88 -INA- 240 (Bd.Alien Lab.Cert.App.), 1988 -INA- 240, 1988 -INA- 00240, 1988 WL 235836

U.S. DEPARTMENT OF LABOR

BOARD OF ALIEN LABOR CERTIFICATION APPEALS

IN THE MATTER OF
OHSAWA AMERICA, EMPLOYER
ON BEHALF OF
NAOHIKO NAKAGAWA, ALIEN

CASE NO. 88-INA-240
August 30, 1988

***1** Appearance: John M. Bernier, Esquire
For the Employer

BEFORE: Brenner, DeGregorio, 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.

The procedures governing labor certification are set forth at 20 C.F.R. §656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements 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 [hereinafter AF], and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On July 31, 1986, Ohsawa America, a Chico, California company specializing in preparing and marketing macrobiotic foods, filed a labor certification application on behalf of the alien, Naohiko Nakagawa, for the position of macrobiotic cook and lecturer (AF 56-57). The Employer said that the successful applicant would "cook and prepare for marketing macrobiotic foods; give lectures and demonstrations on preparing and benefits of macrobiotic foods" (AF 56). The Employer required one year of training in a specialized macrobiotic school, but stated that two years of experience could be substituted for the training (Id.).

On his application, the Alien did not list any previous jobs, but indicated that he had obtained a certificate of completion from the Vega Macrobiotic Center in Oroville, California (AF 81-82).

***2** After the California Employment Development Department determined that the job encompassed an "unusual combination of duties" and that the training requirement appeared to duplicate the education and/or experience requirement (AF 78), the Employer amended the job title to read simply "macrobiotic cook" and the special requirements to read "one year experience may be substituted for training" (AF 60). No change was made in the description of the job duties.

The Employer advertised the job on its premises from October 31, 1986, through November 25, 1986, and in the local newspaper for three consecutive days in October 1986 (AF 67). As a result of that recruitment effort, the Employer received two applications. The Employer said that one applicant did not meet the basic requirements for the position. It interviewed the second applicant, but reported that the applicant, Jerome Canty, said the job was not what he had in mind and that he was not sure he could commit himself to a permanent job (Id.).

In the undated Notice of Findings (AF 53-54), the Certifying Officer (C.O.) denied certification. The C.O. said that, inter alia, it was unclear whether there is a bona fide job open to which qualified U.S. workers could be referred, as required by 20 C.F.R. §656.20(c)(8). Noting that Mr. Canty appears to "far exceed the stated minimum requirements", the C.O. questioned whether Mr. Canty was offered the position and what it was about the job that made Mr. Canty unsure whether it was the type of job in which he was interested.

The C.O. also questioned, pursuant to section 656.20(c)(1), whether the Employer had sufficient funds available to guarantee the salary offered to the Alien, and requested documentation of the company's financial stability (Id).

In rebuttal (AF 8-52), the Employer submitted a June 24, 1987 letter from an accounting firm. The letter was offered to document the solvency of the major shareholder of Ohsawa America, also known as Products Unique (see AF 8), and to substantiate the willingness of that shareholder to continue to fund the company's operations. The Employer enclosed a June 18, 1987 letter from Mr. Canty, in which the writer said that he had declined the offer because "the marketing aspect of the position was more 'business communications' oriented" than he had expected (AF 10).

The September 11, 1987 Final Determination (AF 5-7) again denied certification. The C.O. said that the financial statements submitted regarding the Employer's company reflected prior losses and a negative working capital; and that although the company might show a profit at some future date, the financial statements indicated funds insufficient to pay the Alien's salary. The C.O. also said that "marketing" the product should not have been discussed at the interview with Mr. Canty, as "it was not part of the stated job duties" (AF 6). Furthermore, the C.O. said that there is no evidence that Mr. Canty was not interested in the duties of the petitioned position as advertised, only that he "is not interested in marketing the product" (Id.). Accordingly, the C.O. said he could not find that no qualified U.S. applicants were available at the time of the initial consideration (Id.).

***3** On October 13, 1987, the Employer filed a Request for Appeal (AF 1), which included a brief supporting that request (AF 2-3). No brief was filed on behalf of the C.O.

Discussion

Ohsawa America has acknowledged that, as of the date of application for labor certification, it showed prior losses and a negative working capital (AF 2). Indeed, it submitted financial statements for June 30, 1986 (AF 24-31), December 31, 1986 (AF 12-17), and for March 31, 1987 (AF 18-23), all of which show a deficit. The accounting firm that prepared those financial statements indicated, however, that the company has increased sales and reduced operating losses, and that the major shareholder, who has indicated a willingness to continue to fund the company is "personally worth in excess of $4,000,000" (AF 8).

On the basis of the apparent financial worth and continuing financial support of the major shareholder, as indicated by the above-mentioned accounting firm and as corroborated by a September 29, 1987 letter from the Bank of America (AF 4), we find that the Employer has shown that there are funds sufficient to pay the Alien.

It is not clear, however, that there is a bona fide job clearly open to any qualified U.S. worker. While there is no doubt that applicant Jerome Canty was interviewed for a position with Ohsawa America (see AF 10), the question remains as to what position the Employer was offering and why Mr. Canty declined to be considered further for the job. In applying to the Employer, Mr. Canty wrote that he was interested in the job, which he described as a ""macrobiotic cook and lecturer" and that he had extensive experience teaching and cooking in macrobiotic restaurants (AF 74). After their interview, the Employer wrote that Mr. Canty said "this wasn't the type of job he had in mind" and that he "wasn't sure" he could commit himelf to a permanent job" (AF 67).

When the Employer called upon Mr. Canty to corroborate having rejected the job offer, Mr. Canty wrote that he had declined the job offer because the position was "more 'business communications' oriented" than he had expected, and because he was not a "market person" (AF 10). According to the Employer, however, the advertisement did not state that a "marketing person" was required, and the Employer did not discuss with Mr. Canty marketing as a requirement for the job in question (AF 3). Instead, the Employer maintains that the advertisement stated that the person would "cook and prepare for marketing" macrobiotic foods (Id., emphasis in text).

While it is apparent that the Employer and Mr. Canty perceived differently the job in question, it is not clear how the Employer presented the position to Mr. Canty. It is possible that the Employer described the job in a way calculated to deter Mr. Canty's accep ance. It is also possible that Mr. Canty heard ""marketing" and assumed that he would be required actually to market the company's products. The letter solicited by the Employer and written by Mr. Canty does not resolve the question.

***4** Had the C.O. declined to rely on that letter because of the questions it does not answer, and had he, instead, contacted Mr. Canty directly, he might have been able to make a better-informed judgment call. Curiously, the C.O. commented that the Employer had recontacted the applicant and solicited a letter from him, which the C.O. termed "not the prescribed corrective action" (AF 6). [1] Because the terms of the job as presented by the Employer to Mr. Canty are not clear, with the result that his reasons for rejecting the job are also unclear, we lack sufficient information to decide whether there is a bona fide job open to qualified U.S. workers. Accordingly, we must remand this case to the C.O. for more consideration and factfinding in a new Notice of Findings, pursuant to section 656.27(c)(3).

ORDER

The Final Determination of the Certifying Officer is VACATED, and this case is REMANDED to the Certifying Officer for further consideration consistent with this Decision and Order.

For the Panel:

LAWRENCE BRENNER
Administrative Law Judge

Footnotes

1 The confusion in this case is compounded by the fact that the job title was changed from "macrobiotic cook and lecturer" (AF 56) to simply "macrobiotic cook" (see AF 60), while no comparable change was made in the description of the job duties. It is understandable that an applicant, reading the newspaper advertisement, would surmise that the job entailed more than cooking. If the state agency thought that the job, as originally described, covered an "unusual combination of duties" (see AF 78), it seems likely that the stated job duties would be considered equally inappropriate. Yet neither the state agency nor the C.O. questioned the appropriateness of the job duties. It also is unclear whether the C.O. finds objectionable the described duties of "giving lectures and demonstrations on preparing and benefit of macrobiotic foods", or whether the C.O. believes, based on Mr. Canty's letter, that the employee would be required to actually market (i.e., sell) the product. On remand, the C.O., after determining the facts, should clarify his conclusions, with the supporting bases, in a new Notice of Findings.

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