



DATE: April 12, 1989
CASE NO. 88-INA-417

IN THE MATTER OF

SUPER SEAL MANUFACTURING CO.
Employer

on behalf of

RICARDO MESA
Alien

Appearance: Frank J. Mazzocchi, Esquire
For the Employer

BEFORE: Litt, Chief Judge; and Brenner, 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.

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

Statement of the Case

The Employer, Super Seal Manufacturing Company, filed an application for behalf of the alien, Ricardo Meza, for the position of production line assembler (AF 40), and also submitted a request for a Schedule B waiver (AF 19). The job duties include assembling window frames and setting balance tension on glass sashes using power screw driver, drills and tension tools. The Employer listed the minimum requirements as four years of grade school education and six months of experience in the job offered. The Employer hired the alien in July 1985 for the same position as the one for which labor certification is now sought. The alien had no relevant experience when he was first hired (AF 4-5).

In her April 22, 1988, Notice of Findings (NOF) (AF 26-27), the Certifying Officer (C.O.) denied the Employer's application for labor certification. Noting the alien's lack of experience when hired for the same job, the C.O. found that the Employer had failed to document that the six months 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 experience. See 20 CFR §656.21(b)(6).

The Employer's rebuttal (AF 28) consisted of a letter, dated May 18, 1988, in which it outlined the growth and expansion of its business, and noted that the individual who had trained the alien was no longer with the company.

In her May 31, 1988, Final Determination (AF 35-36), the C.O. rejected the Employer's rebuttal and, therefore, denied labor certification. The Employer requested a review of the denial (AF 44-47) 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 its rebuttal (AF 28) and Appeal Brief, the Employer contended that it is not feasible to train someone, as the alien was trained, because the Employer's volume of business has increased from \$2,000,000.00 to \$12,000,000.00; the number of production line assemblers has increased from 15 to 44;^{1/} the individual who trained the alien no longer works for the company; and most of the orders must be filled within certain time limits. Accordingly, the Employer argues that "(f)or us to use one of our employees or supervisors to train a new worker, given these time constraints and the increase of business, would be detrimental to our company's interests" (AF 28). In support of its position, the Employer contends that the C.O. offers "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 constitutes 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 contention, made in its rebuttal, that it would be detrimental to its business interests to have one of the 44 production line assemblers, or one of the department supervisors, train a new worker, is insufficient to establish infeasibility and thereby invoke the exception to the general rule. See Pancho Villa Restaurant, Inc. v. 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).

In summary, the Employer willingly hired the alien in July 1985 without the requisite experience, and has not documented that it is now infeasible to hire a U.S. worker with less than six months of experience.

The Employer has failed to establish why its greatly expanded business and its extensive growth in manpower has not provided it with greater flexibility in training a new worker. See Pancho Villa Restaurant, Inc., *supra*; Roque & Robelo Restaurant & Bar, *supra*. In the present case, the Employer has not attempted to produce evidence that the 29 additional production line assemblers, who were hired between July 1985 (when the alien was hired) and February 1987

^{1/} Employer's rebuttal represents that the number of production line assembler increased to 44. On the other hand, counsel for the Employer stated in his brief, at page 3, that there are presently 14 production line assemblers. The latter is apparently a typographical error.

(the date of the labor certification application) all had the six months of experience now being hired. In the absence of such a showing, 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). We reach the same result here as in the strikingly similar case of AEP Industries, 88-INA-415 (April 4, 1989) (en banc).

ORDER

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

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/MP/gaf