



DATE: March 1, 1989  
CASE NO. 88-INA-162

IN THE MATTER OF

TEXAS A & M UNIVERSITY,  
Employer

on behalf of

ESHAN BENJAMIN YEH,  
Alien

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

JEFFREY TURECK  
Administrative Law Judge

DECISION AND ORDER

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) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer Benjamin Bustos' denial of a labor certification application pursuant to 20 C.F.R. Section 656.26.<sup>1</sup>

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 a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available 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; 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 Part 656 of the regulations have been met. These requirements include the

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<sup>1</sup> All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

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 a 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 [see §656.27(c)].

#### Statement of the Case

On February 17, 1987, the Employer, Texas A & M University, filed an application for alien employment certification (AF 160-61) to enable the Alien to fill the position of Research Associate. A Ph.D. in Chemistry or Materials Science was required. Employer also specified that applicants meet the following special requirements: (1) education and experience in heterogeneous catalysis, particularly carbon monoxide hydrogenation iron-based catalysts, both precipitated and impregnated; (2) full knowledge of surface science techniques, especially x-ray photoelectron, Auger electron, and ion scattering spectroscopies; (3) ability to interpret Mossbauer spectroscopy results and electron microscopy data; (4) ability to operate x-ray diffractometer and process results; and (5) excellent English communication skills, both written and verbal, for preparation of manuscript and reports.

The overall job duty was to conduct research in promoted iron-based catalysts. This research was said to include: novel catalyst preparation by impregnation and precipitation methods; active center characterization (using x-ray photoelectron, Auger Electron, Ion Scattering, and Mossbauer Spectroscopies); particle size and morphology analysis (using x-ray diffractometer and electron microscopes); and kinetic studies of Fischer - Tropsch reactions. Additional duties included the preparation and editing of research manuscripts and reports.

In the NOF (AF 71), the Certifying Officer ("CO") stated that the special requirements listed by Employer for the position are unduly restrictive. He pointed out that all unduly restrictive requirements had to be eliminated or, in the alternative, Employer had to document that the basic job could not adequately be performed by a person who does not possess the special requirements. The CO informed the Employer that documentation should consist of official records or data, original signed statements by disinterested persons, notarized affidavits and so forth.

In rebuttal (AF 65-69), the Employer submitted an August 23, 1987 letter from Michael P. Rosynek, a chemistry professor at Texas A & M. Professor Rosynek pointed out that the funded research project under which the Alien would work involves the synthesis and characterization of iron - based catalysts for carbon monoxide hydrogenation. He maintained that "it is well established in this research field that characterization of iron catalysts is most effectively performed using, among others, the techniques of Mossbauer spectroscopy, x-ray diffraction, and certain surface analysis methods, particularly x-ray photoelectron, Auger electron, and ion scattering spectroscopies." (AF 66) Professor Rosynek also noted that all of the foregoing techniques are currently being utilized in the project at hand. He further asserted that

the advertised qualifications represent an accurate description of functions that are essential for the project to meet the sponsor-imposed research progress schedule (id.).

Employer also submitted a December 19, 1986 letter from Lyle Schwartz, a former professor of the Alien's at Northwestern University, who was at that time the Director of the Institute for Materials Science and Engineering of the National Bureau of Standards. Prof. Schwartz discussed the Alien's experience while a Ph.D student under his direction, and further noted the subject matter of the Alien's thesis (AF 68). Employer also submitted a copy of the Alien's 1983 Ph.D. diploma from Northwestern University, and a January 7, 1987 letter from Ikai Wang, Ph.D., which certified that the Alien was previously employed as a research associate at Catalyst Research Center/China Technical Consultant, Inc.

In the Final Determination (AF 63), the CO stated that the Employer failed to document that the allegedly restrictive job requirements are essential to the performance of the basic job duties. He pointed out that Employer's unattested, self-serving statement, unsupported by other documentation, does not establish a business necessity.

In a request for reconsideration before the Certifying Officer (AF 4-61), the Employer submitted the following materials: (1) a December 7, 1987 letter from Prof. Schwartz, which maintained that the requirements specified by Employer are appropriate for the type of research work under scrutiny; and (2) published reports from various research groups in the United States, which utilized the methodology required by the Employer. The Employer also pointed out that the special requirement of excellent English communications skills is not a restriction for U.S. workers, whose normal English skills would be expected to be adequate.

In response to the request for reconsideration, the Certifying Officer stated that he reviewed the application again, but could not change the determination (AF 3). He found that Employer's submittals were comprised merely of definitions and studies made.

### Discussion

In Information Industries, Inc., 88-INA-82 (Feb. 9, 1989) (en banc), the Board held that,

to establish business necessity under §656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer.

Id., slip op. at 9. We find that the Employer has adequately documented both elements of this test.

The letter from Professor Rosynek (AF 66) pointed out that the job requirements were integral to the federal contract with which the position is associated, and are established as being among the most effective for performing research in the field in which the Employer is engaged -- promoted iron-based catalysts. The fact that this letter was prepared by one of Employer's

professors and was obviously in Employer's interest, does not mean that the CO could fail to consider it. However, in the NOF, the CO instructed Employer to provide statements by disinterested persons confirming the necessity of these job requirements; and, due to the highly technical nature of these requirements, insisting on such third-party evidence was reasonable<sup>2</sup> and not inconsistent with our decision in Gencorp., 87-INA-659 (Jan. 13, 1988) (en banc). Prof. Schwartz's letter submitted in rebuttal of the NOF, although from a sufficiently disinterested party, was directed more towards the Alien's skills than to whether those skills were required to perform the job. Therefore, it was not unreasonable for the CO to have denied certification at that time, on the basis of Employer's failure to comply with the NOF.

However, Employer requested the CO to reconsider, and filed additional evidence including another letter from Prof. Schwartz (AF 7). This letter was responsive to the CO's instructions. For in it, Prof. Schwartz discussed the appropriateness of most of the job requirements for the stated job duty of research in promoted iron-based catalysts. Employer also submitted articles from several scientific journals to show that the special skills stated as job requirements are necessary in this field (AF 8-61). The CO, although reconsidering his determination based on this new evidence, again denied certification, noting that this evidence consisted of studies and definitions which did not establish business necessity.

We disagree. Taken together, the evidence filed in rebuttal to the NOF and on reconsideration meet the requirements set out by the CO. Dr. Rosynek's letter (AF 66) provides evidence that the job cannot be performed by someone who does not meet the "special requirements" listed on the Form ETA-750A. The letters from Prof. Schwartz, particularly the December 7, 1987 letter submitted on reconsideration, establish that these requirements are appropriate for "the study of iron-based heterogenous catalysts used in the carbon-monoxide - hydrogenation reaction (Fischer - Tropsch reaction) . . ." (AF 7), the same work the job here involves. The journal articles give added support to employer's position.

The CO has provided no specific reasons for rejecting this evidence, noting only that this documentation was inadequate (see AF 3, 63). We do not find it to be inadequate. The Employer explained why these requirements were needed, and, in conformance with the CO's instructions, supported this explanation with independent documentation. Since Employer has established that the job requirements were related to the occupation in the context of the Employer's business, and that the job duties could not be performed by a worker failing to meet the special requirements listed on the Form ETA-750A, business necessity has been established, and certification is granted.

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<sup>2</sup> Cf. Information Industries, Inc., 88-INA-82 (Feb. 9, 1989) (en banc), in which the Board remanded the case to the CO for, among other reasons, an explanation of the technical jargon in which the job duties were expressed.

ORDER

The Certifying Officer's denial of alien labor certification is reversed, and certification is granted.

JEFFREY TURECK  
Administrative Law Judge

JT/jb