



DATE: 3 June 1988  
CASE NO. 87-INA-625

IN THE MATTER OF

Washington International Consulting Group,  
Employer

on behalf of

Juan Gabriel Gonzalez  
Alien

BEFORE: Litt, Chief Judge; Vittone, Associate Chief Judge; and Brenner, DeGregorio, Fath,  
Levin, and Tureck, Administrative Law Judges

### **DECISION AND ORDER**

This proceeding was initiated by the above named Employer who requested review, pursuant to 20 C.F.R. Section 656.26, from the determination of a Certifying Officer of the U.S. Department of Labor denying an application for labor certification which the Employer submitted 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.]

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 for employment 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. Part 656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656.21 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

The employer, Washington International Consulting Group (WICG), filed its application for alien certification employment for the alien, Juan Gabriel Gonzalez, on 15 October 1985. WICG is an organization that provides its Central and South American clients with financial consultation on exporting. It offers financial packaging and evaluation for loan applications to be submitted to public organizations that provide financial assistance to the private sector.

The employer sought to hire a financial analyst with the following qualifications: ability to speak English and Spanish; an advanced accounting degree at the certified public accountant level; an advanced degree in financial management at a masters of business administration level (to evaluate export projects from a financial management point of view); five years of experience in financial export projects evaluation, financial planning and budget preparation. The salary offered was \$24,200 per year.

The employer advertised the position with the above requirements for three consecutive days in the Washington Post. Six United States citizens applied for the job. In a letter dated 12 August 1986, the employer stated that it rejected Ms. Cynthia Joe and Mr. Wondimu Mersha because neither speaks Spanish.

The employer found that Mr. Oswaldo Patino had an M.A. in an "unrelated background". Mr. Patino's resume indicates that he has an M.A. in Development Banking with majors in International Finance and Financial Management and an M.A. in Economics.

The employer found that Mr. Angel Garcia had experience in credit and collections but did not have the required financial management or accounting background.

The employer found that Mr. Clarence Butler's background was in taxation, law, and real estate and that his resume contained no evidence that Mr. Butler could speak Spanish.

The employer found that Ms. Ana McAhron-Schulz did not have the required experience in accounting and budget preparation.

### Notice of Findings

The certifying officer found that the employer's requirements for two advanced degrees in addition to five years of experience exceeded the normal requirements for a financial analyst set out in the Dictionary of Occupational Titles [hereinafter referred to as DOT] and were thus unduly restrictive under 20 CFR Section 656.21.b.2. The certifying officer instructed the employer to readvertise the position, requiring only two to four years of education and

experience combined, or to show that the unduly restrictive requirements were required by business necessity.

The certifying officer further found that the individual requirements of an advanced degree in accounting at the certified public accountant level and an advanced degree in finance were unduly restrictive. He ordered the employer to eliminate the requirements or show that the job could not be adequately performed by a person with either a Bachelor's degree in accounting or a Bachelor's degree in finance.

The certifying officer also found that the Spanish language requirement was unduly restrictive and instructed the employer to eliminate the requirement and readvertise or to provide independent evidence supporting the employer's claim that its primary area of business operations is in Latin America.

Finally, the certifying officer found that the job offered could be performed by someone with qualifications lower than those advertised by the employer. The employer hired the alien in October 1984 without all of the qualifications it now seeks. The certifying officer ordered the employer to delete the requirements, or to show that the alien possessed the qualifications required when he was hired in 1984, or to show that business necessity required that the employer hire someone with all the qualifications listed.

Based upon the above findings, the certifying officer further found that United States applicants Cynthia Joy and Wondimu Mersha were rejected for reasons other than lawful job-related reasons. The employer was therefore again ordered to show that the Spanish language requirement was a business necessity and that the alien had the required experience at the time he was hired in 1984.

### Rebuttal

The employer's rebuttal states that over ninety percent of its clients are from "Panama, Ecuador, Dominican Republic, etc." It adds that the representatives in over half of those cases do not speak English. Since we do not know which Latin American countries are included in the employer's "etc.", it is impossible to determine what language the representatives do speak. The employer adds in its next paragraph that business must be conducted in Spanish with a majority of its non-English speaking clients. Thus, WICG contends that at least forty-five percent of its business is conducted with non-english speaking clients, and that at least half of those clients speak Spanish, at least as a second language. Thus, according to the employer, at least twenty-three percent of its clients require that business be conducted in Spanish. WICG provides no independent evidence that supports its claim that its primary area of business operations is in Latin America. Nor does it indicate how many of the consultants it presently employs are fluent in Spanish. Thus, it is impossible to determine whether or not the Spanish language requirement is a business necessity.

### Final Determination

The certifying officer based his denial solely on the employer's failure to demonstrate by means of independent evidence that the Spanish language requirement was a business necessity.

### Request for Review

The employer requests review by this office based upon its contention that its written arguments and application are credible evidence and that they establish the business necessity of the language requirement.

### CONCLUSION

The certifying officer's denial rests heavily on its finding that the employer failed to provide independent support to its contention that a substantial portion of its business is necessarily conducted in Spanish. Where an employer is required to prove the existence of an employment practice, written assertions which are reasonably specific and which indicate their sources or bases shall be considered documentation. In the Matter of Gencorp, 87 INA 659 (13 January 1988). The certifying officer is not, however, required to accept such written assertions as credible or true, but he must consider them in making the relevant determination and give them the weight they rationally deserve. Id.

In the instant case, the certifying officer was within his discretion in finding that the employer's written assertions alone did not support a finding that the Spanish language requirement was based on business necessity.

Additionally, it is found that, even if the employer's statistics were credited, those statistics would merely establish that at least twenty three percent of the employer's business was conducted in Spanish. Thus, it is found that the employer has failed to offer sufficient information, such as an indication of the language capabilities of its other employees to permit this Board to conclude that a non-Spanish speaking financial analyst could not perform the job.

### ORDER

It is adjudged and ordered that the certifying officer's denial of WICG's application for alien employment certification be, and is hereby, affirmed.

George A. Fath  
Administrative Law Judge

Jeffrey Tureck, Administrative Law Judge, with whom Administrative Law Judge Nicodemo DeGregorio joins, dissenting:

The majority's decision affirming the denial of certification in this case is a major retreat from the holding in Gencorp, 87-INA-659 (Jan. 13, 1988), which we issued only a short time

ago. For although the majority pays lip service to that decision, its holding here is actually inconsistent with our decision in that case.

The majority is incorrect in implying that the Certifying Officer ("CO") considered Employer's rebuttal statement, as Gencorp requires. Rather, the Final Determination continuously cites employer's alleged failure to provide "independent data" (see AF at 6, 7) as the reason for the denial of certification, and concludes that:

Although you state that it is essential for the safety and operation of your business, that the person in the position offered be proficient in Spanish, you have submitted no independent data to support your contentions.

(AF 7 -- emphasis added). Nowhere did the CO either state or imply that he considered the representations made by Employer in its rebuttal and found them to be either not credible or outweighed by other evidence. Although the CO did cite employer's representations on this issue in some detail (see AF 6-7), it is nonetheless clear that he did not consider them because they were not "independent data."

Since Gencorp requires the CO to consider an Employer's factual statements in most instances, and this holding is applicable to the facts in this case, upholding the CO's findings on this issue runs directly counter to our decision in Gencorp.

Second, even if the CO had considered Employer's rebuttal, an evaluation of the evidence would lead to the conclusion that Employer's Spanish language requirement is reasonable. If, according to the majority's interpretation of Employer's rebuttal evidence, at least 23% of Employer's clients speak only Spanish, and many others speak Spanish as a first language, those figures present a compelling argument for a Spanish language requirement. When the highly technical nature of Employer's business is taken into account (see AF 12, 15-55), the necessity of the Spanish language requirement becomes even more apparent.

But the majority's finding that at least 23% of Employer's clients speak only Spanish is a rock - bottom figure calculated by the majority, not by Employer, and is based on a misreading of Employer's rebuttal (AF 12). Employer stated that its work involves projects in Latin America and the Caribbean, 90% of which involves clients "from Panama, Ecuador, Dominican Republic, etc." (AF 12). Employer went on to say that most of the representatives of these clients do not speak English. Read in context, Employer was stating that the overwhelming percentage of its business is with people from Spanish - speaking countries, most of whom do not speak English. The majority, through a series of unwarranted mathematical calculations combined with what I believe to be a misreading of Paragraph (A) of Finding No. 3 in Employer's Rebuttal (AF 12),<sup>1</sup> arrived at a figure that "at least" 23% of Employer's clients speak only Spanish. In fact, based on Employer's rebuttal, the percentage of Employer's clients who speak only Spanish should be

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<sup>1</sup> The majority misread Paragraph A as further narrowing the class of Employer's clients who speak only Spanish, whereas that Paragraph appears to me to be only a restatement of information in the introductory paragraph above it.

closer to 50% than 23%; moreover, it is obvious that a vast majority of Employer's clients speak Spanish as a first language.

Under these circumstances, I would find that Employer has met its burden of establishing the business necessity of its Spanish language requirement, and would reverse the denial of certification.

JEFFREY TURECK  
Administrative Law Judge