



DATE: April 26, 1991

Case No. 89-INA-230

IN THE MATTER OF

LOEWS ANATOLE HOTEL  
Employer

on behalf of

ARUN DEV VITTALA  
Alien

David Swaim, Esquire  
For the Employer

Before: Brenner, Glennon, Groner, Guill, Litt, Romano, Silverman and Williams

RALPH A. ROMANO  
Administrative Law Judge

DECISION AND ORDER EN BANC

This case is before the full Board pursuant to our grant of Employer's petition for review of the June 12, 1990 split decision of a three-judge panel which affirmed the Certifying Officer's ("C.O.") denial of alien labor certification. The Employer is the only party which filed a brief (Oct. 2, 1990) in response to the Board's order granting review en banc. For the reasons stated below, the Board vacates the C.O.'s denial of labor certification, and directs the C.O. to grant certification.

The job offered is Hotel Credit Manager with Employer, a 1,620 sleeping room hotel in Dallas which provides for conventions of up to 6,000 people (AF 24). It is the largest hotel in the southwest, the 19th largest in the world, and has been rated one of the ten best convention hotels in the country (AF 27).

The C.O.'s Notice of Findings ("NOF"), at AF 51-52, cites and quotes 20 C.F.R. §656.21(b)(6). This section of the regulations requires an employer to document that the job requirements are its actual minimum ones by showing it has not hired workers for similar jobs with less training or experience (or that it is not now feasible to do so). This section normally is invoked when it appears that the alien was originally hired by the same employer for the same or a similar job without possessing the employer's presently stated requirements.

The panel majority below affirmed the C.O.'s denial of certification primarily on the ground that the Alien's prior jobs with Employer as accounts receivable assistant and accounts supervisor (which together satisfied Employer's related job experience requirement of one year in those jobs at a 1,000 room plus convention hotel) were sufficiently similar to the job offered to conclude that the Alien was hired with less training or experience, in violation of section 656.21(b)(6). However, as pointed out in the dissent below and argued in Employer's brief before us, nothing in the C.O.'s NOF and Final Determination ("FD") (AF 5) even suggests that the jobs the Alien previously held with Employer were sufficiently similar to the job offered so as to invoke section (b)(6). The C.O.'s mere citation and quotation of this section in the NOF and FD is insufficient to do this. 20 C.F.R. §656.25(c)(2). Tarmac Roadstone, Inc., 87-INA-701 (Jan. 4, 1989). Therefore, Employer's rebuttal naturally and appropriately did not address this point. The panel's reliance on this ground, never raised below, was improper.

The gravamen of the invocation of section (b)(6) in the NOF appears to have been the C.O.'s suspicion that the experience and other special requirements are not the Employer's actual minimum ones unless the Employer submitted documentation that the credit managers of each of the other Loews Hotels in the United States met those requirements when they were hired (emphasis added). This is the sole corrective action required by the NOF (AF 52). The FD denies certification solely because the Employer did not submit this documentation in its rebuttal (AF 5).

The FD fails to consider the rebuttal affidavits from Employer's officials describing the additional experience and knowledge which the credit manager of the Loews Anatole Hotel must have in order to perform the more complex, in number and nature, duties required on the job offered relative to other hotels (AF 24-34). This evidence and the additional affidavits of the Controller of a 300 room nonconvention hotel in Dallas and an accountant who is the accounts receivable manager for a Dallas law firm, rationally and without contradiction supports Employer's distinction between the jobs of credit manager for a large convention hotel and a smaller hotel (AF 30-32). For these reasons, Employer is correct that the comparison to the requirements for the credit managers of all its other hotels is irrelevant.

Given this evidence, we find that Employer has successfully rebutted the sole ground<sup>1</sup> for denial raised by the C.O., and is accordingly entitled to a grant of certification.

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<sup>1</sup> Although the NOF also finds the subject requirements "unduly restrictive", the C.O. did not cite section 656.21(b)(2), which is the section applicable to unduly restrictive requirements and which gives rise to the need for an employer to show business necessity if the requirements are not normally required or not defined for the job in the D.O.T. Nor did the C.O.'s proposed corrective action in the NOF direct the Employer to show a business necessity (AF 52). Likewise, the FD made no mention of this as a ground for denial (AF 5).

ORDER

The Final Determination is VACATED and REVERSED, and the Certifying Officer is directed to GRANT certification.

For the Board:

RALPH A. ROMANO  
Administrative Law Judge

Loews Anatole Hotel, 89-INA-230

Judge LAWRENCE BRENNER, concurring in part and dissenting in part

I agree with the majority decision as far as it goes. The C.O.'s request for the Employer's hiring requirements for the credit managers at all its other hotels (large and more modest ones) is immaterial. However, a legitimate inquiry under section 656.21(b)(6) is the Employer's requirements for the job at its other large (arguendo 1,000 plus room) hotels, if it has any. This information was within the scope of the C.O.'s request in the Notice of Findings. The Employer supplied no information in response. It appears from the record that the Loews Anatole in Dallas is the Employer's largest hotel with some 1,600 rooms, but I have not located any evidence that the Loews chain does not own or otherwise control other hotels with 1,000 or more rooms. (At this stage of the case, and taking account of the C.O.'s poor notice to the Employer, I accept the Employer's 1,000 room bright line criterion for distinguishing the demands on a hotel credit manager.)

For the reasons stated, I would remand the case to the C.O. to require the Employer to affirm whether its parent company owns or controls any other hotels of at least 1,000 sleeping rooms, and, if so, to document that the credit managers when hired for those hotels in the recent past (perhaps from five years prior to this labor certification application up to the present time) met the requirements specified by the Employer in this labor certification application.

LAWRENCE BRENNER  
Administrative Law Judge