U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: FEBRUARY 28, 1989
CASE NO. 88-INA-259

IN THE MATTER OF

BRENT-WOOD PRODUCTS, INC.
Employer

on behalf of

ROBERTO MERCADO
Alien

Appearance: Abbe Allen Kingston, Esquire
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and
Brenner, DeGregorio, Guill, and Schoenfeld
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, Brent-Wood Products, Inc., filed an application for labor certification on behalf of the Alien, Roberto Mercado, for the position of Machine Setter, Woodworking, on September 8, 1986 (AF 13). The job duties were described as follows: "Set-up of woodworking machines in manufacture of furniture, including band saws, boring horizontal, cable reels left-right, molding machines. Assures that work orders are carried out as ordered per blue print." The sole requirement for the position, as initially stated by the Employer, was 2 years of experience in the job offered. However, Employer subsequently amended the application to reflect the minimum requirement of "2 years experience in the job, or 2 years related woodworking machine set-up experience" (AF 15). In addition, the Employer amended the wage for the position from $6.00 per hour to $9.68 per hour (AF 13, 16).

In his September 10, 1987 Notice of Findings, the Certifying Officer (C.O.) denied the certification (AF 8-11). In pertinent part, the C.O. noted that the Alien had no prior experience when he was initially hired by Employer. Furthermore, the C.O. found that "(w)hile the ETA7-50B reflects that the alien worked for 2 years as machine set-up I and was then promoted to machine set-up II, the basic duties are the same. Regardless of the job title designated by the employer during the training phase, the fact remains that the alien was trained to perform the duties of the petitioned position." Accordingly, the C.O. found that the experience requirement violated 20 C.F.R. §§ 656.21(b)(2) and 656.21(b)(6). Furthermore, the C.O. directed Employer to justify the two-year-experience requirement, or delete it from the job offer, and re-advertise the position in accordance with 656.21(f) and (g), respectively.

The Employer, in its rebuttal, stated that the Alien held three different and distinct positions during the course of his eight years of employment with Employer, and that the C.O. was incorrect in concluding that all the positions are simply different levels of the machine setter position (AF 5-7). The C.O., in his December 24, 1987 Final Determination, denied the application for labor certification (AF 2-3). The Employer requested review on January 19, 1988 (AF 1), and subsequently submittd an appellate brief on May 26, 1988. The C.O. did not file a brief.

Discussion

The issue presented in this case is whether the Employer violated section 656.21(b)(6) by requiring an employment prerequisite of U.S. workers not required of the Alien. Section 656.21(b)(6) states that "[t]he 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."

Where, as here, the required experience was gained by the Alien in jobs with the same Employer, the Employer must establish that the Alien gained that experience in jobs which were not similar to the job for which certification is sought. Kurt Salmon Associates, Inc., 87-INA-636 (October 27, 1988); Iwasaki Images of America, 87-INA-656 (May 11, 1988). Cf. Conde, Inc., 87-INA-598 (December 11, 1987).[1] Failing that, the Employer must show that it is infeasible to hire workers with less qualifications than those now being required.

A careful review of the record indicates that the Employer has indeed placed a requirement on U.S. applicants that it did not place on the Alien, namely, a minimum of 2 years of experience in the job offered, or in a related position (AF 13, 15). The ETA7-50B Form establishes that the Alien was hired by Employer, at age 17, without any prior experience (AF 39-40). The Alien reportedly worked for one year as a "Set-up general helper" from February 1979 until February 1980. Thereafter he worked as a "Machine set-up I" for two years, from February 1980 until February 1982. Since then, the Alien has reportedly worked as a "Machine set-up II."

Having considered Employer's rebuttal (AF 4-7), as well as its argument on brief, we find that Employer has failed to meet its burden of establishing that the "Machine set-up I" and "Machine set-up II" are sufficiently separate and distinct positions. Moreover, assuming arguendo that the "Set-up general helper" job is sufficiently dissimilar from the other positions to avoid the prohibition of section 656.21(b)(6), but is still "related woodworking machine set-up experience", the Alien only had one year of experience in that job.

In making this determination, we note that neither Employer's posted notices to its own employees (AF 22-23), nor its general advertisements (AF 25-27), reflect any such designation of Machine Set-up I or II. Instead, the notices and advertisements merely seek a "Machine Setter, Woodworking."

Finally, we note that notwithstanding Employer's argument, the job description and duties for the Machine Set-up I and II are substantially the same. The primary distinction cited by Employer is the requirement of the Machine Set-up II to read blue prints. Needless to say, in view of the Alien's complete lack of prior experience, it would appear that he gained the experience to read blue prints on the job, either as a Machine Set-up I or II, while working for Employer. If the Alien learned it while working as a a Machine Set-up I, then, this undermines Employer's argument that the positions are separate and distinct. On the other hand, if the Alien

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[1] Vacco Industries, 87-INA-711 (March 10, 1988, as amended March 14, 1988), may be read to imply that certification cannot be granted where the Alien received normally required experience with the same employer, even if the employer proves that the experience was obtained in a different job which is not similar to the job for which certification is being sought. That would be an incorrect statement of the law, and we do not adopt such a holding in this case.

learned it while he was employed as a Machine Set-up II, then he had no prior experience, and it is unduly restrictive for Employer to seek someone with two years of such experience.

In summary, we find that Employer has failed to satisfy its burden of establishing that the Machine Set-up I and II positions are sufficiently dissimilar to avoid the prohibition of section 656.21(b)(6). Accordingly, while the Alien was hired as a Machine Setter with, at most, one year of related experience (i.e., as a Set-up general helper), Employer failed to offer a similar opportunity to U.S. workers. Furthermore, Employer did not show why it is not feasible to hire workers with the same (one year) experience the Alien had when he was promoted from Set-up general helper to Machine Setter. Therefore, we find that Employer, has violated section 656.21(b)(6). See In the Matter of James Northcutt Associates, 88-INA-311 (December 22, 1988) (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