



DATE: March 16, 1989

CASE NO. 88-INA-212

IN THE MATTER OF:  
CUSTOM CARD d/b/a CUSTOM PLASTIC CARD COMPANY

Employer,

on behalf of,

CASEY ANN VAN ROOYEN  
Alien.

Christopher A. Wilburn, Esq.  
For the Employer

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

MICHAEL H. SCHOENFELD  
Administrative Law Judge

DECISION AND ORDER

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

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, 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: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; 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 20 C.F.R. 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 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. 20 C.F.R. §656.27 (c).

### Statement of the Case

Employer, Custom Card d/b/a/ Custom Plastic Co., filed an application for labor certification on January 13, 1987, on behalf of Alien, Casey Van Rooyen, for the position of secretary (AF 14-15). Employer described its business to be a "credit card embosser."

The minimum requirements for the job consisted of one year of experience with no specified level of education required. Advertising for the position produced five respondents of whom two appeared at interview appointments held on March 3, 1987. One of these applicants failed to respond to a post-interview request for additional information. Employer stated that the other applicant, Shirley Rose, was "not interested" in the position. (AF50-51).

On October 29, 1987, the Certifying Officer issued a Notice of Findings ("NOF") (AF24-28) composed of three pages of "boiler plate" language accompanied by a similar fourth page checklisting various subsections of §656.20(c). Listed first and highlighted by both a check mark and asterisk is the statement "[t]his job is not open to U.S. workers. \_\_\_ U.S. workers applied and none of these were considered for the job." The second sentence of the above statement is crossed out and a hand written notation at the bottom of the page states, "[t]he employer stated that Shirley Rose was not interested in the job. A signed statement from Ms. Rose states that she was not offered the job."

On November 16, 1987, Employer submitted its rebuttal (AF 8-23). Employer stated that after it received the NOF, Ms. Rose was contacted to arrange a second interview but that she did not respond. The letter was sent certified mail, return receipt requested, on November 17th and signed for by Ms. Rose on November 20th. Apparently, Ms. Rose did not respond. No further evidence was submitted nor was any argument made regarding Ms. Rose's qualifications for the job.

A final determination was issued on February 4, 1988 (AF 6-7) denying labor certification because there was a U.S. applicant whom Employer failed to consider. Employer requested review by letter dated March 10, 1988 (AF 1-4).

### DISCUSSION

We reject at the outset Employer's contention that the record is insufficient to find factually that Ms. Rose was not considered for the job. Employer argues that there is no evidence contradicting its position that Ms. Rose was "not interested" in the job. This Board has held that an employer's bare assertion, in the absence of supporting reasons or evidence, that a U.S.

applicant was not interested in the position is insufficient to prove rejection for a lawful job-related reason. A.V. Restaurant, 88-INA-330 (November 22, 1988). In this case, Employer has provided no documentation in support of its assertion that this applicant was not interested in the position other than to rely on the applicant's written statement made in response to a local office inquiry shortly after the recruitment period. (AF13)

Ms. Rose's signed comment is as follows:

He was very indifferent to me. Gave very little information concerning position. Said it was a little of this and that. Told me he would let me know and said goodbye. Think my age put him off.

This statement does not support, and is indeed inconsistent with, Employer's position that she was not available for the job at the time of recruitment. In applying for and coming to an interview, Ms. Rose's actions demonstrated an interest in the position. She wrote, and Employer does not contradict, that the interview ended by Employer telling her that he would "let her know." An interview ending on that note is surely not one during which an applicant expressed unavailability for the job. Further, Employer's attempted recontact with Ms. Rose after the NOF was issued was for the stated purpose "to further consider" her for the job (AF 23). It was not an attempt by Employer to clarify what Ms. Rose's intentions were at the time of the recruitment. The lack of her response to the recontact letter of November 1987 asking her to arrange another interview in no way implies that she initially was "not interested" in the same job opportunity for which she applied and was interviewed during the recruitment period in March 1987. No documentation has been submitted by Employer showing that Ms. Rose was unable, unqualified or unwilling, at the time of recruitment, to fill the job. Accordingly, we find that Ms. Rose, a qualified U.S. applicant, was available at the time of recruitment.

Turning next to the legal issue raised, we hold that an employer's initial unlawful rejection of a U.S. worker as "unavailable" at the time of recruitment, is not cured a lack of response by that applicant to a post-NOF letter from the employer. The question of whether able, willing and qualified U.S. applicants are available for a particular job opportunity must, perforce, be determined as of the time of recruitment for it would be meaningless to show that such workers existed either before the job was open or after it had been filled. Thus, where, as here, it is alleged that an employer incorrectly rejected a U.S. applicant as unavailable, the applicant's failure to respond to an employer's offer to "further consider" her months later sheds no light on her availability as of the time of recruitment. See, Arcadia Enterprises, Inc., 87-INA-692 (February 29, 1988) (an initial unlawful rejection of a qualified U.S. applicant is not cured by the employer's subsequent attempt, without success, to contact him.); Dove Homes, Inc., 87-INA-680 (May 25, 1988) (en banc).

In its brief before us Employer maintains that since the NOF seemed to identify only one alleged violation, namely that there were U.S. workers available who are able, willing and qualified for the job, the failure to include that specific finding in the Final Determination amounts to an acceptance of its rebuttal and a finding that there were no able, willing and qualified U.S. workers for the job.

This Board has held that a CO's grounds for final denial of a labor certification application must have been set forth in the NOF. Downey Orthopedic Medical Group, 87-INA-674 (March 16, 1988). We have also stated that "it is incumbent upon the CO to identify which sections or subsections of the regulations allegedly have been violated and state with specificity how the employer violated that section or subsection." Flemah, Inc., 88-INA-62 (February 21, 1989). One of the rationales underlying these holdings is that an Employer must be provided notice specific enough to allow it a reasonable opportunity to rebut or to remedy the alleged defects.

The CO's conclusion in the Final Determination that Ms. Rose was not considered for the job at the time of recruitment was clearly alleged in the NOF. While the NOF also used the phrase "this job is not open to U.S. workers," the Final Determination does not include that phrase as part of the CO's "determination." The language of the handwritten comment as well as the attachment of Ms. Rose's statement to the NOF, however, put Employer on specific notice that the CO was of the opinion that one particular U.S. applicant was rejected as "not interested" when, in fact, she was available for the job at the time of recruitment. Thus, despite the use of a confusing boiler-plate NOF, there could have been no reasonable doubt in the mind of Employer as to the nature of the CO's complaint. The gravamen of the violation alleged by the CO in both the NOF and Final Determination is that Employer failed to document that a U.S. worker who applied for the job was rejected for an unlawful reason.<sup>1</sup> Indeed, in response to the NOF, Employer sought to "further consider" this applicant as a remedy to the precise situation complained of by the CO.

Employer raises a similar issue in regard to the language of the NOF. It argues that the Certifying Officer is barred from maintaining that U.S. workers were not considered because in the preprinted NOF he checked the first item under §656.20(c) stating that the job was "not open to U.S. workers" but crossed out the second sentence which stated, "\_\_\_ U.S. workers applied and none of these were considered for the job." It is unclear why the Certifying Officer eliminated this language. As discussed above, however, the handwritten sentences and attachment added to the NOF leave no doubt that the C.O., on the basis of the signed statement by Ms. Rose, was rejecting Employer's claim, made to the local agency, that she was not interested in the position. Employer was clearly on notice as to the nature of the violation.

Lastly, Employer maintains that the Final Determination cites Employer's failure to take corrective action as directed by the NOF when there was no corrective action which could have been taken if the job was not clearly open to U.S. workers.

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<sup>1</sup> Thus, Employer's violation more properly falls under §656.21(b)(7).

An alleged violation of §656.20(c)(8) without either a citation to another regulation or a specific explanation of the nature of the alleged violation does not meet the requirements of specificity set forth in Flemah, Inc., 88-INA-62 (February 21, 1989). The phrase "open to any qualified U.S. worker" is so broad that a CO informing an employer only that its job opportunity is not "open to any qualified U.S. worker" tells an employer virtually nothing about the nature of the violation or how it might be rebutted or remedied. Such an allegation thus fails to afford an employer a reasonable opportunity to rebut the alleged violation.

Employer misreads the Final Determination. Although the Final Determination states that the NOF "advised the employer of deficiencies in the application and the corrective action necessary to satisfy them," the operative conclusion reached by the CO was that "the applicant was not considered at the time of recruitment." Employer's application for labor certification was not finally denied because it failed to take corrective action requested by the NOF. It was denied because Employer failed to document its claim that at the time of recruitment, Ms. Rose was not interested in the position.

Accordingly, we uphold the Certifying Officer's decision to deny certification.

ORDER

The final determination of the Certifying Officer denying labor certification is AFFIRMED.

MICHAEL H. SCHOENFELD  
Administrative Law Judge

MHS/MKG