

U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036



Date: JUNE 15, 1990
Case No.: 88-INA-220

In the Matter of:

AMERICAN EXPORT TRADING CO.
Employer

on behalf of

JACOB SCHULTZ
Alien

Appearance: Moshe A. Young, Esquire
For the Employer

BEFORE: Brenner, Guill, Kaplan, Litt, Marcellino, Marden
Romano, Silverman and Williams
Administrative Law Judges

LAWRENCE BRENNER
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 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) ("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

The Employer, American Export/Trading Co., filed an application for labor certification on behalf of the Alien, Jacob Schultz, on May 19, 1986, to enable him to fill the position of International Sales Coordinator for its import/export business (AF 44-45). The duties for this position were described as follows:

1. Be in charge of administration work, such as: Direct clerical staff in expediting correspondence on an international level, bid requests, credit collection, etc.
2. Convert products from foreign to American standards, shipping details, such as: Import licenses and custom declaration.
3. Sales promotion by advertisements in news media, newspaper, brochures etc.
4. Create new business contracts.
5. Negotiate contracts with foreign merchants and plant owners.

(AF 44).

The specified requirements for the position were a Bachelor's degree in Business/Law and four years experience as an attorney. The Employer specified that applicants should possess knowledge of Israeli law and practice, as well. This requirement was later rescinded, however (AF 47).

The Final Determination, issued July 15, 1987, denied labor certification on three grounds: 1) failure to make a good faith effort to recruit by requiring face-to face interviews of applicants but not offering to reimburse travel expenses, 2) failure to document the business necessity of the requirement of experience as an attorney, and 3) the unlawful rejections of several U.S. applicants who were deemed qualified but for the requirement of legal experience (AF 7). The Employer filed a Request for Review of this determination with the Board on August 17, 1987 (AF 2-5). A three-member panel of the Board issued its initial Decision and Order in this matter on July 31, 1989, affirming the denial of certification on the ground that the Employer had failed to document the business necessity of its requirement of four years experience as an attorney. The Employer petitioned for en banc consideration of this matter on August 28, 1989. The Board granted this petition for consideration by the full Board on October 26, 1989.

Discussion

I.

In order to establish the business necessity of a specified requirement under the regulations, an employer must demonstrate that the requirement bears a reasonable relationship to the occupation in the context of the employer's business and is essential to perform, in a reasonable manner, the job duties as described by the employer. Information Industries, Inc., 88-INA-82 (Feb. 9, 1989)(en banc). In the initial decision, the panel assumed that, in specifying four years experience as an attorney, the Employer was requiring four years of unspecified, general legal experience. Making this assumption, the panel reasoned that an attorney with four years experience in, say, domestic relations or criminal defense, would qualify for the position while an applicant with several years in international sales would not. Accordingly, it found that four years of general legal experience was not essential to perform the job duties as described.^{1/}

Upon reexamination of the record, however, we find that the Employer was, in fact, requiring applicants to be attorneys with experience in international sales and trade, not merely any field of law. Initially, we note that the advertisement for the position clearly states that applicants should possess "4 yrs. Exp. As an attorney dealing with contracts and int. business." (emphasis added) (AF 169).^{2/} More importantly, the entire context of the application, if not the application itself, indicates that applicant attorneys should have experience in the areas of international trade and sales. The duties include dealing with import and customs matters and negotiating contracts. As such, it would be disingenuous to assume that the Employer was specifying a requirement for an attorney of any sort, and not one with experience in the legal duties at hand.

Viewing the requirement of four years of legal experience in its proper context of dealing with international trade issues, we find that the Employer has provided documentation that it arises out of business necessity. By outlining the legal duties which the employee would

^{1/}American Export Trading Co., 88-INA-220 (July 31, 1989).

^{2/} Except in unusual circumstances, in the future the Board will not permit an advertisement or job posting whose content differs from that which is found on the application, especially when the advertisement lists requirements which are more restrictive. See Bell Communications Research, 88-INA-26 (Dec. 22, 1988)(en banc); Montana State University, 87-INA-743 (May 9, 1988). In that situation, the pool of available workers is improperly decreased when compared to what it would have been had the application been followed.

However, in this case, the advertisement, though more restrictive, provides a more accurate depiction of the requirements in their proper context. By including the phrase, "dealing with contracts and international business," the Employer drafted an advertisement which reflected the Employer's and Job Service's understanding of the opportunity and more effectively targeted the correct pool of potential applicants.

perform and stressing the increasingly litigious nature of its business, the Employer has shown that the requirement bears a reasonable relationship to the occupation and is essential to reasonably perform the job as envisioned by the Employer.

II.

The Final Determination also cited the lack of a good faith recruitment effort as an alternative reason for denial of certification based on the Employer's refusal to reimburse the travel expenses of the applicants it invited for interviews (AF 7). The initial letter sent to all applicants required each to appear in Los Angeles for a personal interview yet contained a post-script which stated that it would not reimburse any travel expenses incurred when attending this mandatory interview (AF 51). The Board has previously held that where efforts to recruit are not limited to the local area, the employer must make an effort to interview applicants over the phone or pay their expenses for an in-person meeting, or some combination of the two in a screening process. Hi-Point Development, Inc., 88-INA-340 (May 31, 1989)(en banc); Lin Associates, 88-INA-7 (Apr. 14, 1989)(en banc) (employers in national recruitment for experienced engineer must pay expenses). In the absence of an employer's agreement to screen applicants by means other than an in-person interview at the job site, the offering of travel expenses for an interview for a professional position, such as the one in this case, directly bears on whether the employer's recruiting efforts are in good faith under the law. L.A. United Investment Company, 87-INA-738 (Apr. 20, 1988).

In the present case, the Employer requires an interview in its offices yet adopts a uniform policy of not offering travel expenses. In rebuttal, the Employer states that it is its right to require such an in-person meeting and that it has no obligation to pay expenses under any circumstances (AF 10-11). This assertion is simply incorrect and contrary to Board precedent. Where an employer is recruiting for a professional position, not limited to the local area, and flatly refuses to pay expenses or interview over the phone, rejection of U.S. workers for failure to agree to an interview at the job site is unlawful; an employer has the affirmative obligation to mitigate the financial hardship involved in some way. See Misak's General Building Contractors, 89-INA-39 (Oct. 25, 1989). Under the circumstances described, it is not surprising that almost half of the U.S. applicants did not respond to the Employer's letter (AF 50), -- including applicants Cartozian, Khalsa, and Knudston, who appear to meet the requirement of four years of relevant legal experience (AF 72,101,159). An employer has the obligation to further investigate the credentials of applicants -- like the above three -- whose resumes create the reasonable possibility that they are qualified. Nancy, Ltd., 88-INA-358 (Apr. 27, 1989)(en banc).

ORDER

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

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/VF/gaf

J. Guill, concurring in part and dissenting in part.

I concur with the reversal of the panel decision. On the other hand, while I agree that issues preserved by the Certifying Officer but not reached in a panel decision are proper for en banc consideration, I do not agree that the Board sitting en banc should decide such issues prior to notifying the parties and granting them leave to file briefs. To do otherwise creates an added burden for the adversely affected party, i.e., Employer in this instance now must overcome a position already formulated by the majority of the Board.

NOTICE OF PETITION FOR EN BANC RECONSIDERATION: The above Decision and Order is based upon an issue which was preserved by the Certifying Officer in the Final Determination. This issue did not appear in the initial panel Decision and Order. Consequently, both parties may not have chosen to brief this issue prior to en banc review. Should either party seek to readdress this issue on brief, it may petition the Board for en banc reconsideration of this Decision and Order. Petitions must be filed with the Chief Docket Clerk, Office of Administrative Law Judges, Suite 700, 1111 20th Street, N.W., Washington, D.C. 20036. This Decision and Order will become the final decision of the Secretary unless such a petition is received within 10 days from the date of service.