



DATE: FEB 9 1989
CASE NO. 88-INA-82

IN THE MATTER OF

INFORMATION INDUSTRIES, INC.,
Employer

on behalf of

MAYURAM RAVICHANDRAN,
Alien

Nancy B. Elkind, Esq.
Denver, Colorado
For the Employer

Robert J. Lesnick, III, Esq.
Washington, DC
For the Certifying Officer

Howard S. Myers, III, Esq.
Minneapolis, Minnesota
For the American Immigration Lawyers
Association, Amicus Curiae

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

JEFFREY TURECK
Administrative Law Judge:

DECISION AND ORDER

This application was submitted by the Employer on behalf of the above-name Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer Rebecca A. Stuart's denial of a labor certification application pursuant to 20 C.F.R. § 656.26.

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 labor certification 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.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 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 a 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 and oral arguments of the parties [see § 656.27(c)].

Statement of the Case

The Employer, Information Industries, Inc., is a nationwide computer consulting business headquartered in Aurora, Colorado. Employer's business consists of hiring technical and professional computer specialists and contracting out their services to other companies. The job in question in this case was entitled "Systems Engineer" by Employer. The employee hired for this position was to be contracted out to AT&T in Denver. The application for certification filed on December 15, 1986 (AF 39) listed the duties of the job as follows:

Use UNIX and IBM operating systems to develop, implement and service scientific based operating systems for engineering firms and other clients. Includes converting symbolic statements of administrative data or business problems to detailed logical flow charts of coding into computer language. Analyzing business problems by applying knowledge of computer capabilities, subject matter, algebra, and symbolic logic to develop to develop sequence of program steps. Analyzing, reviewing, and rewriting programs to increase operating efficiency or adapt to new requirements. Compiling documentation of program development and subsequent revisions.

The only requirements for the job listing by Employer were a B.S. in Engineering and an M.S. in Computer Science (id.).

In a Notice of Findings ("NOF") issued on August 10, 1987, the Certifying Officer ("CO") found that Employer's application had not met the requirements of the regulations. Employer filed a lengthy rebuttal on October 13, 1987. Certification was denied by a Final Determination issued on October 19, 1987, on the ground that the requirement of two degrees, a B.S. in Engineering and an M.S. in Computer Science, is unduly restrictive in violation of § 656.21(b)(2).

Employer requested review of the CO's denial of certification on November 19, 1987 (AF 1-2). On March 17, 1988, the American Immigration Lawyers Association ("AILA") filed a brief as amicus curiae, urging reversal of the denial of certification. Following the filing of briefs by the CO and the Employer, AILA moved for an oral argument before the Board, stating that this would be an excellent case to determine a test by which business necessity could be judged. That motion was granted, and oral argument was held before the full Board in Washington, D.C. on December 13, 1988.¹ The Employer, Director and AILA all participated in the oral argument.

Discussion

a. Congressional History of Immigration Legislation

In 1875, Congress enacted the first enduring federal controls on immigration, beginning with a variety of regulations to exclude "undesirables" such as prostitutes, criminals, paupers, chinese laborers and anarchists. Extensive additional controls were enacted in the midst of World War I. In the 1920's Congress added a quota system placing numerical ceilings based on national origins, reserving the largest allocations for the "more desired" nationalities of northern Europe. In 1952, Congress enacted the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163. Although making some fundamental changes in the nation's immigration procedures, the 1952 Act retained the national origins quota system. It also permitted entry to aliens seeking to perform labor in the U.S. unless the Secretary of Labor affirmatively certified that U.S. workers were available or that the employment of the alien would adversely affect the wages and working conditions of U.S. worker [see 8 U.S.C. § 1182(a)(14) (1952)].²

The landmark 1965 Amendments to the Act repealed the national quota system and enacted a highly selective system of admission giving preference to aliens who have close family relationship with U.S. citizens or permanent residents, as well as to those aliens who seek employment in the U.S.³ Two categories of preferences were established on the basis of employment. One established a preference for aliens with exceptional ability in the sciences or the arts (the Third Preference). The other established a preference for skilled or unskilled workers who can fill specific labor needs in short supply (the Sixth Preference).⁴

The 1965 Amendments also revised §1182(a)(14). As amended, aliens seeking to enter the U.S. for employment purposes had to receive certification from the Secretary of Labor that U.S. workers are not available to perform the job and that employment of the alien will not adversely affect

¹ Citations to the transcript of the oral argument will be abbreviated as "TR".

² See 41 ALR Fed §2[a], at 615 (1979).

³ See H.R. No. 1365, 82 Cong., 2nd Sess., reprinted in 1952 U.S. Code Cong. & Ad. News 1653, 1705; Senate Report (Judicial Committee) No. 748, Legislative History of Immigration and Nationality Act-Amendments 3328, at 3329, 3330 (September, 1965).

⁴ See Senate Report, supra n.3, at 3329, 3332.

the wages and working conditions of U.S. workers. This amendment was intended to reverse the prior presumption in §1182(a)(14) in favor of admission of aliens for employment purposes.⁵ Accordingly, since this section of the Act is still in effect, it is the burden of the alien, or more accurately the employer on behalf of the alien, to establish to the Secretary's satisfaction that U.S. workers are not available to perform the job, and that the employer of the alien will not adversely affect the wages and working conditions of U.S. workers. If this burden is met, the Secretary's delegatee, the Certifying Officer, should grant certification.

b. Business Necessity

In 20 CFR Part 656, DOL has set out procedures through which an employer, on behalf of an alien, can establish the factors required for certification. The regulations contain detailed requirements for the employer to advertise the job, recruit through the local job service office and otherwise, and offer terms and conditions of employment that match those prevailing in the relevant job market. If, after complying with these regulations, the employer can establish that there are no U.S. workers both qualified for the job and available to perform it, certification will be granted.

In advertising and recruiting for the job, §656.21 (b)(2) requires that:

The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:

(i) The job opportunity's requirements, unless adequately documented as arising from business necessity:

(A) Shall be those normally required for the job in the United States;

(B) Shall be those defined for the job in the Dictionary of Occupational Titles (D.O.T.) including those for subclasses of jobs;

(C) Shall not include requirements for a language other than English.

Accordingly, assuming the absence of a foreign language requirement, if the job requirements are those normally required in the United States and are those defined for that job in the D.O.T., the job's requirements are not unduly restrictive, and it is unnecessary for the employer to document that they arise from business necessity. Conversely, should an employer fail to establish both that the job's requirements are normal and in accord with the D.O.T., then the employer must establish that they arise from business necessity.⁶

⁵ See, e.g., 41 ALR Fed. §2[a], at 615 (1979); Note, Immigration Law: Alien Employment Certification, 16 International Lawyer 111, at 111-12 (Winter, 1982).

⁶ Although §656.21(b)(2)(i) could have been made clearer by the drafters in regard to whether the requirements of subsections A, B and C are conjunctive or disjunctive, when read in context the only logical interpretation is that they are conjunctive. Otherwise, the issue of business necessity would never be reached in any job for which a foreign language is not required. Therefore, in order for the business necessity test to be inapplicable, an employer must establish all three elements of
(continued...)

What constitutes business necessity in the context of alien labor certification cases has produced some of the most controversial and diverse decisions in this area of the law. Since this is the first case in which the Board is attempting to address this issue in a definitive manner, it will be analyzed in great detail below.

In labor certification cases, judges have viewed business necessity from different perspectives. These different focuses have led to the development of inconsistent business necessity standards. The case law shows that those judges who have upheld the denial of labor certifications have often disregarded the employer's need to effectively operate its business, by focusing exclusively on the stated legislative purpose of protecting the U.S. workers. Courts following this rationale have adopted stringent business necessity standards. For instance, in Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir. 1974), cert. denied, 419 U.S. 1038 (1974), the court stressed in its decision denying certification that the 1965 legislative shift in §1182(a)(14) was intended to protect the U.S. labor market from an influx of aliens. The court reasoned, therefore, that the Secretary has discretion "... to ignore employer specifications which he [the Secretary] deems in accordance with his labor market expertise, to be irrelevant to the basic job which the employer desires performed." Id. at 762. In a subsequent decision upholding a denial of certification in which it followed Pesikoff, the D.C. Circuit rejected a District Court's holding that "[e]very employer is entitled to hire persons who have qualifications that can be utilized in a manner that will contribute to the efficiency and quality of the business." Acupuncture Center of Washington v. Dunlop, 543 F.2d 852, 858 (D.C. Cir. 1976).⁷

Additionally, some judges have focused on how the term "business necessity" has been interpreted under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e), adopting the strict business necessity standard set out in an early Title VII case, Diaz v. Pan Am World Airways, Inc., 442 F.2d 385 (5th Cir. 1971). In the preamble to the Notice of Proposed Rulemaking for the current labor certification regulations, DOL defined "business necessity" as something the absence of which would undermine the essence of the business operation. 45 F.R. 4920 (January 22, 1980). This definition was substantively identical to the definition set out in Diaz. However, DOL and the Certifying Officer no longer contend that this definition should be adopted, conceding that it is not necessary that an entire business be undermined before certification can be granted (see TR 59-62). Rather, they agree that business necessity must be measured "in the context of the employment opportunity for which certification is being sought." Attachment to Brief of the Certifying Officer, at 8; see also TR 60. In any event, the inappropriateness to alien labor certification cases to Diaz or similar standards holding business necessity to have been established "only when the essence of the business operation is undermined" (Diaz, supra, at 388) is readily apparent. For under this standard, business necessity

⁶(...continued)

§656.21(b)(2)(i), that is, that the job requirements are those normally required in the United States, are those in the D.O.T., and do not require fluency in a foreign language.

⁷ For other cases upholding denials of certification, see, e.g., Pancho Villa Restaurant Inc., v. U.S. Department of Labor, 796 F.2d 596 (2nd Cir. 1986); Doraiswamy v. Secretary of Labor, 55 F.2d 832 (D.C. Cir. 1976); Posadas De Puerto Rico Associates, Inc., v. Secretary of Labor, U.S. Court of the District of Puerto Rico, No. 86-0201 (JP) (slip op. October 12, 1988).

could rarely, if ever, be established by any sizeable business entity. As an example, it is doubtful that a company such as AT&T could ever establish that the inability to fill a single job would undermine the essence of its business. Having created a procedure by which alien labor certification can be obtained, and allotting 27,000 visas yearly for this purpose [see 8 U.S.C. §§ 1151(a), 1153(a)(6)], it is illogical to believe that Congress intended it would be virtually impossible for employers to obtain such certification. Therefore, since none of the parties advocate the Diaz test, and we believe it is inherently inappropriate to apply this standard in labor certification cases, that test will not be adopted by the Board.⁸

In contrast, judges who have refused to substitute their own business judgments for those of the employer have often accepted any offered business justification for hiring an alien. As a result, courts which have focused on the needs of employers have adopted a more lenient business necessity standard. The court, in granting labor certification in Silva v. Secretary of Labor, 518 F.2d 301 (1st Cir. 1975), concluded that the legislative intent after 1965 was not to confer on the Secretary a right to treat as irrelevant the employer's job preferences. Id. at 310. Similarly, the court in Ratnayake v. Mack, 489 F.2d 1207 (8th Cir. 1974), in its grant of certification, reasoned that some deference must be accorded to employers in setting forth the needed employment qualifications, because an employer is in the best position to judge what is needed for its business. The court held that "the job requirements of an employer are not to be set aside if they are shown to be reasonable and tend to contribute to or enhance the efficiency and quality of the business." Id. at 1212. In that same vein, the court in Jadesko v. Brennan, 418 F. Supp 92, 95 (E.D. Pa. 1976), stated that "Congress has not given [the Secretary] the authority to say that one who wants to employ a baker in the morning must be content with a candle stick maker who is willing to work in the afternoon."

c. Business Necessity Standard

Having analyzed the legislative history of the Act, the applicable regulations, and the relevant case law, it is the Board's opinion that in adopting a business necessity standard, consideration must be given both to the preference system which recognizes that the United States can benefit from alien labor, and to the purpose of labor certification, *i.e.*, the protection of the American worker. Since the statutory burden is on the employer to justify certification, emphasis should be placed on protecting the American worker; but Congress's recognition that alien labor can benefit the United States should not be ignored.

Our task is somewhat easier following oral argument, since the more extreme positions have been rejected by the parties. Not only has the Certifying Officer disaffirmed a strict "essence of the

⁸ It should be noted that the Diaz test has not been adopted in alien labor certification cases by any circuit of the U.S. Court of Appeals, including the Fifth Circuit (the circuit which decided Diaz). Further, the Diaz test is only one of many the courts have used to interpret "business necessity" under Title VII, and should not be considered to express the majority position. See, e.g., Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972); Davis v. City of Dallas, 777 F.2d 205 (5th Cir. 1985); Rutherglen, Desperate Impact Under Title VII: An Objective Theory of Discrimination, 3 Virginia Law Review 1297, at 1312-29 (1987).

business operation" test, but conversely both Employer and amicus agree that more can be required in establishing business necessity than merely "tend[ing] to contribute to or enhance the efficiency and equality of the business." See Statement of American Immigration Lawyer's Association's Alternative Business Necessity Test, at 3 ("AILA Statement"), quoting Ratnayake, supra, at 1212; see also TR 27-28, 31.

In formulating a standard, it must be kept in mind that the regulation we are considering, §656.21(b)(2)(i), concerns the business necessity of abnormal job requirements. It does not deal with job duties. Even §656.21(b)(2)(ii), which does mention job duties, does so only in the context of whether it is permissible to combine two traditionally separate jobs into one position. Nothing in §656.21(b)(2) concerns the reasonableness of the specific duties of a particular job.

Therefore, it would be inconsistent for a "business necessity" test being applied to §656.21(b)(2)(i) to set standards both for job requirements and job duties. Accordingly, the test we adopt sets standards only in regard to the reasonableness of the job requirements. Questions regarding the reasonableness of the job duties listed on the application must be addressed under other sections of the regulations.

We hold 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. This standard, in assuring both that the job's requirements bear a reasonable relationship to the occupation and are essential to perform the job duties, gives appropriate emphasis to the Act's presumption that qualified U.S. workers are available. An employer cannot obtain alien labor certification by showing that the job requirements merely "tend to contribute to or enhance the efficiency and quality of the business."⁹ On the other hand, this standard is not impossible to meet.¹⁰ An employer has the discretion, within reason, to obtain certification for any job whose requirements are directly related to its business, and does not have to establish dire financial consequences if the job is not filled or is filled by a U.S. worker who is not fully qualified.

Turning to the facts of this case, the Certifying Officer denied certification because she found that Employer's job requirements were unduly restrictive, in violation of §656.21(b)(2). It is Employer's position that its requirements are normal for this job in the United States, and conform to the D.O.T. If

⁹ For example, for a position as a lawyer, a job requirement of the ability to play golf usually cannot be justified as a business necessity even if the employer listed playing golf as a job duty on the Form 750A. Although it may "tend to contribute to or enhance the efficiency and quality of the business" socially and perhaps even economically, playing golf generally does not bear a reasonable relationship to the occupation of practicing law.

¹⁰ It should be noted that, even in regard to the less restrictive (as compared to Diaz) standard now advocated by the Certifying Officer, counsel for the CO could not point to the type of evidence an employer should provide to satisfy that standard and obtain certification (see TR 76-80).

Employer is correct, then it is not required to establish that the job requirements arise from business necessity [see §656.21(b)(2)(i)].

In addressing Employer's contention, first, the specific title of the job must be determined. The CO contends that the position is that of "Programmer, Engineering and Scientific;" D.O.T. Code 020.167-022; Employer states that the position is that of "Systems Engineer," D.O.T. Code 003.167-062. Until the correct job title is determined, it cannot be decided whether the job requirements are normal for the job in the United States. That the requirements conform to the D.O.T. is clear, for the only job requirement for either job title in the D.O.T. is a Specific Vocational Preparation rating (SVP) of 8. An SVP of 8 means that it is permissible for the Employer to require up to 10 years of education and experience; thus, the two degree requirement in this case does not conflict with the D.O.T.. Moreover, the position does not require fluency in a foreign language.

In regard to whether the job requirements are normal for this job in the U.S., neither party's position is established by the record. Although the duties of the job are set out in the Form ETA 750A (AF 39), they are expressed in technical jargon which cannot be precisely understood by laymen. Neither party attempted to explain these job duties in lay terms. That a so called expert body offered an opinion which was relied upon by the CO is insufficient, since that evidence contains little more than the conclusion of that body, without explanation or reasoning (see AF 34). Nor did either party attempt to analyze the jobs requirements in terms of the job duties, as required under our business necessity test. Thus Employer has not explained which job duties require its systems engineers to have a B.S. in Engineering, and the CO has not explained why this degree, or a Masters in Computer Science, are not bona fide requirements for the position regardless of which title best suits it.

Moreover, as counsel for the CO apparently admitted at the oral argument, it cannot be determined exactly which job requirements the CO alleged to be unduly restrictive -- the requirement that the applicant have a B.S. specifically in engineering, or the requirement of having both a Bachelor's and a Master's degree (see TR 51,59).

Under these circumstances, this case must be remanded to the Certifying Officer. On remand, the CO shall determine which job title best describes this job, and further determines whether the job requirements are normal for that job title in the U.S. If the CO finds that the job requirements are not normal, and are unduly restrictive, a Notice of Findings clearly setting out her findings and the reasoning behind them shall be issued. Employer shall then have the opportunity to file an appropriate rebuttal addressing, inter alia, the business necessity standard set out in this decision.

ORDER

The Certifying Officer's denial of certification is vacated, and the case is remanded to the CO for further proceedings consistent with this decision.

JEFFREY TURECK
Administrative Law Judge

JT/jb

In the Matter of Information Industries, Inc., 88-INA-82, NAHUM LITT, Chief Judge,
concurring:

Upon consideration of the issues involved in whether requirements are unduly restrictive or arise from business necessity and the difficulties encountered in interpreting §656.21, it is recommended that the Department of Labor consider redrafting the regulations applicable to alien labor certifications.

NAHUM LITT
Chief Administrative Law Judge

In the Matter of INFORMATION INDUSTRIES, 88-INA-82, Judge LAWRENCE BRENNER,
concurring:

The first prong of the majority's test for business necessity under section 656.21(b)(2)(i) is that an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business. I believe that the purpose of this prong is to not permit an employer to include duties for which the restrictive requirements are essential (thus meeting the second prong of the test), where the job duties have no reasonable relationship to the occupation. I agree with this purpose, which is illustrated by the majority's example of the impermissible requirement that a lawyer have the ability to play golf. The duty of playing golf, and derivatively the requirement of ability to do so, does not bear a reasonable relationship to practicing law.

In my view, it is sometimes difficult analytically to proceed directly from the job requirements to the occupation in the context of the employer's business. It is relevant, and helpful, in deciding under the first prong whether the job requirements bear a reasonable relationship to the occupation in the context of the employer's business, to consider whether the job duties bear a reasonable relationship to the occupation in the context of the employer's business. I therefore disagree with the majority's view that the reasonableness of the job duties cannot be addressed under section 656.21(b)(2)(i), simply because this subsection does not use the term "duties". By this logic, the second prong of the majority's test (with which I agree) -- whether the job requirements are essential to perform the job duties in a reasonable manner -- would also be impermissible.

I believe most analysis under the first prong must per force involve consideration of the duties, even if this implicit link between the occupation and the requirements which an applicant must possess is left unstated. Therefore, I believe that my disagreement with the majority's banishment of consideration of the reasonableness of the job duties under section 656.21(b)(2)(i) will not result in different outcomes provided the parties are alert to the premium that is being placed on use of "requirements" terminology.

The majority also asserts that nothing in the "combination of duties" business necessity subsection 656.21(b)(2)(ii), concerns the reasonableness of the job duties. That statement is dicta in this section 656.21(b)(2)(i) case.

LAWRENCE BRENNER
Administrative Law Judge