U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE ISSUED: June 28, 1989
CASE NO: 88 INA 403

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

WARMTEX ENTERPRISES
Employer

on behalf of

HUANG RONG YEH
Alien

Steven Frank Swanson, Esq.
Daniel Chan, Esq.
For the Employer

BEFORE: Litt, Chief Judge; Brenner, 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

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

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 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 Stated 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-A149), and any written arguments of the parties. See § 656.27(c).

Statement of the Case

On January 27, 1986, the Employer, Warmtex Enterprises, in Alhambra, CA, filed an application for alien employment certification to enable the Alien, Huang Rong Yeh, to fill the position of import manager. The duties included: responsibility for the importation of garments for sale to domestic customer; selecting merchandise; corresponding and maintaining contracts with overseas suppliers; negotiating contracts; arranging transportation for shipments; selling imports to companies and customers in the United States. The Employer required a high school degree and four years experience in the job offered or four years experience in the related occupation of international trading. The Employer also required the ability to speak, read and write Mandarin. (A46).

On October 14, 1986, the CO issued a Notice of Findings stating that the wage offer was below the prevailing wage, and that the Employer's advertisement in a local newspaper was inadequate. (A42-A46). The CO required the Employer to increase the wage offered and readvertise the position in a professional publication or the Wall Street Journal. (A43). On October 23, 1986, the employer agreed to a wage amendment and readvertised the job position. (A30).

On March 31, 1987, the CO issued a second Notice of Findings stating that U.S. workers were rejected for other than lawful, job-related reasons, and that the Employer has not shown a good faith effort to recruit U.S. workers. (A17-A18). According to the CO, "applicants contacted by this office reported that employer refused to interview by phone, demanding instead that qualified applicants travel to Alhambra at their own (considerable) expense." (A18). Five applicants were rejected for failure to appear at an interview. Applicant Ling Schmidt stated that "employer demanded I travel to Los Angeles at my own expense. . . he did not give enough information for me to make a decision." (A18). The CO required the Employer to demonstrate a good faith effort to consider and hire a qualified U.S. worker. (A18).

In its rebuttal of May 5, 1987, Employer stated that on January 4, 1987, it sent letters scheduling interviews for Thursday, January 13, 1987, to nine applicants. (A16, A108-A115). The

Employer argued, inter alia, that the five applicants who failed to appear for the personal interview were not willing and available, and therefore, the Employer was justified in considering their applications withdrawn. (A13).

On June 26, 1987, the CO issued a Final Determination denying certification. (A7-A8). The CO found that the Employer had the burden to show a good faith effort to recruit U.S. workers and has not satisfactorily done so. According to the CO, the Employer argues that applicant Schmidt should have spent $750.00 to travel to the Los Angeles area for an interview if he was really interested; however, "$750.00 may not be much to employer . . . but to an applicant looking for work, that is a month's rent, and employer failed to give any encouragement for the prospect to interview." (A8).

On appeal dated July 31, 1987, Employer contends that the CO failed to consider the evidence presented in rebuttal; specifically that each U.S. applicant was rejected as unqualified or unavailable. (A1-A76). In its brief, the Employer argues that it is not obligated to pay travelling expenses for an applicant to appear for a personal interview.

Discussion and Conclusion

The CO denied certification on the grounds that the Employer failed to demonstrate a good faith effort to recruit U.S. workers, and that U.S. workers were rejected for other than lawful, job-related reasons. According to the Employer, five applicants were rejected for failing to appear at a scheduled interview. The Employer further argues that it has no obligation to pay travelling expenses for applicants to appear for personal interviews.

In In re Hipoint Development, Inc., 88 INA 340 (May 31, 1989) (en banc), the Board held that "where more than local recruitment efforts are required, yielding referrals of apparently qualified U.S. applicants, the employer must make efforts, either through telephone interviews or through personal interviews at the employer's expense, to determine the qualifications of the U.S. applicants, and to specify lawful, job-related reasons for rejecting each U.S. applicant."

In the instant case, the Employer rejected five applicants solely on the basis of failing to appear for an interview at their own expense. The Employer made no effort to determine the qualifications of the applicants, either through telephone interviews or by paying the applicants' traveling expenses. According to the CO, applicant Schmidt was not even given enough information to make a decision as whether to interview for the position. The Employer's conduct in recruitment suggests that it was using the interview requirement as a means to reject U.S. workers. In re Lin & Associates, Inc., 88 INA 7 (Apr. 14, 1989). An employer cannot lawfully reject a U.S. applicant solely on the basis of the applicant's unwillingness to pay traveling expenses. Hipoint, 88 INA 340.

The Employer has not specified lawful, job-related reasons for rejecting each U.S. worker as required by §656.21(b)(7); therefore, the CO properly denied certification.

ORDER

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

NAHUM LITT
Chief Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 30 days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with the Chief Docket Clerk, Office of Administrative Law Judges, Suite 700, 1111 20th Street, NW, Washington, DC 20036. The Petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double spaced pages. Upon the granting of a petition the Board may order briefs.