



DATE: 13 NOV 1987
CASE NO. 87-INA-529

IN THE MATTER OF

MULTI-PROCESS INTERNATIONAL CORP.
Employer

on behalf of

YUH-JING HAN
Alien

BEFORE: Litt, Chief Judge, Vittone, Associate Chief Judge, and Brenner, DeGregorio, Fath,
Levin and Tureck, Administrative Law Judges

Jeffrey Tureck
Administrative Law Judge

DECISION AND ORDER

This proceeding was initiated by the above-named Employer who requested review, pursuant to 20 C.F.R. Section 656.26, from the determination of a Certifying Officer of the U.S. Department of Labor denying an application for labor certification which the Employer submitted 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).

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 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.

The procedures governing labor certifications 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. § 656.21 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 (hereinafter AF), and any written arguments of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

Multi-Process International Corp. is located in Jamaica, New York and is engaged in the business of customhouse brokerage, i.e., the importing and exporting of goods to and from foreign countries. On April 28, 1986 the company filed an application for labor certification on behalf of the Alien, Yuh-Jing Han. (AF 8). The Alien's job title was Commodity Analyst, and the duties of the position were to identify and classify importing/exporting material, including chemicals, plastics, electronics and special scientific instruments, and to communicate with customers in English, Mandarin and Taiwanese. The requirements of the position were listed as a B.S. degree in Chemical Engineering with one year of graduate study in polymer science, 3 months training in customhouse brokerage, 6 months experience in analyzing plastic materials or 6 months related experience, and the ability to communicate in English, Mandarin and Taiwanese.

The Notice of Findings was issued on April 2, 1987. (AF 18-20). First, the Certifying Officer found the training and education requirements of the job to be too restrictive and tailored to the Alien's background. She stated that companies pack and ship sophisticated scientific and volatile material all the time without the benefit of employees with degrees in particular disciplines to handle and direct such packing, and that people involved in customhouse brokerage acquire knowledge through experience, so that training is not essential. In fact, the Certifying Officer questioned whether the job is needed and whether it is full-time and permanent in nature. The Certifying Officer therefore required the Employer to amend the requirements referred to or else document how the requirements arise from business necessity.

In addition, the Certifying Officer found that the foreign language requirement had not been supported by evidence of business necessity. She stated that the Employer had failed to document the percentage of people with whom he deals who cannot communicate in English. The Employer had also failed to document the percentage of his business that is dependent upon the language, the percentage of time that the Alien would use the language and how the absence of the language would adversely impact business.

Employer responded on April 23, 1987. (AF 21-135). Employer first modified the requirements for the position, asking that the applicants possess only four years of college with a background in plastics, chemicals and metals. Furthermore, the Employer stated that the position at issue requires the employee to possess knowledge of the materials and goods being shipped as well as the relevant laws and regulations so that the employee may properly advise customers with regards to shipping conditions and proper preparations. As support for this assertion, the Employer submitted export airway bills. Employer also removed the training requirements for the position.

Next, the Employer stated that 90% of its export shipments go to the Peoples' Republic of China and 5% go to Taiwan, that 90% of its vendor communications are in Mandarin, and that it is absolutely necessary for the Commodity Analyst to speak both English and Mandarin. As support for this assertion, the Employer submitted copies of correspondence written in Chinese and copies of invoices for import shipments.

Finally, the Employer simply stated that the job offer is for a permanent, full-time position, 9:00 a.m. to 5:00 p.m., Monday to Friday. No support for this assertion was submitted.

The Final Determination was issued on May 4, 1987. (AF 140-141). The Certifying Officer noted that the Employer had successfully documented the business necessity of the language requirement. However, she denied labor certification based on two independent grounds. First, she found insufficient evidence to show that the company needed a permanent full-time Commodity Analyst and therefore denied certification based on 20 C.F.R. 656.50.¹ The Certifying Officer found that materials imported from foreign countries into the U.S. are inspected and classified by Customs Officials before reaching the buyer and that the documentation provided by the company showed that it had engaged mostly in importing materials rather than exporting materials.

As an alternative ground for denial, the Certifying Officer found the modified requirements for the position to be unduly restrictive and therefore denied certification based on 20 C.F.R. 656.21(b)(2).² Although the employer had reduced the requirements for the position to four years of college with a background in plastics, chemicals and metals, the Certifying Officer found even these requirements to be too restrictive.

The Employer requested a review of this decision on May 15, 1987. (AF 265). A brief was received on July 15, 1987.

Discussion

¹ 20 C.F.R. 656.50 defines "Employment" as permanent full-time work by an employee for an employer other than oneself.

² 20 C.F.R. 656.21(b)(2) states:

The Employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:

(i) the job opportunity's requirements, unless adequately documented as arising from business necessity:

(A) Shall be those normally required for the job in the United States;

(B) Shall be those defined for the job in the Dictionary of Occupational Titles (D.O.T.) including those for subclasses of jobs.

In response to the Certifying Officer's Final Determination, the Employer submitted over a hundred pages of invoices, bills of lading, etc., showing the export activity of the employer. (AF 142-260). Although such documents were explicitly requested in the original Notice of Findings (AF 132) they were not submitted to the Certifying Officer on rebuttal and cannot be considered by this Board. Further, these documents do not aid Employer's position sufficiently to justify a remand to the Certifying Officer. For these papers are insufficient in and of themselves to rebut the Certifying Officer's finding that no full-time position exists. Although these documents do demonstrate export activity, they do not demonstrate a regular and continuous volume of export activity great enough to establish the need for a full-time Commodity Analyst. The raw, uncategorized evidence contained in the file sheds no light on the issue. In short, the Employer failed to file these documents in a timely manner, and they are not so probative that a remand is justified.

In addition, although the Employer agreed to reduce the educational and training requirements to include only four years of college with a background in plastics, chemicals and metals (AF 134), these requirements are still too restrictive for the position at issue. In the Notice of Findings, the Certifying Officer found that other companies pack and ship sophisticated, scientific and volatile material without the benefit of employees with degrees in particular disciplines to handle and direct such packing. (AF 132). The Certifying Officer repeated in the Final Determination that the job requirements were too restrictive. (AF 263). However, the Employer has failed to rebut these findings either in response to the Notice of Findings or in response to the Final Determination.

Furthermore, the job requirements listed, i.e., four years of college with a background in plastics, chemicals and metals, appear to be tailored to match the Alien's qualifications more than to match the actual requirements of the job. The record indicates that the Alien has a four-year degree in Chemical Engineering. (AF 261). However, a review of the 119 pages of evidence that was submitted to demonstrate export activity reveals that slightly over half (62 pages) deals not with chemicals and plastics but rather with computer systems, computer parts, computer software and miscellaneous electronic equipment.³ Thus, whereas the Certifying Officer found that the job requirements were not those normally required for the job in the United States and were not arising from business necessity,⁴ the Employer has failed adequately to rebut either of these findings.⁵

³ See AF 144-147, 149, 151-153, 159-161, 164, 165, 167, 170, 171, 173, 175-177, 180-184, 186, 188-191, 196, 198-201, 204-207, 210-214, 217, 218, 222, 223, 225-230, 232, 246, 247, 249, 251-254.

⁴ 20 C.F.R. 656.31(b)(2), *supra*, note 2.

⁵ Our dissenting colleague apparently reads 20 C.F.R. § 656.25(c) to require the Certifying Officer to issue a new Notice of Findings with further opportunity for rebuttal any time an employer has filed evidence or argument in an attempt to cure a defect pointed out in a
(continued...)

In light of these findings, and the record as a whole, we conclude that the Certifying Officer's denial of certification is reasonable and must be sustained.

ORDER

The decision of the Certifying Officer to deny labor certification is affirmed.

For the Board:

Jeffrey Tureck
Administrative Law Judge

DeGregorio, Administrative Law Judge, dissenting:

I think the affirmance of the denial of labor certification on the ground that the job requirements are too restrictive is improper. The Certifying Officer, while commenting on the reduced requirements as still restrictive, explicitly stated that this “is somewhat of a moot issue in this determination, the primary basis of which is employer's inability to document a permanent, full-time job offer.” AF 140. Thus, this ground is available to support the denial of certification only on the assumption that the Board performs a de novo review of the case. In any case, Employer would be entitled to an opportunity to rebut any objections raised to the new requirements. See 20 CFR 656.25(c).

But I am more concerned with the second ground, which is far-reaching. The Board does not dispute that Alien has been working for Multi-Process since September of 1985, as a commodity analyst, 40 hours per week. See AF 9. It does not say that such a job is a sham, existing only on paper. The Board denies certification on the ground that Multi-Process has not demonstrated the need for such a full-time job. With all due respect, I think it is not for this Board to tell any employer in the country what job he needs to have done, or how long it should take to do it.

NICODEMO DeGREGORIO
Administrative Law Judge

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⁵(...continued)
previous Notice of Findings. We find no such requirement in that or any other section of Part 656. Rather, when the rebuttal to a Notice of Findings does not cure the defect found by the Certifying Officer, the Certifying Officer may issue a Final Determination.