



DATE ISSUED: May 11, 1989

CASE NO. 88-INA-323

IN THE MATTER OF THE APPLICATION
FOR AN ALIEN EMPLOYMENT CERTIFI-
CATION UNDER THE IMMIGRATION AND
NATIONALITY ACT

PEKING GOURMET
Employer

on behalf of

YU-YEN TANG LI
Alien

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For the Employer

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

NAHUM LITT
Chief Judge

DECISION AND ORDER

This case 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).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 labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney

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

General that there are not sufficient workers 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 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-A53), and any written arguments of the parties. §656.27(c).

Statement of the Case

On November 10, 1986, the Employer filed an application for alien employment certification to enable the Alien to fill the position of Chinese speciality cook. (A12). The duties as advertised were to prepare, season and cook a variety of entrees, dishes, soups, noodles, and appetizers per menu and customers' orders; to be familiar with use of all utensils associated with Chinese cooking. The Employer required a sixth grade education and two years of experience in the job offered. (A12).

In accordance with instructions by the State Employment Development Department, the position was advertised in Nation's Restaurant News on January 12, 1987. (A28). The Employer received one referral who was considered unqualified and who did not respond to an opportunity for an interview. (A18, A20).

On October 30, 1987, the Certifying Officer issued a Notice of Findings. (A9-A11). The CO stated that Nation's Restaurant News, the publication used for the required advertisement, is not a publication appropriate to the occupation. According to the CO, the ads therein are for managers, and a newspaper of general circulation is most likely to generate responses. The Employer was required to advertise in the next issue of the Orange County Register or the L.A. Times (Orange County Edition). The CO pointed out that approval of the advertising by a State agency is not determinative, and that it is the CO who determines whether the requirements of the regulations have been met.

In its rebuttal of November 10, 1987, the Employer explained that it was instructed by an Alien Certification Specialist from the California Employment Development Department to publish the job in the periodical used. It did so at a cost of \$420, and the ad received nationwide exposure. It points out that the ads in this publication are for other than restaurant managers and that employers should be able to rely on the advice of the employ of the Employment Development Department. It believes that the ad is in substantial compliance with the requests to

publish the position, and that to require that the ad be readvertised in another publication places an undue burden on the employer. (A5-A8).

The CO issued a Final Determination on December 24, 1987, denying certification. (A3). The CO found that there was an insufficient response by the Employer to the Notice of Findings, and that the Employer has not provided convincing evidence that the publication used is the most likely to generate response from qualified U.S. workers. (A3-A4).

In its appeal request dated December 30, 1987, the Employer contended that the advertisement fairly tested the labor market and met the requirement of §656.21(g). (A1-A2).

In its Brief on Appeal, the Employer argued that, in accordance with §656.21(g), it requested the assistance of the local office regarding the proper publication, and that since the local office is in the best position to analyze which publications are most likely to result in responses from qualified U.S. workers, it reasonably relied on the expertise of the local office. Further, it argued that the publication chosen was appropriate, and in fact did result in a referral. Finally, it contended that to readvertise this position in a publication which it believes would reach a smaller audience of interested persons would be unfair to both the Employer and U.S. workers. It requested that the decision of the CO be reversed, or be remanded for further consideration.

Discussion and Conclusion

Section 656.21(g) requires the employer, in conjunction with the recruitment efforts before the local job office, to place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication, whichever is appropriate to the occupational and most likely to bring responses from able, willing, qualified, and available U.S. workers. This section puts the burden on the employer to advertise in the publication which is most likely to bring responses from U.S. workers.

Here, the Employer was advised by the local job service to publish the required ad in Nation's Restaurant News, which is circulated throughout the United States. In the Notice of Findings, the CO found that this publication was not appropriate and suggested either of two local newspapers because they would be most likely to generate responses. In rebuttal, the Employer stated that it had acted in good faith and refused to readvertise.

Contrary to the Employer's argument on appeal, "the Certifying Officer is authorized to require further recruitment if he or she finds that such recruitment could produce additional qualified job applicants." In re Intel Corp., 87 INA 570 (Dec. 11, 1987). However, "the Certifying Officer should not require additional advertising or recruiting without offering a reasonable explanation of why the employer's advertisements and/or recruitment were inadequate and how the additional recruitment recommended by the Certifying Officer would be appropriate." *Id.*

In the Notice of Findings, the CO stated that Nation's Restaurant News was inadequate because the ads are for managers. The CO also stated that a newspaper of general circulation is most likely to generate responses. In rebuttal, the Employer listed some advertisements in Nation's Restaurant News which were not for managers and stated that the publication was in substantial compliance with the regulations. In the Final Determination, the CO stated that the Employer has not submitted convincing evidence that the publication used was most likely to bring responses from U.S. workers.

We agree. The Employer has the burden to establish that the CO's determination of inadequate advertisement was in error and that the Employer's advertisement in Nation's Restaurant News was most likely to bring responses from able, willing, qualified, and available U.S. workers. The Employer's statement, in rebuttal, that four advertisements were for chef positions is insufficient to establish that the CO's determination was in error. The Employer does not indicate the number of advertisements in the publication and whether a majority or a significant amount of advertisements are for positions other than manager. The Employer failed to establish that the CO's determination was in error, and that advertising in the Nation's Restaurant News was most likely to bring responses from able, willing, qualified, and available U.S. workers, under §656.21(g). Accordingly, the CO properly denied certification.

ORDER

The Final Determination of the Certifying Officer denying certification is hereby AFFIRMED.

NAHUM LITT
Chief Administrative Law Judge

NL:WB

Jeffrey Tureck

Administrative Law Judge, dissenting:

I dissent from the majority's affirmance of the CO's determination.

The CO, in the NOF, stated that Nation's Restaurant News was an inappropriate publication for Employer to advertise a cook's position, since "all of the ads are for managers." (A 10) In rebuttal, Employer cited four other advertisements for chef's jobs on the same page of Nation's Restaurant News as its advertisement for its chef position (A 7; see also A 29). The CO completely ignored this rebuttal in his five-line Final Determination. Since Employer's rebuttal provided evidence contradicting the only reason given by the CO for finding Nation's Restaurant News to be an inappropriate publication to advertise the job, the denial of certification cannot be affirmed. I would remand the case to the CO to fully consider Employer's rebuttal.