



DATE: JAN 13 1988
CASE NO. 87-INA-659

IN THE MATTER OF

GENCORP

Employer

on behalf of

GARY BRYAN MITCHELL

Alien

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

Nicodemo DeGregorio
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 whereby such immigrant labor certifications may be applied for, and granted or denied, are set forth in 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 ("AF"), and Employer's brief dated August 4, 1987.

Statement of the Case

On July 14, 1986, Employer filed an application for alien labor certification (AF at 5) to enable Alien to fill the position of Chemical Research Engineer.

The Certifying Officer issued a Notice of Findings on June 15, 1987. (AF at 24) He noted that although Employer had determined a U.S. applicant lacked the proper academic course work, the applicant asserted he met the academic qualifications and possessed the ability to perform the stated job duties. The Certifying Officer questioned whether Employer had requested the U.S. applicant submit a copy of his academic transcript.

Employer rebutted on July 15, 1987. (AF at 28) It informed the Certifying Officer that, subsequent to the Notice of Findings, it requested and received a copy of the applicant's academic record. While Employer did not submit the transcript, it did describe how the transcript led it to conclude that the applicant was unqualified. Employer similarly detailed a lengthy telephone interview held with the applicant subsequent to the issuance of the Notice of Findings. This interview, Employer contended, also established that the U.S. applicant lacked the academic background and the ability to perform the stated job duties.

Certification was denied on July 23, 1987. In his Final Determination, the Certifying Officer found that Employer had failed to adequately document its rejection of the U.S. applicant. He concluded that Employer's description of the telephone interview and the academic transcript did not constitute documentary evidence which could nullify the assertion made by the U.S. applicant that he was qualified. The Certifying Officer required documentation in the form of the academic record itself and a record of the alleged phone interview.

Discussion

This case presents the general question of what constitutes documentation required by various provisions of section 656.21 (b), as well as other sections of Part 656. In the instant case, the Certifying Officer construed the term documentation so as to require a copy of the U.S. worker's academic transcript and a record of the lengthy phone interview with the U.S. applicant subsequent to the Notice of Findings.

We are of the opinion that where a provision of the regulations requires information to be furnished in a specified form, e.g., documentation of experience "in the form of statements from past or present employers," §656.21(a)(3)(J), the regulation controls. In the absence of such a specific provision, where a document has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the document, if requested by the Certifying Officer, must be adduced. In all other cases, e.g., where an employer is required to prove the existence of an employment practice or the performance of an act and its results, written assertions which are

reasonably specific and indicate their sources or bases shall be considered documentation. This is not to say that a certifying officer must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve.

Based on our interpretation of the term "documentation," the instant case must be remanded. First, since Employer stated that it had the rejected U.S. applicant's academic transcript, the Certifying Officer may reasonably require as documentation a copy of that transcript. But he failed to request this in the Notice of Findings; he had only noted that he was uncertain as to whether Employer had requested the U.S. worker's transcript. Additionally, it was unreasonable to require a transcript of Employer's phone interview with the U.S. applicant. Employer had not been put on notice in the Notice of Findings that a detailed report of the conversation, such as the one it offered in rebuttal, would be insufficient. More importantly, Employer's report of the conversation should be deemed documented if it conforms to the rule set forth above. The Certifying Officer can then assess the credibility and weight of the report.

ORDER

The Certifying Officer's determination denying labor certification is vacated, and the case is remanded to the Certifying Officer for further proceedings consistent with this opinion.

NICODEMO DeGREGORIO
Administrative Law Judge

ND:KLJ:kat