



DATE: DECEMBER 22, 1988
CASE NO. 88-INA-311

IN THE MATTER OF

JAMES NORTHCUTT ASSOCIATES
Employer

on behalf of

CARLITO ULANA CENIDO
Alien

Appearances

Larry G. Noe, Esquire
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and
Brenner, DeGregorio, Guill, Schoenfeld, and Tureck,
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, James Northcutt Associates, filed the application for labor certification on behalf of the Alien, Carlito Ulana Cenido, for the position of Interior Space Planner. The duties of the position, according to the ETA 750A, were those pursuant to planning the interior space use of hotels in construction or renovation (AF 15). Specifically, the job duties included the use of architectural blueprints and models, consultation with the senior project manager concerning such matters as building regulations and customer criteria, and the supervision of draftsmen.

The minimum requirements for the job were a Bachelor of Science degree in Architecture, the ability to read floor plans, and one year experience in the position of interior space planner. According to the ETA 750B, the Alien has a Bachelor of Science degree and has been employed since January 1986 by the Employer in the position offered for labor certification (AF 20). Prior to his position with the Employer the Alien worked as a "project coordinator" and also, for four years, as a space planner.

In his August 18, 1987 Notice of Findings the Certifying Officer (C.O.) proposed to deny labor certification (AF 11). The C.O. first stated that the Employer violated section 656.24(b)(2)(ii) by rejecting qualified U.S. applicants. The C.O. also found the Employer violated section 656.21(b)(6) by requiring one year experience specifically with hotel space planning when no evidence was presented that the Alien possessed such experience when hired.

The Employer, in its rebuttal of September 21, 1987, responded first that it lawfully rejected all U.S. applicants because none were qualified (AF 4-7). Specifically, applicants were rejected for lack of experience in hotel planning. The Employer also

In his October 23, 1987 Final Determination the C.O. rejected the Employer's rebuttal arguments, finding that because the Alien had no prior experience as a hotel space planner the Employer's stated conditions of employment were less favorable to U.S. applicants than those offered to the Alien (AF 2-3). The Employer requested review of the C.O.'s decision on November 3, 1987, and filed a brief on July 22, 1988 (AF 1). The C.O. did not file a brief.

Discussion

The principal issue presented in this case is whether the Employer violated section 656.21(b)(6) by requiring an employment prerequisite of U.S. workers not required of the Alien. Section 656.21(b)(6) states that "[t]he employer shall document that its requirements for the job

opportunity as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience . . . "

The C.O., in both the Notice of Findings and the Final Determination, found that the Employer rejected otherwise qualified U.S. applicants because the applicants did not have experience specifically in hotel space planning (AF 3, 12). The C.O. found throughout that the Alien did not have any such experience when the Alien was hired by the Employer, and hence that the Employer treated U.S. workers less favorably than it treated the Alien.

A careful review of the record indicates that the Employer has indeed placed a requirement on U.S. applicants that it did not place on the Alien, namely, experience as a hotel space planner. Throughout its rebuttal the Employer asserted that a particularized knowledge of hotels was essential to perform the position. The Employer stated that the duties of the position "mandates a working knowledge of various disciplines in building our designs for our particular type of product, i.e. hotels" (AF 5). As a specific example the rebuttal states that because hotels present unique building code problems, applicants who did not possess such knowledge would not be able to "troubleshoot code requirements and avoid code violations" (AF 5). Therefore, the Employer, asserting that the interviewed applicants "did not possess any experience with the design and planning of interior space use for hotels," rejected the applicants as "they did not possess the knowledge and experience necessary to be responsible for performing the tasks" of the position. (AF 7).¹

The Employer asserts in rebuttal that the Alien "is a highly qualified space use planner for hotels" and that he has the "familiarity and knowledge" that is required for the job (AF 7). The Employer's assertions notwithstanding, the Alien did not possess the experience when hired that the Employer now demands from U.S. applicants. According to the ETA 750B the Alien worked from May 1985 to January 1986 as a "project coordinator" for ABC Construction, a firm engaged in the construction of commercial and governmental buildings (AF 20). In that position the Alien "supervised and coordinated project activities for construction of commercial and government buildings." From June 1983 to May 1985 the Alien worked for Gomberoff Policzer Architects, a firm engaged in the design and construction of multi-residential and commercial buildings as a space planner. In this position the Alien planned interior space use for the company and

¹ In its appellate brief, however, the Employer modified its argument. It argued that the criteria used in hiring for the position was "knowledge of the requirements needed to plan hotels", not experience in hotels, and that the Alien possessed such knowledge while the U.S. applicants did not. Brief at 4. This argument fails on several grounds. First, it is in direct contradiction with the Employer's assertions in rebuttal, where the Employer stated that it rejected U.S. applicants who had no experience in hotel space planning. See, *infra* p. 3. Second, given the rebuttal's assertions concerning the uniqueness of the hotel environment, it seems highly improbable that anyone, including the Alien, could have acquired the requisite "knowledge" of hotel space planning without any experience in the environment. Finally, the Employer failed to demonstrate, given the similarity of experience and education between the Alien and the rejected interviewed U.S. applicants, that the Alien possessed such knowledge when hired for the job and the U.S. workers did not.

consulted with the senior project manager. The ETA 750B also lists a position previous to the Gomberoff firm as a space planner with the same duties as that of the Gomberoff position.

The Employer has failed to satisfy its burden of proof. In none of the listed positions is there any indication that the Alien was specifically involved with the design or construction of hotels. While the firms the Alien worked for were involved in the design and construction of commercial, and in the case of Gomberoff, multi-residential buildings, there is no indication of any work specifically with hotels. Likewise, none of the duties performed by the Alien in any of the jobs were specific to hotels. Nowhere in the record is there any evidence that the Alien had any experience with hotels prior to his employment with the Employer. On the basis of the disparity in treatment between the U.S. applicants, who were rejected for lacking hotel experience, and the Alien, who was hired but also lacked the experience, we find that the Employer violated section 656.21(b)(6).

ORDER

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

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/DC/gaf