



DATE: APRIL 4, 1989
CASE NO. 88-INA-415

IN THE MATTER OF

AEP INDUSTRIES
Employer

on behalf of

CESAR PINO
Alien

Appearance: Frank Mazzocchi, Esquire
For the Employer

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

LAWRENCE BRENNER
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 a 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.

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 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 ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

The Employer, AEP Industries, filed an application on behalf of the Alien, Cesar Pino, for the position of "film set up and lead man" on extruders of low density polyethylene (AF 7). The Employer hired the Alien, in July 1979, for the same position as the one for which labor certification is now sought. The Alien had no experience when he was first hired. The Alien stopped working for the Employer in December 1981, and worked in unrelated employment until May 1984, when he returned to work for the Employer in the same position as one he had left (AF 4).

In her March 22, 1988 Notice of Findings (AF 23-24), the Certifying Officer (C.O.) proposed to deny the Employer's application for labor certification. Noting the Alien's lack of experience when first hired for the same job, the C.O. found that the Employer had failed to document that the two years of experience which it required were the minimum necessary for the performance of the job; and that the Employer had failed to document why it was not feasible to hire workers with less training and/or experience. See 20 C.F.R. §656.21(b)(6).

The Employer's rebuttal (AF 25) consisted of a letter, dated April 15, 1988, in which it noted the growth of its business. In her April 29, 1988 Final Determination (AF 28-29), the C.O. rejected the Employer's Rebuttal and, therefore, denied labor certification. The Employer requested a review of the denial (AF 34-36) and filed a brief in support of review. The C.O. did not file a brief.

Discussion

Section 656.21(b)(6) states that:

An employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and 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 (Emphasis added).

In a letter dated July 7, 1987 (AF 10), its Rebuttal (AF 25), and Appeal Brief, the Employer contended that it is not feasible to train someone, as the Alien was trained, because the company has grown 247 percent between 1979 and 1987, with annual production volume estimated to be \$72,000,000.00. Furthermore, there are presently 17 set up and lead men, who

are extremely busy due to the increased volume, whereas there were only 10 at the time the Alien was trained. Finally, the person who trained the Alien in 1979, formerly the shift supervisor, is now the production manager and his position does not allow him to train individuals (AF 25). Accordingly, Employer argues that it is "impossible" for it to now train a new employee, and that it has made a valid business decision not to maintain a training program. Thus, there is no one available to train a new worker. In addition, the Employer further contends that the C.O. "offer(s) no evidence, surveys, reports, etc. that would indicate that expanding businesses are better able to absorb cost such as the costs of training an alien." Therefore, the C.O.'s denial of labor certification was an abuse of discretion. (See Appellate Brief, pp.3-4). We disagree.

The general rule is that labor certification will be denied under section 656.21(b)(6) when the alien has been employed in the position for which certification is sought and has gained experience which is required by the job offer while working for the employer in that position. The exception requires the employer to document that it is now not feasible to hire workers with less training or experience than that required by the employer's job offer.

The burden is not on the C.O. to offer evidence, surveys, reports, etc., documenting that the Employer can offer the same training to a U.S. worker, as was offered to the Alien. To the contrary, the burden clearly rests with the Employer to document why it is no longer feasible to do so.

In the present case, the Employer's statements of infeasibility, made in two letters by its personnel manager, are inadequate to invoke the exception to the general rule. See Pancho Villa Restaurant v. U.S. Department of Labor, 796 F.2d 596 (2d Cir. 1986); Roque & Robelo Restaurant & Bar, 88-INA-148 (March 1, 1989) (en banc). Hoffmann-LaRoche, 88-INA-30 (July 21, 1988); G. C. Construction Corp., 88-INA-20 (May 9, 1988); MMMATS, Inc., 87-INA-540 (November 24, 1987). The Employer has not established why its greatly expanded production volume combined with its substantially greater number of people performing the set-up and lead man job does not provide it with even greater flexibility now to train a worker with no experience. See Pancho Villa Restaurant and Roque & Robelo Restaurant & Bar, *supra*. It was open to the Employer to show that in the intervening years since the original hiring of the Alien, during which many persons were hired for the same occupation, none were hired with less than the two years of experience now being required. The Employer has not even alleged, let alone established this.

In summary, the Employer was willing to originally hire the Alien without any experience, and has not documented that it is now infeasible to hire a U.S. worker with less than two years of experience. Therefore, the Employer has failed to establish that its stated minimum experience requirement is its actual minimum requirement, in violation of section 656.21(b)(6).

ORDER

The Final Determination of the Certifying Officer denying labor certification is
AFFIRMED.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/MP/gaf