



DATE: DEC 20 1988
CASE NO. 88-INA-125

IN THE MATTER OF

BEST ROOFING COMPANY, INC.,
Employer

on behalf of

HASSAN ADIBZADEH,
Alien

Steven W. Blalock, Esq.
Los Angeles, CA
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and
Brenner, DeGegorio, 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-named 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 Paul R. Nelson's denial of a labor certification application pursuant to 20 C.F.R. Section 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

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

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 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 review, as contained in an Appeal File ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case

On June 20, 1986, the Employer, a roofing company located in Torrance, California, filed an application for alien employment certification (AF 49-50; 189-90) to enable the Alien to fill the position of financial controller. The requirements of the job were the ability to speak Farsi; a B.S. degree in business administration; familiarity with business and management operations; and one year of prior experience in the job offered. The job duties were described as follows:

Direct financial affairs for a contracting corporation. Prepare financial analyses of operations for guidance of management. Establishes major economic objectives and policies for the company. Prepares reports which outline the company's financial position in areas of income, expenses and earnings based on past, present and future operations. Directs the budget and financial forecasts. Advises management on desirable operational adjustments due to tax revisions, as well as insurance coverage for protection against property losses and potential liabilities. Arranges audits of company's accounts. Must be able to speak Farsi. (AF 49)

Following the issuance of the Notice of Findings ("NOF") by the Certifying Officer ("CO") on May 29, 1987 (AF 20-22), and the Employer's filing of its rebuttal on July 2, 1987 (AF 5-19), the Final Determination denying certification was issued on July 9, 1987 (AF 2-4).

Discussion

Employer is a roofing company seeking certification of Hassan Adibzadeh for the position of financial controller. The Employer required proficiency in Farsi because of an alleged necessity for interaction between the controller and business people, contractors and customers, some of whom primarily speak Farsi (AF 58). The job's description as provided on Employer's Form ETA 750A focuses on the direction and planning of Employer's financial affairs, nowhere describing interaction with business people, contractors or customers.

The NOF required documentation that the foreign language requirement was supported by business necessity (AF 21). The Certifying Officer stated that the position was not one which normally required a foreign language. He dismissed Employer's August 15, 1986 letter discussing interaction with Farsi-speaking individuals lacking English speaking ability as unconvincing without further evidence showing that such people constitute a major percentage of the people with whom Employer dealt. The NOF noted that the position's minimum requirements, which include the foreign language requirement, were an attempt to tailor the requirements for the Alien. Aside from the Farsi requirement, the Certifying Officer found 30 of the U.S. applicants qualified for the job (AF 22). Finally, the Certifying Officer required that Employer specify the lawful, job-related reasons for not hiring each U.S. applicant.

In rebuttal, Employer's President, Mr. Taba, submitted a letter citing a variety of factors he believed supported the language requirement. He maintained that 25 percent of Employer's customer base was of Iranian descent, with at least 50 percent of those customers speaking only broken English at best (AF 6). As indicative of this customer base, Employer submitted 13 work contracts entered into with customers having Iranian-sounding surnames (AF 7-19). These contracts were written entirely in English. Employer stated that its demographic research yielded figures published by the Iran Times which show that, between 1977 and 1987, Los Angeles' ethnic-Iranian population increased from 19,000 to 490,000 (AF 6). That copy of the Iran Times was never entered into the record. Further, Employer explained that entire areas of Los Angeles have become largely Iranian, with restaurants, cabarets, specialty markets, delis, and literature predominantly in Farsi (id.). Employer alleged that most Iranians in the Los Angeles area own their own homes, and may utilize substantial capital accumulated while in Iran to develop real estate. Finally, Mr. Taba stated that the Farsi requirement was necessary since the successful job applicant would have to assume the responsibilities of his/her predecessor in that position, who "handled a tremendous volume of [the] company's bilingual activity." (Id.).

The Final Determination denied certification on the ground that Employer failed to satisfactorily document that the Farsi language requirement was essential (AF 3). Noting Employer's assertion that half of the 25 percent of its customers who are Iranian speak only broken English at best, the CO reasonably deduced that only 12.5 percent of Employer's customers had problems communicating in English. Further, the CO pointed out that Employer never claimed that any of its customers spoke only Farsi. Finally, turning to the work contracts forwarded by Employer, the CO noted that they were entirely in English, and bore customer signatures in Western-style script. Holding the Farsi requirement to be restrictive, and noting Employer's admission that many U.S. applicants would have been qualified but for that requirement (AF 51), the CO found that Employer failed to specify lawful job-related reasons for not hiring a U.S. applicant (AF 3).

Under the regulations, Employer is required to document the business necessity for a foreign language requirement [see §656.21(b)(2)(i)(C)]. Further, Employer is required to provide lawful job-related reasons for rejection of U.S. workers [see §656.21(b)(7)]. We find, consistent with the Final Determination, that Employer failed to document the business necessity for the foreign language requirement.

In its brief, Employer argued, in effect, that 12.5 percent of its customers were primarily Farsi-speaking, making a language requirement for the financial controller position necessary. Given the nature of Employer's business -- roofing -- the language requirement is not obvious on its face. Further, as this Board noted in Weidner's Corp., 88-INA-97, slip op. at 3 (Nov. 3, 1988) (en banc):

Even if some potential customers are unable to speak or understand English, so that some potential sales are lost as a consequence, it still would not follow that fluency in [a foreign language] is necessary to do the work of a salesperson in California, because there are other potential customers accessible.

The Board's decision in Colorado Association of Korean Chambers of Commerce, 87-INA-669 (Dec. 21, 1987), in which a Korean language requirement was upheld for an Employer whose business purpose was the counseling of newly immigrated Koreans, most of whom spoke only Korean, is clearly distinguishable.

Not only is the Farsi requirement unnecessary for this business in general, but it clearly is unnecessary for the position in question. The job description for the financial controller's position fails even to suggest interaction with any individuals other than Best Roofing's own employees, and thus does not support Employer's statement that the successful candidate must interact with businessmen, contractors and customers lacking fluency in English. Although Employer contends that the Alien's predecessor performed such duties, they are not mentioned either in the job's description or in the advertisements for the position.

Therefore, we hold that Employer's requirement of fluency in Farsi is not required by business necessity, and Employer's rejection of job applicants on that ground was for a non job related reason. The NOF required Employer to specify the lawful reasons for rejection, yet Employer failed to do so (AF 22). Since Employer conceded that the applicants would have been qualified but for the Farsi requirement, the applicants were not rejected for a lawful, job-related reason.

Therefore, this alien labor certification was correctly denied by the Certifying Officer.

ORDER

It is ordered that the Certifying Officer's denial of certification is affirmed.

For the Board:

JEFFREY TURECK
Administrative Law Judge

JT:DN:jb