



DATE: DEC 21 1989

Case No. 88-INA-350

IN THE MATTER OF

KENNEDY RESEARCH, INC.
Employer

on behalf of

MUN YEE YIM,
Alien

William H. Dance, Esquire
For the Employer

Before: Litt, Vittone, Brenner,
Guill, Marden, Murrett,
Romano, Tureck and Williams,
Administrative Law Judges

RALPH A. ROMANO
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 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 a 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 and 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

The Employer, Kennedy Research, Inc., filed the application for labor certification on March 5, 1987, for the position of Project Director on behalf of the Alien, Mun Yee Yim (AF 27). The Employer's requirement for the position, as stated in the application form 750A, is a Masters of Business Administration as well as one course in quantitative analysis of marketing decisions and one course in statistical computer programming. No experience was required.

In his January 19, 1988 Notice of Findings, the Certifying Officer (C.O.) denied labor certification (AF 20-24). The C.O. found, inter alia, that the Employer unlawfully rejected a qualified U.S. applicant, Thomas Powers, IV. The C.O. required the Employer to document its reasons why Powers was rejected. The Employer, in its March 24, 1988 rebuttal, failed to address the reason for rejection relied upon by the C.O., but instead stated a new, independent reason for rejection (AF 17-19). The C.O., in his Final Determination of April 25, 1988, denied labor certification (AF 14-16). The Employer submitted an undated brief (received September 9, 1988), in support of its May 26, 1988 request for review (AF 1-4). The C.O. did not file a brief.

Discussion

Section 656.21(b)(7) states that "[i]f U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful job-related reasons." The principal issue presented here is whether Powers was rejected for a lawful job-related reason.

The Employer conducted recruitment for the position offered for labor certification during July 1987 (AF 34). In a letter sent to the Michigan Employment Security Commission dated September 24, 1987, the Employer stated that it did not hire Powers because he had "no statistical experience for marketing research applications" (AF 34).

The C.O., in his Notice of Findings, found the Employer's reason for rejection, lack of experience in marketing research applications, unlawful (AF 23). The C.O. noted that the Employer's requirements for the position, as stated in the 750A, did not include any experience. According to the C.O., Power's qualifications matched the qualifications required for the position.

The Employer, on February 18, 1988, submitted a letter stating that it acknowledged its error in rejecting Powers for the reason originally given (AF 18). The Employer stated that subsequent to the Notice of Findings it had held two interviews with Powers. Powers, according to the Employer, stated interest in the position and said that he would forward a copy of his academic transcript, upon receipt of which the Employer would make a decision. Because no response had been forthcoming the Employer requested and received an extension to March 25 to rebut the Notice of Findings.

Richard Kennedy, writing on behalf of the Employer, submitted a subsequent letter, dated March 24, 1988, in which the Employer again rejected Powers (AF 17). In the letter Kennedy stated that when he spoke with Powers on February 10, Powers expressed interest in the position and said he would contact his two universities and supply the requested transcripts. Kennedy also stated that he called Powers on March 21 to determine why no transcripts had been sent, and that he left a message with Powers' mother to return Kennedy's call. Finally, Kennedy stated that, as the call was not returned, nor any transcripts received, Powers was rejected.

The C.O., in his Final Determination, denied labor certification (AF 14-16). The C.O. stated that the Employer failed to offer documentation as to why Powers was initially rejected, and instead, some seven months after the recruitment period, interviewed and offered to reconsider Powers after receipt of his transcripts. The C.O. categorized the Employer's initial reason for rejection as "vague and generalized." The C.O. also stated that the Employer's 750A did not include a transcript as a requirement for employment, that Powers stated he had contacted his universities concerning the transcript and that the Employer failed to make any effort to contact the universities as to why the transcript had not been received.

This Board has consistently held that an Employer's later attempts to recontact U.S. applicants, and its determination that they are unavailable or uninterested, cannot serve to cure an otherwise improper initial rejection. See e.g. Dove Homes, Inc., 87-INA-680 (May 25, 1988); Solarch, Inc., 88-INA-338 (June 27, 1989); Annette Gibson, 88-INA-396 (June 20, 1989); Listrani's Restaurant, 88-INA-360 (June 8, 1989); International Panstate Corp., 88-INA-231 (June 8, 1989); Arcadia Enterprises, Inc., 87-INA-692 (February 29, 1988). In Dove Homes the Board held that the failure of a U.S. applicant to respond to the Employer's recontact attempts, some six months after the recruitment period, did not cure the defect of improper initial rejection. "Otherwise," according to the Panel, "an Employer could succeed in its application for alien labor certification by the artifice of improperly rejecting a qualified U.S. worker, and then waiting for several months, until after the Notice of Findings, to 'cure' the defect by ascertaining that the U.S. worker is no longer available." Dove Homes, 87-INA-680 (May 25, 1988), quoting, Arcadia Enterprises, 87-INA-692 (February 29, 1988).

The instant case, however, is distinguishable from Dove Homes and its progeny. In Dove Homes the Employer was unable to demonstrate any interest in the position by the U.S. applicant upon recontact. Indeed, the decision rests upon the finding that the Employer's initial unlawful rejection of the U.S. applicant, combined with the lengthy period before recontact, resulted in the applicant's lack of interest in the position. In the case at bar no such finding can be made. Rather, as the Employer asserts, in an uncontroverted affidavit, Powers was interested in the position

upon recontact, met with the Employer on two occasions, and agreed to submit his college transcripts (AF 17-18).

The Employer then asserts in an uncontroverted statement that Powers failed to submit the transcripts as promised (AF 17). We credit the Employer's statement and find that the Employer's rejection of Powers for failing to provide his transcript was a lawful rejection.¹ Thus, Powers was initially rejected for an unlawful reason, subsequently recontacted by the Employer, during which Powers demonstrated renewed interest in the position, and ultimately rejected for a lawful reason.

We hold that where, as here, the Employer initially rejects a U.S. worker for an unlawful reason, upon the subsequent revival of interest in the position, and the Employer's later rejection on lawful grounds, the Employer must establish, in addition to the lawfulness of its second rejection, that the initial unlawful rejection as well as the delay generated by the initial rejection, did not contribute to the basis underlying such lawful rejection.² In other words, the Employer must establish that neither the initial unlawful rejection, nor the delay in recontact, contributed in any way to the subsequent lawful rejection.

In the instant case, the Employer was not given the opportunity to demonstrate, before the C.O., the effect, if any, of the initial unlawful rejection and delay in recontact, upon its second lawful rejection. Thus, we remand in order to allow the C.O. to issue a NOF consistent with this ruling.

¹ We find no merit in the C.O.'s contention that Employer's requesting academic transcripts was an unlawful requirement (AF 14-16). Considering that the ETA 750A requires coursework in quantitative analysis, the Employer was entitled to verify such coursework through an academic transcript. Likewise, we find no merit in the C.O.'s assertion that the Employer was required, inexplicably, to request Powers' transcripts directly from the applicant's universities.

² This standard is consistent with analogous rulings in "mixed motive" cases, where an employer terminates, or otherwise adversely affects, an employee for both lawful and unlawful reasons. See e.g. NLRB v. Transportation Management Corp., 462 U.S. 393, 400 (1983) ("proof that the discharge would have occurred in any event and for valid reasons amounted to an affirmative defense on which the Employer carried the burden of proof by a preponderance of the evidence"); East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403 n.9 (1977) ("[e]ven assuming, arguendo, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents [plaintiffs] had not been injured because they were not qualified and would not have been hired in any event").

ORDER

The denial of certification by the Certifying Officer is VACATED and the case is REMANDED to the Certifying Officer in accordance herewith.

For the Board:

RALPH A. ROMANO
Administrative Law Judge

KENNEDY RESEARCH, INC., 88-INA-350
Judge LAWRENCE BRENNER, joined by Judge Marden, dissenting:

I would deny certification in this case and hold that an employer which rejects an applicant for an improper reason may not later substitute an independent reason to reject the applicant.

The Board previously has held that the C.O. is not required to investigate the legitimacy of an independent reason offered by an employer for the first time in its rebuttal, once the employer has rejected an apparently qualified U.S. applicant for an unlawful reason. Foothill International, Inc., 87-INA-637 (January 20, 1988). In Foothill International, the employer originally rejected a U.S. applicant because the applicant allegedly had no experience in the position offered. The C.O., in the Notice of Findings, determined that the U.S. applicant did have such experience and gave Foothill an opportunity to rebut. In rebuttal, the employer did not refer to the initial reason for rejection, but instead stated that the U.S. applicant was unqualified for another, previously unstated, reason. The Board found Foothill in violation of section 656.21(b)(7).

Foothill International is applicable to the instant case. The Employer, by initially rejecting Powers for lack of statistical experience, where no such experience requirement was stated in the 750A or the advertisement, rejected Powers for an unlawful reason. The Employer, in its rebuttal, failed to address its rejection of Powers for lack of experience other than to say that it was unaware that the "precise language on the ETA 750A controlled our action" and to agree with the C.O. that it, therefore, was in error in rejecting Powers for lack of experience (AF 18). Instead, the Employer put forth a new and independent reason for the rejection of Powers, lack of a transcript. The Employer violated section 656.21(b)(7) by unlawfully rejecting a qualified U.S. applicant, and failed to rebut the finding that the applicant was not rejected initially for a lawful job-related reason.

Allowing employers to substitute new, independent reasons for the rejection of an applicant, subsequent to a finding that the initial reason was unlawful and not job-related, would be unsound on policy grounds. It would encourage employers to improperly reject U.S.

applicants in the belief that even if the initial reasons for rejection are determined unlawful and not job-related, new, independent reasons could be substituted. Such employer engendered delay would discourage U.S. applicants from remaining interested enough in the job to respond to new requests for information or interviews (cf. Arcadia Enterprises and Dove Homes, cited by the majority), and would prevent the C.O. from addressing all of an employer's arguments in the first Notice of Findings. All lawful job-related reasons for rejection should clearly be stated initially by an employer.

I note further that as a result of the delay caused by the Employer's actions in this case, it was reasonable for the C.O. to infer that Powers, some seven months after the initial recruitment, was no longer interested enough to follow-up the recontact with further submissions (of transcripts) to the Employer which previously had unlawfully rejected him. Such circumstances are more probative than the Employer's insistence that Powers actually was still interested in the job (and therefore presumably did not supply the transcripts because they would show he lacked required courses).

LAWRENCE BRENNER
Administrative Law Judge