



DATE: MAY 12 1989
CASE NO. 87-INA-553

IN THE MATTER OF

FELICIAN COLLEGE
Employer

on behalf of

TERESITA TAN ORGILES
Alien

Steven Elias, Esq.
New York, NY

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

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This application was submitted by the 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) (herein-after "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer Bette F. Roy's denial of a labor certification application pursuant to 20 C.F.R. §656.26.¹

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: (1) there are not sufficient workers in the United States 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 the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

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

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations 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 a labor certification is based on the record upon which the denial was made, together with the request for administrative - judicial review, as contained in an Appeal File ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case

On July 16, 1985, Employer, Felician College, filed an application for Alien employment certification on behalf of the Alien, Teresita Tan Orgiles (AF 1-2). The position for which certification is sought is Financial Aid Counselor.²

The application for labor certification described the job duties as follows:

To assist the Treasurer in the Treasury Department and the Department of Grants. This will entail management of funds, handling of bank transactions, coordinating with the different sponsoring institutions and determining qualified and deserving students. Will also supervise two (2) clerks and one (1) typist.

(AF 2). Employer listed the job requirements as a B.S. degree in Business Administration with an emphasis in Accounting, and three years experience in the job offered or the related occupation of treasurer (*id.* 2).

Following recruitment efforts, Employer reported only one applicant as responding, by telephone, and that applicant apparently hung up when told of a requirement of fluency in Spanish and Tagalog.³

A Notice of Findings ("NOF") was issued on February 5, 1987 (AF 32-33). The Certifying Officer ("CO") noted that the U.S. applicant was rejected because he could not speak

² Employer originally entitled the position "assistant Treasurer", but the New Jersey Division of Employment Services retitled the position based on Employer's job description (AF 2, 28).

³ See AF 23. Employer explained the rejection of this applicant as follows:

Mr. Patrick Crane from New York City responded. He gave no address after the question, "How many languages do you speak?" [Spanish and Tagalog- a Philippine dialect-are required.

This is accurately quoted.

Spanish and Tagalog. Noting that this requirement did not appear in the application form, newspaper ads and job posting, the CO determined that the applicant's rejection was for other than lawful job-related reasons as required by 20 CFR 656.21(b)(7). Employer was advised that if the language requirement is a bona fide job requirement then, pursuant to §656.21(b)(2), Employer must document that it arises from a business necessity rather than employer's convenience. The CO also found Employer's education and experience requirements to be excessive and restrictive in light of the normal requirements set forth in the Dictionary of Occupational Titles ("D.O.T."), and advised Employer either to reduce its requirements to comply with the D.O.T. or document business necessity.

In response to the NOF, Employer submitted a letter of rebuttal, dated March 5, 1987 (AF 34). Employer asserted that the foreign language requirement is an "'absolute necessity" because 14 percent of its applicants speak Spanish (10 percent) or Tagalog (4 percent) and little or no English. Employer further stated:

Accounting knowledge is also needed to be able to analyze financial statements of parents/student applicants whose children are seeking financial aid to see if they are eligible for scholarships or grants. Also, a college degree is required in order to be able to analyze or determine from students' records what course they are capable of pursuing.

A Final Determination denying labor certification was issued on April 21, 1987 (AF 39-40). The denial was based upon a finding that the Employer had failed to support the foreign language requirements and the excessive and restrictive education and experience requirements with evidence of business necessity, as required by §656.21(b)(2). The US worker's rejection was deemed unlawful as it was based upon his inability to speak Spanish and Tagalog.

Employer filed a Request for Review on May 22, 1987 (AF 49), followed by a Brief on July 24, 1987. The CO submitted a Brief supporting his position on July 30, 1987.

Discussion

The issue of business necessity was recently addressed in the Board's decision In re Information Industries, Inc., 88-INA-82 (Feb. 9, 1989) (en banc). We held that, "to establish business necessity under §656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer." (Id. at 9).

In the instant case, the CO denied certification because he found that Employer had failed to document business necessity for the foreign language requirements and the allegedly excessive and restrictive educational and experience requirements. The NOF was very specific regarding rebuttal of the stated findings. Employer was advised that it should document business necessity for the foreign languages requirement. Employer was instructed to document the percentage of the people it deals with who cannot communicate in English; document the percentage of its

business that is dependent upon each language; indicate how the absence of each language would adversely impact on its business; and indicate the percentage of time the employee would use each language (AF 32). The CO further advised Employer that its education and experience requirements were excessive and restrictive and that it should either reduce its requirement to that in the D.O.T. or document business necessity (AF 32).

Employer's statement of rebuttal was cursory and, for the most part, unresponsive to the NOF (AF 44). Employer was given the opportunity to justify the education, experience and foreign languages requirements. It did little more than state that 14 percent of its students are foreign speaking. There is no documentation as to how this factor alone establishes business necessity for a foreign language requirement of an employee whose job it is to process applications.⁴

Similarly, Employer's statement that "accounting knowledge" is needed to analyze financial statements and a college degree to analyze the capability of the students is insufficient to document business necessity for its requirements of a college degree in Business Administration and Accounting plus three years experience. While Employer's statement may demonstrate that the requirements bear a reasonable relationship to the occupation in the context of Employer's business, it does not establish that they are essential to perform, in a reasonable manner, the job duties as described. See Information Industries, Inc., supra.

Employer having failed to adequately document that its foreign language, education and experience requirements arise from business necessity, labor certification was properly denied.

ORDER

The Certifying Officer's decision is affirmed and labor certification is denied.

JEFFREY TURECK
Administrative Law Judge

JT/jb

⁴ In its Brief on appeal, Employer emphasizes the "increasingly intense competition between institutions of higher learning for students," thus, necessitating a bi-lingual individual in order to remain competitive. This assertion was first raised on appeal, thus precluding its consideration upon review. 20 CFR §656.26(b)(4). We note, further, that Employer offers no documentation to support this assertion. Nor does the record establish growth in the student population as a result of Alien's employment since January 1985.