



DATE: April 27, 1989
CASE NO. 88-INA-358

IN THE MATTER OF

NANCY, LTD.,
Employer

on behalf of

FRANCISCO X. GAYA,
Alien

Philip M. Zyne, Esq.
Miami, FL

For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge;
and Brenner, Tureck, Guill and Williams,
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 Austin L. Miller's denial of a labor certification application pursuant to 20 C.F.R. §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 January 29, 1987, the Employer filed an application for alien employment certification (AF 63) to enable the Alien to fill the position of Project Engineer. A Bachelor's Degree in Civil Engineering and four years of experience in the job offered were required. The duties of the job as listed on the application form were:

Design and direct the construction of high-rise reinforced concrete buildings requiring stress analysis and structural calculus. Must have extensive knowledge and experience in engineering interpretation of plans and specifications for the construction of complex reinforced concrete structures. Capable of using precast concrete frames and machine foundations. Proficiency in the use of engineering aids associated with computation and drafting.

There were no additional special requirements listed for the job.

Following the issuance of the Notice of Findings ("NOF") by the Certifying Officer ("CO") on February 26, 1988 (AF 29-30), and the Employer's filing of its rebuttal on March 31, 1988 (AF 17-28), the Final Determination denying certification was issued on April 29, 1988 (AF 15-16).

Discussion

After the job was advertised, there were 11 applicants for the position (see AF 33-83). Three of the applicants who submitted resumes were considered by the Employer, but were not interviewed (AF 71, 72). In his NOF, the CO cited subsection 656.21(b)(7), which requires an employer to document that U.S. workers were rejected solely for lawful job-related reasons, and subsection 656.24(b)(2)(ii), which states that the CO shall consider a U.S. worker able and qualified for the job if the worker by education, training, experience or a combination thereof is able to perform, in the normally accepted manner, the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. The employer was advised

that, although it rejected applicants Mohamad and Wheeler, their resumes showed them to have the needed experience. Employer was told to submit the evidence necessary to rebut the findings.

In rebuttal of the NOF, Employer contended that neither Mohamad nor Wheeler had the required experience of four years in the job offered (AF 17-19). Further, in an effort to reevaluate these applicants, Employer attempted to contact them by phone and by mail. In both instances, the applicants' wives were informed by phone that Employer was trying to get in touch with their husbands about a job (see AF 20-21). In addition, certified letters were delivered to their addresses (AF 24, 28). But neither applicant responded.

In the Final Determination, the CO conceded that Mohamad was not qualified (see AF 16). But he reiterated that Wheeler was qualified, based on his degree in civil engineering, four years of experience as a civil engineer, and experience "in developing residential, commercial and large industrial buildings to include design and construction of reinforced concrete [and] reinforced masonry structures." (Id.; see AF 77). The CO also noted that Wheeler's recent apparent lack of interest in the position does not cure the Employer's unlawful rejection of the applicant at the time of the initial recruitment.

In regard to the latter point, the CO clearly is correct. If Wheeler was qualified for the job, and the Employer fails to show that he was either uninterested in the job or was unavailable at the time of recruitment, that he may no longer be interested in it cannot cure the Employer's rejection of Wheeler at the time of recruitment. See, e.g., In re Done-Rite, Inc., 88-INA-341 (Mar. 2, 1989) (en banc); In re ENY Textiles, Inc., 87-INA-641 (Jan. 22, 1988).

However, if Wheeler was not qualified for the job in the first place, then it is irrelevant if Employer cannot establish his unavailability. It is Employer's burden to establish that Wheeler was unqualified, and thus lawfully rejected. See §656.21(b)(7).

The CO's finding in the Final Determination that Wheeler met the job requirements was based on a misreading of those requirements. Employer did not require four years of experience merely as a civil engineer; Employer required four years of experience in the job offered, i.e., a Project Engineer designing and directing the construction of high-rise reinforced concrete building (see AF 63).² In addition, the job requires the supervision of 100 employees. Nevertheless, although the CO erred in stating the experience required for the job, Employer has failed to establish that Wheeler did not meet the actual, more stringent job requirements.

The Board has held that an Employer can reject a U.S. worker solely on the basis of his or her resume where the resume indicates that the U.S. worker does not meet the job requirements. See, e.g., In re Anonymous Management, 87-INA-672 (Sept. 8, 1988) (en banc); In re ENY Textiles, supra. However, despite Employer's protestations to the contrary, Wheeler's resume and cover letter, although not expressly stating that he has four years of experience in the job offered,

² See In re Integrated Software Systems, Inc., 88-INA-200 (July 6, 1988), in which the Board held that "experience in the job offered "[means]" experience in the job duties and not just in the job title." (Id., slip op. at 3).

list such a broad range of experience in various aspects of civil engineering, as well as supervisory experience, that there is a reasonable possibility he may meet the job requirements. Employer appears to be contending that Wheeler's eight years of experience as a facilities engineer is unrelated to the job offered, in which case Wheeler could not have had four years of qualifying experience by the date of the application for certification (see AF 3-5). However, Wheeler's duties in this position involved the planning, design and direction of construction, the crux of the definition of "Civil Engineer", DOT Code 005.061-014, cited by Employer.

Under these conditions, it cannot be said with any degree of confidence that Wheeler does not qualify for the job. Therefore, it was incumbent on the Employer to further investigate Wheeler's qualifications, either through an interview or by other means. Although an Employer is not obligated to interview every job applicant who files a resume, where that resume indicates that the applicant may meet the job's requirements, an employer cannot reject that applicant without attempting to clarify the applicant's qualifications.

Conversely, Wheeler's resume also fails to establish that he does meet the job's requirements. The NOF contains absolutely no reason for finding that Wheeler met the job's requirements, and the Final Determination ignores both the supervisory nature of the job and the requirement that the employee's four years of experience must be in the area of the construction of high-rise reinforced concrete buildings.³

Although, due to the ambiguity of Wheeler's resume, it would have been preferable in the NOF for the CO to have instructed Employer to interview Wheeler, Employer attempted to do so anyway. However, it could not get Wheeler to respond to its phone calls and letter. Therefore, Employer has not been able to shed more light on Wheeler's qualifications.

Accordingly, since the record fails to establish that Wheeler did not meet the job requirements, his rejection for the job by Employer was not for a lawful, job-related reason, and Employer has violated §656.21(b)(7). Therefore, the denial of certification is affirmed.

ORDER

The Certifying Officer's denial of alien labor certification is affirmed.

JEFFREY TURECK
Administrative Law Judge

JT/jb

³ The reasonableness of the job requirement was not contested by the CO.