Date Issued: JUL 23 1990
Case No: 89-INA-24

In the Matter of:

HIP WO INC.,
Employer

on behalf of

MU TAI LIN,
Alien

BEFORE: Brenner, Guill, Groner, Lipson, Litt, Marcellino, Romano, Silverman and Williams
Administrative Law Judges

JAMES GUILL
Administrative Law Judge

DECISION AND ORDER

This matter arises from a request for administrative-judicial review of a United States Department of Labor Certifying Officer's denial of labor certification. 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 written arguments of the parties. See 20 C.F.R. §656.27(c).

Statement of the Case

On August 3, 1987, Employer, Hip Wo Inc. (doing business as Mandarin Restaurant), filed an application for labor certification on behalf of Mu Tai Lin for the position of "Specialty Cook-Chinese Foods." (AF 1). Employer required six months of experience in the job offered or six months in the related occupations of "Assistant Cook/Trainee-Chinese Style Foods."

1 Labor certification is governed by §212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14), and Title 20, Part 656 of the Code of Federal Regulations, 20 C.F.R. Part 656. Unless otherwise noted, all regulations cited in this Decision and Order are contained in Title 20, Part 656.
The Certifying Officer (CO) issued her Notice of Findings (NOF) on March 29, 1988 (AF 6). The CO found that the Alien was trained in the job of Assistant Cook and was promoted to Chinese Specialty Cook, "a job which is similar if not identical to that of Assistant Cook." (AF 6). The CO instructed Employer to either delete the requirement of six months experience and rerecruit or document that it is not feasible to hire a worker with less training or experience than that required by the job offer.

Employer filed its rebuttal on April 15, 1988 (AF 7). In response to the CO's findings, Employer stated that the position of assistant cook is different from the position of cook in that the assistant cook does not do the final preparation and cooking of the meals (AF 7). Employer averred that it easily taught the Alien and others the position of assistant cook but cannot teach the position of cook. Employer also submitted documentation of a similar position which was certified by a different CO.

On June 21, 1988 the CO issued a Final Determination denying certification based upon her finding that the Employer had violated §656.21(b)(6) and had not documented that its requirements for the job represented the Employer's actual minimum requirements (AF 8). In the Final Determination, the CO found that Employer had failed to document why it was not feasible to "train someone else at the present time the way he had trained the alien [in] January 1986; or to reduce the minimum requirements for the job and recruit again, which he did not do in violation of 656.21(b)(6) and 656.21(g)."

Employer filed a request for review of the Final Determination on June 29, 1988 (AF 9), and submitted a brief in support of its request on November 29, 1988.

Discussion

Section 656.21(b)(6) provides that the employer shall document that its requirements for the job opportunity represent the employer's actual minimal requirements for the job opportunity, and that 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. The requirements cannot include the same type of experience that the alien had acquired while working for the employer in that or a similar job. Apartment Management Co., 88-INA-215 (Feb. 2, 1989). If the experience was gained by the alien in jobs with the same employer, the employer must establish that the alien gained that experience in a job which was not similar to the job for which certification is sought. Brent-Wood Products, Inc., 88-INA-259 (Feb. 29, 1989).

Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries. Delitzer Corp. of Newton, 88-INA-482 (May 9, 1990)(en banc).
The record fails to establish that the jobs involved in this matter are not similar. The Alien's duties as an Assistant Cook are to "assist the chef in the preparation, seasoning, cutting and cooking of all Chinese specialty dishes of the restaurant and all daily specials posted in the restaurant." (AF 2). The position of Specialty Cook requires that the employee "prepare and cook all Chinese style foods of the restaurant." (AF 1). The only distinction made in the record between the two positions is that the Assistant Cook does not actually do the final preparation and cooking of the meals. (AF 7).

The record fails to disclose how much extra knowledge and responsibility final preparation and cooking of the meals entails. There is no indication that final preparation and cooking is significantly different from assisting in "the preparation, seasoning, cutting and cooking" of the restaurant's menu items. There is no indication that the jobs have a significant distinction under Employer's job hierarchy, that the salaries offered are significantly different, or that a specialty cook has any significant supervisory responsibilities.2

Employer argues that it is possible to teach the job of assistant cook, but not the job of cook. Yet Employer's job requirement for the Specialty Cook position of six months of experience as assistant cook/trainee is at odds with this argument. Rather, the situation appears merely to be that it takes approximately six months to train a cook.

In sum, Employer has failed to demonstrate that the two jobs of assistant cook and specialty cook in the context of its business are sufficiently dissimilar so as to avoid the proscription regarding "similar" jobs of §656.21(b)(6). Nor has Employer demonstrated that it is not feasible to hire an applicant for the position with less training and experience than that being required.

ORDER

The Final Determination denying labor certification is hereby AFFIRMED.

At Washington, D.C. Entered: JUL 23 1990

By:
JAMES GUILL
Administrative Law Judge

JG/lg/trs

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when

2 We note that the application (AF 1) indicates "0" number of employees to be supervised.
the proceeding involves a question of exceptional importance. Petitions must be filed with the Chief Docket Clerk, Office of Administrative Law Judges, Suite 700, 1111 20th Street, N.W., Washington, D.C. 20036. Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double spaced pages. Upon the granting of a petition the Board may order briefs.