



DATE ISSUED: March 1, 1989

CASE NO. 88-INA-148

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

ROQUE & ROBELO RESTAURANT & BAR  
Employer

on behalf of

JOAO LICINIO ABREU  
Alien

Milton S. Kramer, Esq.  
For the Employer

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

NAHUM LITT  
Chief Judge

DECISION AND ORDER

This case arose 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) (1976). The Certifying Officer of the U.S. Department of Labor denied the application, and the Employer requested administrative-judicial 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 labor certification 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 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

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

place where the alien is to perform the such labor, and that 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 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 an Appeal File (A1-A24), and any written arguments of the parties. See §656.27(c).

#### Statement of the Case

On September 5, 1986, Roque & Rebelo Restaurant and Bar, filed an application for alien employment certification to enable the alien, Joao Licinco Abreu, to fill the position of cook. (A8). The duties of the position include: cooking Portuguese style food for service in the restaurant, preparing the ingredients, seasoning the food and cooking meats, fowl, seafood and soups. (A8). The employer's requirements for the position include one year of experience in the job offered. (A8).

On September 15, 1987, the Certifying Officer issued a Notice of Findings. According to the CO, the Employer required one year experience in the job offered; however, the alien had no experience in the job prior to his being hired by the Employer. The CO stated that pursuant to §656.21(b)(6), the Employer is required to document that his requirements are the minimum necessary for the performance of the job and that he has not hired workers with less training or experience, nor is it feasible to hire workers with less training or experience. The CO required the Employer to either 1) document why it is not feasible for him to train someone else at this time, 2) submit evidence that the alien at the time of hiring had the qualifications required, or 3) reduce the requirements and state a willingness to train a U.S. worker. The CO further stated that to show why it is not now feasible to train a U.S. worker, the Employer must document who trained the alien, why one of the two present cooks cannot train someone else at this time, and what change in total work force and annual volume of business took place.

In its rebuttal of October 20, 1987, the Employer stated that its business has increased, that it presently has an apprentice cook being trained, but that it needs a trained cook now to meet its present business needs. (A15). The Employer stated that it can not hire and train a cook, which takes about a year, and still conduct its business. (A15). According to the Employer, the alien started to work for the Employer in May, 1985, and was trained by the Employer. At that time it had only one cook. Now it has three cooks, including the alien. (A4). Its business has increased from \$423,803 in the fiscal year ending March 31, 1986, to \$812,787 in the fiscal year ending March 31, 1987. (A15). The Employer stated that it needs three cooks to take care of its present volume of business, and that it is training another cook who will hopefully be a qualified cook after a year. (A15).

The C.O.'s Final Determination of November 4, 1987, (A17), denied certification on the ground that the Employer did not satisfactorily document why it is not now feasible to train a U.S. worker as it did the alien, or submit evidence that the alien had experience when hired, or reduce the requirement to that which the alien had at the time of hire. (A18).

The Solicitor of Labor, on behalf of the CO, did not file a brief, but by letter of March 17, 1988, stated that the Employer trained the alien when he was hired, and did not document why an inexperienced worker could not be hired at this time, citing Pancho Villa Restaurant, Inc. v. U.S. Department of Labor, 796 F.2d 596 (2d Cir. 1986); In the Matter of M M Mats, Inc., 87-INA-540 (Nov. 14, 1987); In the Matter of Jackson & Tull, Engineers, 87-INA-547, (Nov. 24, 1987); In the Matter of Bank of New York, 87-INA-664 (Jan. 25, 1988); and In the Matter of Don Juan Restaurant, 88-INA-3 (Feb. 17, 1988).

In its brief, filed March 22, 1988, the Employer contended that it is small and growing and cannot manage its present business with only the 2 cooks (other than the alien) to do the work, and would have to turn away business. Therefore, it is not feasible hire an inexperienced worker to do the job.

#### Discussion and Conclusion

Under §656.21(b)(6), the Employer must document that its requirements represent, the actual minimum requirements for the job, and that it has not hired workers with less training or experience for similar jobs, or that it is not feasible to hire workers with less training or experience than that required by the job offer. As stated in MM Mats, Inc., 87-INA-540 (Nov. 24, 1987), the general rule is that labor certification will be denied under section 656.21(b)(6) when the alien has been employed in the position for which certification is sought and has gained experience which is required by the job offer while working for the employer in that position. The exception requires the employer to document that it is not now feasible to hire workers with less training or experience than that required by the employer's job offer. Id.

In the Notice of Findings, the CO required the Employer to either document why it is not now feasible to train someone else, submit evidence that the alien was qualified at the time of hiring, or to reduce the requirements and state a willingness to train a U.S. worker. The Employer, in its rebuttal, did not submit evidence that the alien was qualified, and did not reduce the requirements. Instead, the Employer argued that its business has increased so substantially that it now needs three experienced cooks to handle the current volume of business, and that to deprive it of the service of the alien would adversely affect its business. The alien was hired and began his training, which took a year, in May of 1985. At that time the Employer had one cook. It now has three, including the alien, and has shown that its business doubled from 1986 to 1987. That would appear to justify an increase from one experienced cook to two. The Employer presented insufficient evidence of a change in circumstances such that it could not now train an inexperienced cook when it has two experienced cooks. See Pancho Villa Restaurant, Inc. v. Department of Labor, 796 F.2d 596 (2nd Cir. 1986). Further, the Employer has not established why two experienced cooks cannot handle its current volume of business. In sum, we are not convinced by the Employer's argument that economic circumstances demonstrate the

infeasibility of hiring workers with less training or experience, nor has the Employer provided any other justification to demonstrate infeasibility.

The Employer has not demonstrated that it is not now feasible to hire workers with less training or experience than that required by the job offer. Accordingly, the CO properly denied certification pursuant to §656.21(b)(6).

ORDER

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

NAHUM LITT  
Chief Administrative Law Judge

NL:WB