



DATE: March 17, 1989
CASE NO. 88-INA-535

IN THE MATTER OF

NATIONAL INSTITUTE FOR PETROLEUM AND ENERGY
RESEARCH,
Employer

on behalf of

WILLIAM VICTOR STEELE,
Alien

Thomas K. Mirabile, Esquire
For the Employer

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

JAMES GUILL
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 its 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 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 who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work and (2) employment of the alien will not adversely affect the wages and working conditions of U.S. workers similarly employed.

The procedures governing labor certification are set forth at 20 C.F.R. Part 656. 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 the prevailing working conditions through the public employment service and by other reasonable means in order to test 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 herein), and any written arguments of the parties. 20 C.F.R. §656.27(c) (1988).

Statement of the Case

National Institute for Petroleum and Energy Research, Employer, is a research institute located in Bartlesville, Oklahoma. On October 27, 1987 Employer filed an application for alien employment certification on behalf of William Victor Steele, Alien. The job title is Senior Chemist and the requirements for the job are a Ph.D. in Thermodynamics or Thermochemistry and five years of experience in the job offered. The job duties of the position are to coordinate various teams in thermodynamics research, supervise personnel in a full range of thermodynamic research, submit written and verbal reports and presentations at technical meetings, design highly precise combustion bomb calorimetry equipment, assimilate reports using a full range of thermodynamic disciplines, and obtain highly precise combustion calorimetry data (AF 29).

On May 13, 1988, the Certifying Officer ("CO") issued his Notice of Findings ("NOF") (AF 336). The CO's NOF was case in language that signifies both a Section 21(b)(2) "unduly restrictive requirements" issue and a Section 21(b)(6) "actual minimum requirements" issue. The CO began his NOF by citing Section 21(b)(2) and followed that cite with the following text:

The following employer's special requirements are unduly restrictive: five years in the job offered.

The alien's job history shows that the only experience in the job offered was with the petitioning employer, which cannot be counted. If the employer was willing to hire and train the alien, it should be willing to train a U.S. worker (AF 336). (emphasis in original)

Employer followed that NOF with a rebuttal on June 17, 1988 that addressed, inter alia, both the unduly restrictive requirements issue (AF 11-15,19) and the actual minimum requirements issue (AF 15,19-20). Thereafter, on June 30, 1988, the CO issued his Final Determination, which began with the following text:

The employer's documentation submitted to rebut the NOF does not support the employer's claim. The employer's argument centers around the alien's experience as a "combustion calorimetrist". The job title in the application is that of a Chemist requiring thermodynamic research, written and verbal reports, publications/presentations. Assimilating reports using thermodynamic discipline to obtain combustion calorimetry data.

The employer's requirement in Form ETA 750A is five years in the job offered, not in a related occupation. The only experience in the job offered was obtained with the petitioning employer which does not count, as was noted in the NOF. The employer failed to produce documentation to prove otherwise (AF 8). (emphasis in original)

The CO raised in his NOF and Final Determination both the Section 21(b)(2) issue, i.e., that the five year experience requirement is unduly restrictive, and the Section 21(b)(6) issue, i.e., that the alien did not meet the experience requirement before being hired. We find this in spite of the fact that the CO never cited Section 21(b)(6) in his NOF. The language of both documents indicates that the CO clearly had both issues in mind. Furthermore, Employer has cognizant of both issues, as it addressed both issues in its rebuttal (AF 11-15, 19-20), and in its Brief. (Employer's Brief at pp. 3-7, 12-14).

The CO cited two additional issues in his NOF and Final Determination. The CO cited §656.21(b)(7), which requires an employer to document that U.S. workers were rejected solely for lawful, job related reasons, and found that three U.S. workers were unlawfully rejected. Also, the CO cited §656.21(b)(4), which requires an employer to document that its efforts to locate U.S. workers for the job opportunity have been and continue to be unsuccessful. In his NOF, the CO had instructed Employer to contact Mr. Bob Peters of Transco Energy Company in Houston. The CO had given no explanation for his instruction to contact Mr. Peters, and Employer subsequently did not comply with the instruction (AF 8-9, 336).

The Employer filed a request for review on July 28, 1988 (AF 2-4). Along with the request for review, Employer submitted a motion for oral hearing (AF 5-6). Employer timely filed a brief on November 14, 1988. The arguments put forth by Employer in its request for review and in its brief have been duly considered.

Discussion

I

The first issue in this case is whether Employer has demonstrated that its requirement of five years of experience in the job offered, a requirement found to be unduly restrictive by the CO, arises from a business necessity. In In re Information Industries, Incorporated, 88-INA-82 (February 9, 1989) (en banc), we held that in order to establish business necessity under §656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform in a reasonable manner, the job duties as described by the employer.

Applying the first part of this test, we state the obvious by saying that experience in the job offered bears a reasonable relationship to that same occupation.

The second part of the test requires the job requirements to be essential to perform, in a reasonable manner, the job duties as described by the employer. In this regard, the record indicates that the Employer is a research institute doing business in the field of combustion

calorimetry (AF 26, 29). Employer asserts that combustion calorimetry is a highly technical, highly specialized field requiring years of experience to develop the necessary skills. Employer states that practicing combustion calorimetry is an art as well as a science, requiring high levels of manual dexterity, computational skills and imagination (AF 12, 26, 35). The projects and experiments carried out by Employer have included such highly sophisticated pursuits as the development of special purpose military fuels of high speed jet flight and the derivation of materials from petroleum, oil shale and coal for the Department of Energy (AF 28, 33-34, 314-315, 318, 328). Furthermore, the job duties listed on the ETA 750A indicate that the individual filling the position of Senior Chemist will be expected to coordinate research teams, supervise personnel and design equipment (AF 29). In short, the position to be filled is an upper level, supervisory position.

Therefore, due to the complexity and sophistication of Employer's business and due to the supervisory nature of the job offered, we find that five years of experience in the job offered is essential to perform, in a reasonable manner, the job duties as described by Employer.

II

Employer's requirement for the position at issue is five years of experience in the job offered. The CO found that the alien's only experience in the job offered was gained while working for Employer. If this be true, then Employer has violated §656.21(b)(6).

Section 656.21(b)(6) requires an employer to demonstrate that its requirement for the job represent the employer's actual minimum requirements for the job opportunity and that the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer. However, we have found a requirement of experience in the job offered to mean experience in the job duties, as described in item #13 of the ETA 750A, and not just experience in the job title. In re Integrated Software Systems, 88-INA-200 (July 6, 1988).

The record indicates that alien received his Ph.D. in Thermochemistry in 1968 and from 1970 to 1983 was employed as a Professor of Chemistry at the University of Stirling in Scotland, U.K. During this time, he taught courses in thermodynamics, conducted research and supervised graduate students in their own research. He built a thermodynamic measurement laboratory from scratch and designed all the calorimeters in the university workshop. During his tenure at the university, alien spent twelve months of sabbatical leave at the Argonne National Laboratory working in the fields of fluorine bomb calorimetry and the thermochemical aspects of nuclear and geothermal energy utilization (AF 18, 30-31, 70). In addition, alien has studied under one of the foremost European combustion calorimetrists and has authored over fifty scholarly articles and nineteen presentations regarding thermodynamics (AF 27, 31, 71-76, 84-312). Therefore, the evidence indicates that alien met the minimum requirement of five years of experience in the job duties, as described on the ETA 750A, before being hired for his current position by Employer.

III

The CO found that U.S. workers Des, Phutela and Reddy were rejected for other than lawful, job related reasons and instructed Employer to recontact and reconsider these applicants or, in the alternative, to document lawful reasons for their rejection (AF 336). Employer responded by outlining various reasons why each of these workers is not qualified for the position (AF 16-17,5 8-59).

A careful review of the U.S. workers' responses to the job advertisement along with Employer's assessment of their credentials indicates that although each of these three workers may possess much qualifying experience, each lacks specific experience in designing highly precise combustion bomb calorimetry equipment (AF 58, 362-72). This duty was listed by Employer on item #13 of the ETA 750A (AF 29), and we have determined that requiring experience in this duty is not an unduly restrictive requirement for the position. (Supra, Section I of this Discussion). Furthermore, alien obtained significant experience designing combustion bomb calorimetry equipment during his sabbatical studies at the Argonne National laboratory (AF 30,70).

Because each of the applicants' responses to Employer's advertisement fails to demonstrate experience in designing combustion bomb calorimetry equipment, we find that Employer rejected these applicants for lawful, job related reasons. In re Anonymous Management, 87-INA-672 (September 8, 1988).

IV

In his NOF the CO required Employer to send a job opening announcement to Mr. Bob Peters at Transco Energy Company in Houston; the CO did not offer any explanation for his request (AF 336). In its rebuttal, Employer stated that it had carried out extensive recruiting efforts and that it had no knowledge of Mr. Bob Peters or of Transco Energy Company. Employer did not follow the CO's instructions to contact Transco (AF 21-22). In his Final Determination, the CO included Employer's refusal to follow these instructions as a ground for denial (AF 9).

In In re Intel Corporation, 87-INA-570, 87-INA-571 (December 11, 1987), we held that a CO, under Section 656.24(b)(2)(i), may require an employer to conduct additional recruitment if he offers a reasonable explanation of why employer's recruitment was inadequate and how the additional recruitment efforts he is requiring would add to the test of the job market. In the instant case, the CO offered not a scintilla of explanation as to why such an unusual recruitment effort be made, and as such Employer was justified in not carrying out such recruitment.

Accordingly, we hold that Employer's recruitment efforts met the regulatory requirements, and establishes that there are no qualified and available U.S. workers. Therefore, certification should have been granted, and the CO's denial of certification must be reversed.

V

Finally, in light of our disposition of all issues in this case, Employer's motion for an oral hearing on the merits (AF 5-6) is moot and is therefore denied.

ORDER

The Final Determination denying certification is hereby REVERSED and labor certification is GRANTED.

JAMES GUILL
Administrative Law Judge