



DATE ISSUED: May 4, 1989

CASE NO: 88-INA-402

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

KOMFORT INDUSTRIES, INC.  
Employer

on behalf of

RICARDO FERNANDEZ-GODARD  
Alien

Donley Brady, 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).<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 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

---

<sup>1</sup> 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-A82), and any written arguments of the parties. See §656.27(c).

#### Statement of the Case

On September 3, 1986, the Employer filed an application for alien employment certification to enable the Alien to fill the position of assistant general manager. (A23-A82). The duties included: coordinate all operational activities; review all administrative and personnel matters; act as safety committee chairman and be responsible for plant maintenance; and have full knowledge of all recreational vehicle components and raw material, plant acquisition and set-up, inventory control and materials flow, production line set-up and scheduling, marketing and territory knowledge, sales and promotion, and accounting, analysis and interpretation of financial statements. (A26). The Employer required a BS or equivalent in business or accounting, and two years of experience in the job offered or two years of experience in any management position in the manufacture of recreation vehicles. (A23). The salary offered was \$40,000.00 per year. (A25).

The Employer's recruitment efforts resulted in eight U.S. applicants. (A33). The Employer stated that six of the applicants were unqualified based on their resumes. According to the Employer, U.S. applicant, Lawrence Vermilyga, was interviewed and stated that the Employer's salary offer was insufficient for his needs. (A34). The Employer stated that the other U.S. applicant, Robert Laws, was qualified, even over-qualified. (A34). Mr. Laws was invited by telephone for an interview, and after a series of questions about the job and salary, Mr. Laws stated that his salary expectations substantially exceeded the Employer's salary offer. Mr. Laws declined to come for an interview and stated that he had no real interest in the job. (A34).

On September 18, 1987, the CO issued a Notice of Findings. (A17-A18). The CO stated that a U.S. worker was rejected for other than lawful, job-related reasons under §656.21(j)(1), and that the Employer had not conclusively demonstrated that Mr. Laws could not perform the basic job duties in a satisfactory manner through a combination of educational training/experience under §656.24(b)(2)(ii). According to the CO, over-qualification is not a reason for rejection of a U.S. worker, and the Employer has not presented evidence that Mr. Laws was not interested in the job. (A18).

In its rebuttal of September 23, 1987, the Employer stated that Mr. Laws had been called on the telephone and invited for an interview, and that Mr. Laws had asked a series of questions about the job and the salary. He then declined to come for an interview, and indicated that he had no real interest in the job. (A4-A4A). The Employer submitted a copy of Mr. Law's referral letter indicating that his last compensation package was in the \$50,000.00 range plus a company car. (A13). The Employer submitted interview notes indicating that Mr. Laws had "no interest when called for an interview." (A8-A11). The Employer also submitted a copy of a letter to Mr. Laws dated February 2, 1987, stating as follows: "Thank you for submitting your resume for the Assistant General Manager position at Komfort Industries. As we discussed on the telephone you are no longer interested and do not want to have an interview. Again, thank you for your interest." (A12).

On October 30, 1987, the CO issued a Final Determination denying certification. (A2-A3). The CO found that the Employer had failed to satisfactorily rebut the findings in the Notice of Findings. According to the CO, the only information on file with respect to Mr. Laws' rejection of the job is self-certifying information generated by the Employer. Also he found that the fact that applicant had a previous wage higher than here offered is not a sound basis for rejection of applicant. The CO then found that the Employer had not furnished convincing evidence that Mr. Laws was not interested in the job and that the employer had not shown a lawful job-related reason for the rejection of a U.S. worker. Citing §656.21(j)(1), the CO denied certification. (A3).

Employer filed an appeal dated June 24, 1988. (A1). On brief Employer argues (1) that the action of the Certifying Officer in denying certification was arbitrary, capricious and an abuse of discretion, (2) that the Employer demonstrated a good faith effort to hire a U.S. worker, (3) that convincing evidence was submitted that Mr. Laws was not interested in the job, and (4) that Mr. Laws was not rejected unlawfully, rather that he declined the position. The Employer argues that based on the above, labor certification should be granted.

### Discussion and Conclusion

The CO denied certification on the ground that the Employer failed to specify lawful, job-related reasons for not hiring U.S. workers under §656.21(j)(1). According to the Employer, Mr. Laws, during a telephone conversation with the Employer, declined to come in for an interview and indicated a lack of interest in the job. To substantiate its position, the Employer provided a photocopy of the notes of the telephone call and a copy of a letter to Mr. Laws confirming that Mr. Laws was not interested in the job. While the record contains questionnaire responses from other U.S. applicants, there is no indication that Mr. Laws submitted a questionnaire or that Mr. Laws account of the interview would have differed with that of the Employer. The Employer has sufficiently documented that the U.S. applicant was uninterested in the position.

Since the Employer has demonstrated lawful, job-related reasons for rejected each U.S. applicant, 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