



DATE: AUG 17 1988
CASE NO: 88-INA-98

IN THE MATTER OF

FRITZ GARAGE,
Employer

on behalf of

MANFRED SCHLEGEL,
Alien

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

GEORGE A. FATH
Administrative Law Judge

DECISION AND ORDER

The above named Employer requests review, pursuant to 20 C.F.R. Section 656.26, of the United States Department of Labor Certifying Officer's denial of its application for labor certification. 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].

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: (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 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 similarly employed United States workers.

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. §656.27(c).

Statement of the Case

The employer, Fritz Garage, filed an application for alien employment certification to enable the alien to fill the position of foreign car mechanic. Four years experience in the job offered was required to qualify for the position. The job duties included repairing and overhauling German automobiles, examining the vehicle to determine the nature and extent of damages or malfunctions, planning the work procedure, removing the units to be worked on, repairing, replacing, or rebuilding parts, doing rewiring, brake and front end adjustment and re-alignment and minor body work. (AF 27-28)

On August 22, 1986, the Certifying Officer issued a Notice of Findings denying certification on the ground that the employer unlawfully rejected two qualified U.S. workers who applied for the position. (AF 23-25) The employer unsuccessfully attempted to reach one applicant by telephone and by mail. A second U.S. worker, Jenó Nemeth, had eight years mechanic experience on import cars and five years training on European cars.¹ The employer rejected this applicant because he has done very little work on Volkswagens and did not satisfactorily respond to questions asked by the employer.

The employer contends that the first applicant was not available because he could not be reached by telephone and did not respond to a letter. The employer contends that the second U.S. worker, Jenó Nemeth, was rejected for lawful, job-related reasons because he was not an expert in VW repair, could not answer most questions about VW repair and was not interested in a regular, salaried position. (AF 17-22) However, the Certifying Officer noted that the employer failed to explain what questions were asked of applicant Jenó Nemeth and why he was not qualified.

Discussion and Findings

The regulations provide that if U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(7). The employer is required to explain, with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed. 20 C.F.R. §656.21(j)(1); See also, Gladysz v. Donovan, 585 F. Supp. 50 (N.D. Ill 1984). A U.S. worker is considered able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is

¹ He has over four years of experience as a foreign car mechanic with two San Diego car repair shops, from July 1981 to November 1985. He also has four years of experience with the Hungarian Government Transportation Department from 1976 to 1980 as Transportation Director supervising the servicing of vehicles including BMW and Mercedes. AF 35

able to perform in the normally accepted manner, the duties involved in the occupation as customarily performed by other U.S. workers similarly employed.

An applicant is considered qualified for a job if he meets the minimum requirements specified for that job in the labor certification application. See, In the Matter Of International World of Travel, Inc., 87-INA-568 (December 8, 1987); In the Matter Of Microbilt Corporation, 87-INA-635 (January 12, 1988). Here, the resume of Jenő Nemeth indicates that he has approximately eight years experience as an auto mechanic on import cars, including Mercedes, BMW, Volkswagen and Volvo. He was rejected by the employer because he "has done very little work on Volkswagens and could not answer most of the questions I asked him on VW engines and repairs on them." Therefore, the employer concluded that he is not qualified for the position because the "shop is known for work on VW's, with only incidental work on other models of German cars." AF 30. Both the employer's rebuttal evidence and appeal request note that the applicant is not an expert in Volkswagen repair (AF 7, 21). However, expertise in Volkswagen repair was not listed as a requirement for the position on either the ETA 750A form or in the advertisements. An employer cannot subsequently reject a U.S. worker because he lacks a requirement which was not disclosed. See, In the Matter Of The Quay Restaurant, 87-INA-504 (November 18, 1987); In the Matter Of Villa Doria, 87-INA-655 (January 20, 1988); In the Matter of Gould Semiconductors, Inc., 87-INA-631 (January 28, 1988). Such an important distinction should not be left to being "implicit" but unstated, as urged by our dissenting colleague. Among other vices, the failure by the Employer to be explicit omits an incentive for U. S. mechanics who primarily or exclusively repair Volkswagens to respond to the advertisement.

Additionally, the employer failed to document, with specificity, the lawful job-related reasons for rejecting Mr. Nemeth. The employer contends that it is better able to evaluate the qualifications of a mechanic and that the Certifying Officer could not justifiably find the applicant qualified to perform the job duties based solely on his resume.² The employer misconceives the nature and purpose of this proceeding. The issue is whether the employer has made a convincing showing that Mr. Nemeth could not perform the job in an acceptable manner, as contemplated by §656.24(b)(2)(ii) of the regulations. This issue was for the Certifying Officer to decide in the first instance. See, In the Matter of Screen Actors Guild, 87-INA-626 (March 9, 1988). Therefore, we reject employer's contention which, in effect, shifts the burden of proof to the Certifying Officer to show that the U.S. worker was qualified and places the employer as the judge of its own case. Id.

The burden is on the employer to consider U.S. workers in good faith and to document that U.S. workers are unqualified. Even if we were, *arguendo*, to agree with the dissent that the

² A Certifying Officer may reasonably rely on a resume to determine whether a U.S. applicant is minimally qualified for a position. See generally, In the Matter of Gould Semiconductors, Inc., 87-INA-631 (January 29, 1988); In the Matter of Dressshapers Lingerie, 88-INA-6 (February 23, 1988) See also, In the Matter of Eny Textiles, 87-INA-641 (January 22, 1988), holding that a U.S. worker was clearly unqualified for a position based on a comparison of his resume with the employer's requirements.

requirement for Volkswagen experience is implicit, we would affirm the Certifying Officer. As noted above, employer's report of recruitment stated that Mr. Nemeth "could not answer most of the questions I asked him on VW engines and repairs on them (AF 30)". The Certifying Officer in his Notice of Findings correctly found this vague statement nonconvincing as a basis for finding Mr. Nemeth unqualified to repair Volkswagens, given his extensive repair experience, including work on Volkswagens. AF 25. The Certifying Officer correctly confirmed this finding in his Final Determination, noting that the employer never improved on its vague basis, which demonstrated his lack of qualifications to repair Volkswagens. AF 16.

Equally unconvincing is the employer's argument that the U.S. applicant wasn't really interested in the position because he wanted to pursue a career in free-lance mechanic work. However, the employer produced no documentation to substantiate this assertion. Even the employer concedes that Mr. Nemeth did not refuse to take the job. (AF 22) Labor certification is granted only in cases where the Secretary of Labor has certified to the Secretary of State and the Attorney General that there are not sufficient workers who are able, willing, qualified, and available to perform skilled or unskilled labor. 8 U.S.C. §1182 (a)(14). Under the circumstances of this case, we agree with the Certifying Officer that the employer did not convincingly document that no U.S. workers were available to fill this position.

ORDER

It is adjudged and ordered that the determination of the Certifying Officer denying labor certification be, and is hereby, **AFFIRMED**.

For the Board:

GEORGE A. FATH
Administrative Law Judge

GAF/SN

Jeffrey Tureck, Administrative Law Judge, dissenting:

I dissent from the majority's affirmance of the denial of certification because I believe the Employer established that the applicant, Mr. Nemeth, did not meet the job requirements.

First, I disagree with the majority's holding that expertise in Volkswagen repair was not a requirement for the job. Knowing how to fix Volkswagens, which undoubtedly comprise a plurality, and perhaps even a majority, of the German cars in this country, is implicit in the requirement of being able to repair German cars. Moreover, the Certifying Officer ("CO") did not contest, either in the Notice of Findings or the Final Determination, that repairing Volkswagens was an essential part of the job. Rather, he found that "[i]t is not convincing that someone with [Mr. Nemeth's] background cannot work on VWs." (AF 25; see also AF 16). Therefore, that

repairing Volkswagens is not a requirement of the job is being found for the first time in this decision, and overrules the CO on an issue that was not disputed by either party.

Second, both the majority and the CO place great reliance on Mr. Nemeth's resume to establish that he met the requirement of four years in the job offered -- i.e., repairing German cars (AF 27). However, as the Employer noted in its rebuttal to the NOF (see AF 21), Mr. Nemeth's resume (AF 35-36) fails to establish that he has the requisite experience.¹ In fact, his resume shows only a bit more than one year, from July 1981 to August 1982, in which it appears that he worked repairing predominantly German cars. He spent the most recent three-year period repairing unspecified cars for a company called ""Import Car Service"; spent the period from June 1976 to August 1980 in a management position, in charge of servicing the Hungarian Government Transportation Department Fleet; and spent the years 1971 to 1973 in Hungary repairing "all foreign vehicles" (AF 36). Finally, he spent the three-year period from 1973 to 1976 training for the management position he filled from 1976 to 1980.

In short, the applicant's resume establishes no more than one year in which he worked repairing primarily German cars. Under these conditions, there is no basis for either the CO or this Board to find that the applicant met the minimum requirements for the job. There is even less of a basis to dispute Employer's evaluation of the applicant's knowledge and ability, following a face - to - face interview, that Mr. Nemeth "has done very little work on Volkswagens and could not answer most of the questions . . . asked [of] him about VW engines and repairs on them." (AF 30). Rather than being contradicted by the applicant's resume, this evaluation actually is consistent with it.

Therefore, I would find that Employer has established that there were no U.S. workers qualified for the position. Certification should have been granted.

JEFFREY TURECK
Administrative Law Judge

JT/jb

¹ This aspect of Employer's rebuttal was not discussed by the CO.