



DATE ISSUED: May 4, 1989

CASE NO. 88-INA-398

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

EUCLID CHEMICAL, CO.
Employer

on behalf of

WILLIAM VAN SISSEREN
Alien

Jeffrey J. Rummel, Esq.
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 matter arises 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) (1982). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested 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 a visa 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 time of the application for a visa and admission into the United States and at the place where the

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

alien is to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of the 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 the Appeal File (A1-A134), and any written arguments of the parties.² See §656.27(c).

Statement of the Case

On May 18, 1987, the Employer filed an application for alien employment certification to enable the Alien to fill the position of director of technical marketing services. The duties of the job included responsibility for the promotion and marketing of company's chemical materials to architects and engineers for 13 Western states, specifically, the presentation of marketing and technical seminars to architects and engineers concerning the technical application of company's chemical materials for use in structural concrete. The Employer required a high school education and five to ten years experience in the job offered or five to ten years experience marketing chemical/concrete products. The Employer also required in-depth knowledge of concrete admixtures and ability to present technical seminars on chemical products for structural concrete. (A46-A69).

In his Notice of Findings of December 24, 1987, the CO stated that a U.S. worker was rejected for other than lawful, job-related reasons under §656.21(j)(1). (A43-A44). According to the CO, the Employer had not demonstrated conclusively that U.S. applicant, Marlin L. Stinson, could not perform the basic job duties in a satisfactory manner through a combination of experience and special knowledge (A44). The CO found that Employer rejected Mr. Stinson because he lacked the in-depth knowledge of concrete products and admixtures and overall familiarity with typical aspects of concrete required by employer. The CO stated that Mr. Stinson's experience appears to be close enough to that required by Employer that he should be considered for the job, and that the Employer's evidence of Mr. Stinson's inability to perform the job duties is unconvincing. The CO also stated that the Employer's reasons for rejection of Mr. Stinson appear to be possibly restrictive, especially "overall familiarity with typical aspects of concrete required by the Employer." (A44). The Employer was required to submit documentation that the U.S. applicant was not qualified, willing or available at the time of initial consideration and referral. (A44).

² The documents submitted with the Employer's Request for Review, (A6-A36), were not in the record upon which the denial of certification was based; therefore, they cannot be considered on appeal. §656.26(b)(4); §656.27(c); In Re University of Texas at San Antonio, 88 INA 71 (May 9, 1988); In Re Physicians Inc., 87 INA 716 (Jul. 12, 1988).

In its rebuttal of January 18, 1988, the Employer stated that Mr. Stinson was interviewed and was considered unqualified for the position. (A40-A42). The Employer, however, concluded that based on the interview, Mr. Stinson did not have the expertise and depth of knowledge of concrete admixtures and other specialty products necessary to perform the job duties of this position. Employer stated that it does not offer its four directors of marketing and technical services any training programs in these areas and all of them have gained the necessary knowledge and experience through employment with other companies prior to becoming employed by Euclid. Employer concluded that Mr. Stinson does not have the breadth of knowledge necessary for him to be relied on as an expert by building professionals or the wide experience necessary to present seminars as Employer requires. (A40-42).

On March 18, 1988, the CO issued a Final Determination denying certification. (A37-39). The CO found that 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 a U.S. worker was rejected for other than lawful, job-related reasons, under §656.21(j)(1). According to the CO, the Employer did not establish how its other marketing directors were able, immediately after they were hired, to conduct seminars on the Employer's products and have complete and total knowledge and be considered experts in the Employer's products without any training. The statement by Employer that its other marketing directors gained exact and specific knowledge of Employers products while employed by other, possibly competing, firms was found not to be convincing. The CO concluded that Mr. Stinson was qualified, and that certification cannot be granted when a qualified U.S. worker is available.

On April 13, 1988, the Employer requested reconsideration. (A1-A36). The Employer submitted documentation that its present regional directors had the knowledge and experience to perform the job at the time they were hired, and that the applicant does not. The Employer concluded that the U.S. applicant was not qualified for the position and that certification should be granted. The CO did not respond and apparently treated the Employer's request for reconsideration as an appeal to this Board.

Discussion and Conclusion

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).³ Where an employer's job requirements are not found to be unduly restrictive, a U.S. applicant who does not meet all of the stated job requirements is not qualified for the position, and may be lawfully rejected. In Re Adry-Mart, Inc., 88 INA 243 (Feb. 1, 1989).

In the instant case, the Employer determined after the interview that the U.S. applicant did not have technical knowledge of concrete admixtures and other speciality products. Since the applicant does not meet the employer's unchallenged, minimum requirements for the position, and is not capable of performing the job, the Employer rejected the U.S. applicant for lawful, job-related reasons. Accordingly, the CO improperly denied certification.

³ The substantive regulatory section which controls is §656.21(b)(7).

ORDER

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

NAHUM LITT
Chief Administrative Law Judge

NL:WB