



DATE: MAY 4 1989
CASE NO. 88-INA-420

IN THE MATTER OF

MARATHON HOSIERY CO., INC.
Employer

on behalf of

HAMIDA AKERBALI JAMANI
Alien

Steven Lyons, Esq.
New York, NY
For the Employer

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

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

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"). The Employer requested review from U.S. Department of Labor Certifying Officer Bette F. Roy's denial of a labor certification application pursuant to 20 C.F.R. §656.26.

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: (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 United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations 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 a labor certification is based on the record upon which the denial was made, together with the request for administrative - judicial review, as contained in an Appeal File ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case

The Employer, Marathon Hosiery Co., Inc., filed an application for labor certification on behalf of the Alien, Hamida Akerbali Jamani, for the position of Accountant (AF 9).

In her November 24, 1987 Notice of Findings ("NOF") (AF 110-111), the Certifying Officer ("CO") noted that Employer rejected a U.S. worker, Joseph V. Danbusky, representing that Mr. Danbusky was not satisfied with the \$34,000.00 annual salary offered. Yet, the CO pondered, since Mr. Danbusky claimed he was never contacted by the Employer, how could the Employer have established that Mr. Danbusky was not satisfied with the salary? (AF 111).

In its rebuttal (AF 113-121), the Employer's President stated in a letter dated December 17, 1987 (AF 120), that it attempted to contact Mr. Danbusky both by phone and by letter on several occasions since the NOF was issued but he did not respond (AF 12). Further, the Employer reiterated that "Mr. Danbusky was contacted earlier and was not satisfied with \$34,000.00 and wanted an annual salary more than that." (Id.)

On February 26, 1988, the CO issued her Final Determination denying certification (AF 125-126). Relying on a February 17, 1988 letter from Mr. Danbusky to a member of the CO's staff, the CO, in addition to stating that Mr. Danbusky advised that he did not reject the job due to an unacceptable salary, noted that Employer's contacts with the applicant "resulted in discouraging applicant from his original interest in the job." (AF 125)

The Employer requested review of the denial of certification on April 1, 1988 (AF 143), alleging that its recruitment was reasonable and customary, and that it properly rejected Mr. Danbusky.

Discussion

We have previously held that a CO's grounds for denial of a labor certification must be set forth in an NOF, giving the Employer an opportunity to rebut or to cure the alleged defects. See, e.g., In re Downey Orthopedic Medical Group, 87-INA-674 (Mar. 14, 1988) (en banc). We have also held that a CO may not cite new evidence in a Final Determination, because the Employer must be afforded the opportunity to rebut the evidence being relied on to deny certification. See, e.g., In re Shaw's Crab House, 87-INA-714 (Sept. 30, 1988) (en banc). In this

case, the CO violated both of these principles. First, although not raised in the NOF, the CO found in the Final Determination that Employer engaged in several recruitment practices which were irregular and which discouraged the applicant from pursuing the job. Her denial of certification was based either entirely or in great part on these recruitment practices. Second, the CO's findings in the Final Determination were based almost entirely on a letter submitted by the applicant to a member of the CO's staff only days before the Final Determination was issued. Employer was not given the opportunity to comment on this letter or file further rebuttal evidence.

Accordingly, this case must be remanded to the CO. On remand, the CO shall issue another NOF specifying the grounds for her proposed denial of certification and identifying all of the evidence she is relying on in this regard. After Employer has had the opportunity to file an appropriate rebuttal, the CO shall determine whether to grant certification.

ORDER

The CO's final determination is vacated, and the case is remanded to her in accordance with this opinion.

JEFFREY TURECK
Administrative Law Judge

JT/jb