



DATE: JAN 4 1989
CASE NO. 87-INA-701

IN THE MATTER OF

Tarmac Roadstone (USA), Inc.,
Employer,

on behalf of

Michael Wallis,
Alien

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

JOHN M. VITTONI
Deputy Chief 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 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.

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. § 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. § 656.26(e).

Statement of the Case

On November 15, 1985, Employer Tarmac Roadstone (USA) Inc., filed an application for labor certification on behalf of Michael Wallis (AF 125), a citizen of the United Kingdom. (AF 497). The position for which certification is sought is President/CEO of Employer's business involving ready mix concrete. (AF 125). Employer described the job duties as follows:

Plan and implement business objectives of U. S. subsidiary to U.K. parent corporation that evaluates, acquires, and profitably operates ready mix concrete plants as well as related concrete product and quarry industries, by introducing advanced concrete technology and market planning methods. Develop organizational policies, responsibilities, and procedures to coordinate acquisition activities, operations of multiple U.S. subsidiaries generating over \$200 million per year in sales, and attain objectives of U.K. parent firm. Direct formulation of financial programs to fund acquisitions, corporate operations, and maximize returns on investment capital.

(AF 125). Minimum job requirements included a Bachelor's or equivalent degree in Business Administration or Economics, and either four years' experience in the job offered or eight years experience as a Senior Corporate Executive (President or Vice-President) for a ready mix concrete company, with four years of this experience in evaluating and acquiring concrete companies and related quarry industries. (AF 125). All experience had to be with a company that generates an average of \$100 million per year in gross sales. (AF 125).

The Notice of Findings ("NOF") was issued on November 28, 1986. (AF 80-A - 87-A). The Certifying Officer, misreading the minimum job requirements, found that "a college degree plus 12 years experience for a total of 14 years experience" was excessive, and that Employer had to show that this was a business necessity. The Certifying Officer also found that the requirement that an applicant had to have experience as a Senior Corporate Executive with a ready mix concrete company generating over \$100 million in annual sales was unduly restrictive, and that Employer had to show that this also was a business necessity. The Certifying Officer further found that 12 U.S. applicants had been improperly rejected due to the unduly restrictive requirements previously mentioned. Finally, the Certifying Officer found that the job was not open to U. S. workers because "72 U.S. workers applied, none of these were considered for the job."

On January 9, 1987, Employer submitted a letter in rebuttal to the NOF. (AF 52-79). Additional affidavits were submitted on February 18, 1987, (AF 38-51), and February 24, 1987. (AF 35-37). Employer first corrected the Certifying Officer's misinterpretation of the job's minimum requirements, and then went on to show how the minimum requirements were essential for the job. Employer's assertions were supported by affidavits from executives of

corporations similar to Employer and from a university professor who specializes in Human Resource Management. Finally, Employer detailed its objections to each of the U. S. applicants whom the Certifying Officer had found to be improperly rejected.

A second Notice of Findings ("SNOF") was issued on March 10, 1987. (AF 29-34). The Certifying Officer found that new issues had arisen out of the rebuttal letter dated January 9, 1987. These new issues were that the job was not open to U.S. workers because "[t]he alien has been in the job since [December, 1982] and the employer is only interested in the alien," and that the Alien did not have the experience required by Employer. As a basis for the latter conclusion, the Certifying Officer stated that "the employer cannot include as a requirement any experience the alien gained while in the position for which certification is sought." Subtracting the Alien's four years' experience with Employer, the Certifying Officer found that "[i]t appears that the alien did not have eight years [sic] experience with companies which gross \$100M when hired in the position for which certification is sought." Because the Alien did not appear to meet the minimum requirements, the Certifying Officer determined that Employer had not documented the minimum acceptable requirements of the job. The Certifying Officer required that the complete rebuttal be received by April 14, 1987, but granted Employer an extension to April 30, 1987. (AF 28).

Employer submitted a letter in rebuttal to the SNOF on April 27, 1987. (AF 16-23). Employer asserted that simply because the Alien held the position for which labor certification is sought does not mean that the job opportunity was not open to U.S. workers, and that Employer had followed the labor certification regulations in good faith, evaluating all U.S. workers who had applied for the job and measuring each applicant against the minimum requirements. Regarding the Alien's qualifications for the job, Employer noted that the Alien had acquired his experience with Pioneer Concrete Services Ltd. in the United Kingdom from 1974 to 1982. During that period, Pioneer had average sales of \$70 million per year. When expressed in 1982 dollars, this averaged more than \$100 million in sales per year. Employer asserted that this demonstrated that the Alien had met the minimum requirements. Employer also provided exhibits which supported his calculations.

The Final Determination was issued on August 6, 1987. (AF 12-14). The Certifying Officer found that Employer had established that its experience requirements as to length and as to involvement with a company generating over \$100 million in sales annually were not unduly restrictive, and that no applicant had been rejected based on unduly restrictive requirements. Additionally, the Certifying Officer implicitly accepted Employer's rebuttal of the finding that the Alien did not meet the minimum job requirements.¹ However, the Certifying Officer found

¹ In discussing this finding, the Certifying Officer noted that Employer had adjusted prior years' sales figures for inflation to show that the Alien's experience met the minimum requirements. Without questioning this methodology, the Certifying Officer then found that Employer had failed to perform the same task for U.S. applicant Raymond C. Czarnecki. Implicit in this is the notion that Employer had satisfactorily demonstrated that the Alien met the minimum requirements. Additionally, 20 C.F.R. § 656.25(g)(2)(ii) requires that the Final

(continued...)

that one applicant, Raymond C. Czarnecki, had met the minimum requirements and had still been rejected. The Certifying Officer noted that Employer did not go through the same analysis for Mr. Czarnecki as Employer had for the Alien to determine whether Mr. Czarnecki's experience, when adjusted for inflation, was for a company that generated \$100 million in sales per year.

Employer submitted its request for review on August 19, 1987. (AF 1-6). A brief in support of Employer's position was filed on November 2, 1987.

Discussion

To issue a Final Determination denying labor certification, a Certifying Officer must follow a specified path. First, the Certifying Officer must issue the NOF, letting the employer know that the Certifying Officer is contemplating a denial, specifically stating the bases for the proposed denial, and informing the employer that it is allowed to submit documentation and argument to cure the defects or rebut the bases for the denial. 20 C.F.R. § 656.25(c)(2)-(3). If the employer timely submits such documentation and argument, the Certifying Officer must then examine this additional information in conjunction with that previously received and determine whether to grant or deny labor certification. 20 C.F.R. § 656.25(f). If the Certifying Officer decides that a denial is still warranted, the Final Determination is issued, stating the bases for the denial. 20 C.F.R. §656.25(g)(2)(ii). Any basis for denial appearing in the Final Determination must have first appeared in the NOF. See In the Matter of Downey Orthopedic Medical Group, 87-INA-674 (March 16, 1988).

In the instant case, Employer was informed in the NOF that the Certifying Officer was contemplating a denial of labor certification because 12 U. S. applicants had been rejected "based on unduly restrictive requirements." Raymond C. Czarnecki was among this group. Employer was advised that to rebut the conclusion that the requirements were unduly restrictive, it would have to prove that the requirements were a business necessity. The SNOF did not alter this.

In the Final Determination, the Certifying Officer found that Employer had established that its requirements were not unduly restrictive. However, the Certifying Officer still denied labor certification, finding that Raymond C. Czarnecki met Employer's minimum requirements and that Employer did not prove to the contrary. This basis for denial was not specified in the NOF as required by 20 C.F.R. § 656.25(c)(2). To deny labor certification at this stage of the proceedings on a basis which was not mentioned in either of the Notices of Findings violates § 656.25 and the due process considerations this section was set up to preserve by not allowing Employer to rebut this conclusion. See Downey, supra.

¹(...continued)

Determination shall "[s]tate the reasons for the determination." Nowhere in the Final Determination does the Certifying Officer state that a reason for denying labor certification is because the Alien did not meet the minimum requirements. Accordingly, this cannot be a reason for denial.

To ensure that Employer's due process rights are not violated, we remand this case to the Certifying Officer pursuant to 20 C.F.R. § 656.27(c)(3) for further factfinding and determination. The Certifying Officer is instructed to afford Employer an opportunity to show, through the same methodology used to qualify the Alien, that Raymond C. Czarnecki does not meet Employer's minimum requirements and thus was not improperly rejected.

ORDER

The Final Determination of the Certifying Officer is vacated, and this case is remanded to the Certifying Officer for further findings and actions consistent with this Decision and Order.

JOHN M. VITTONI
Deputy Chief Judge

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