(2)(ii), and that U.S. workers were rejected for other than lawful, job-related reasons, under §656.21(j)(1). According to the CO, the U.S. applicant had experience and background which would have made him suitable to perform the job duties. The CO found that the Employer had not shown why the applicant was not initially qualified nor had it shown why the applicant cannot perform the basic job duties. The CO also found that the attempt of the Employer to contact the U.S. applicant in October and November, 1987 is not a factor, since the Employer was instructed to show why the U.S. worker was not initially qualified. Based on the above, the CO denied labor certification.

On appeal, the Employer recited the attempts that it made to contact the U.S. worker between October 30, 1987, and November 16, 1987, and that he had verified with the post office the receipt by applicant of the registered letter of November 16, 1987. The Employer also reiterated that it had investigated the applicant's references and found that applicant had not at any time been employed as a "Cement Mason", the position offered. Employer believes that it made a good faith effort to give applicant an opportunity for a personal interview. (A1-A2).

### Discussion and Conclusions

The CO denied certification on the ground that the Employer failed to specify lawful job related reasons for not hiring the U.S. worker under §656.21(j)(1).<sup>2</sup> This Board has 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 be lawfully rejected. Concurrent Computer Corp., 88 INA 76 (Aug. 19, 1988); Adry-Mart, Inc., 88 INA 243 (Feb. 1, 1989).

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<sup>2</sup>The substantive regulatory section which controls is §656.21(b)(7).

According to the Employer, the U.S. applicant, Mr. Johnson, is not qualified for the position due to his lack of experience in the job offered. The Employer stated after recruitment that Mr. Johnson admitted that he did not have field experience as a cement finisher. The Employer's reference verification indicates that Mr. Johnson worked as a general laborer, rather than a cement finisher.

Since the U.S. applicant did not meet the stated minimum requirements for the position, the Employer lawfully rejected the U.S. applicant as unqualified. Therefore, the CO improperly denied certification.

ORDER

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

NAHUM LITT  
Chief Administrative Law Judge

NL:WB