



DATE: DEC 20 1988  
CASE NO. 88-INA-328

IN THE MATTER OF

LEE & CHIU DESIGN GROUP,  
Employer

on behalf of

HSING-CHENG WANG,  
Alien

Howard Hom, Esq.  
Los Angeles, CA  
For the Employer

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 a ove-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 Paul R. Nelson's denial of a labor certification application pursuant to 20 C.F.R. §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

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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.

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 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 and Discussion

On July 10, 1985, Employer, an architectural design firm located in Baldwin Park, California, filed an application for alien employment certification (AF 123-24) to enable the Alien to fill the position of Project Designer. The requirements for the position were a Bachelor's Degree in Architecture and two years of experience in the job offered or, in lieu of the educational requirement, six years of architectural design experience.

Employer completed its initial recruitment pursuant to the certification application in the fall of 1985 (AF 127-29). A Notice of Findings ("NOF") requiring Employer to readvertise in a national architectural magazine was not issued until June 20, 1986 (AF 117-19). Employer complied with this directive, and provided a narrative summary of the results of this second recruitment and other relevant documents on October 31, 1986 (AF 58-109). Employer stated that, of the ten applicants for the job in response to the recent recruitment, none of the applicants were both qualified and available (AF 59-61).

The Certifying Officer ("CO") issued a second NOF on February 19, 1987 (AF 55-57). First, he found that Employer did not recruit in good faith because it received the applicants' resumes on October 9, 1986 but did not contact the applicants before October 30. Second, the CO apparently found each of the job applicants (except perhaps for Chambers) to be qualified for the position. Third, the CO apparently rejected Employer's argument that three applicants were unavailable, contending that Employer waited too long to contact them.

It is interesting that, in connection with applicant Bennett, the CO noted both that Employer stated it could not contact him, and that the applicant, in response to a questionnaire sent out soon after the events in issue, stated that he was contacted but he already had another job (AF 121). The CO did not mention this obvious inconsistency. It also must be pointed out that the CO significantly misquoted Bennett's questionnaire response. The CO stated that

Bennett reports "by the time he contacted me I had another job".

(AF 56). As quoted, this seems to support the CO's position that Employer's alleged delay between its receipt of the resumes and contacting the applicants led to the unavailability of some of the applicants. In fact, what Mr. Bennett did write was:

I found another job soon after answering the ad[.]

(AF 121). This creates quite a different impression -- that regardless of how soon after receiving the resumes Employer had contacted Mr. Bennett, it probably would have been too late.

In its rebuttal to this second NOF (AF 44-52), Employer stated that it did not receive all the resumes until after October 13, 1986. Further, Employer explained that its response to the resumes was delayed because of confusion in the way it received the resumes from the State Employment Development Department. In addition, Employer recontacted seven of the applicants, to reconfirm their lack of interest or failure to meet the job's minimum requirements. As a result of these subsequent contacts, Employer reaffirmed its initial statement that none of the applicants were both qualified and interested in the job.

In a Final Determination dated June 26, 1987, the CO denied certification (AF 42-43). The grounds of this denial will be discussed in detail below. Employer requested review of the denial on July 29, 1987 (AF 41), but for some unexplained reason the CO did not forward the file to this Office for review until the end of May, 1988. It was docketed on June 2, 1988.

In denying certification, the CO once again cited Employer's delay in contacting the applicants as proof that Employer failed to recruit in good faith (AF 43). But under the circumstances of this case, in which the recruitment effort had already been going on for a year at the time the resumes were received (in great part due to delay on the part of the CO), and the advertisement mandated by the CO appeared in a monthly, national publication (see AF 111) rather than a daily newspaper, making some delay inevitable, a period of 16-20 days between receipt of the applicants' resumes and Employer's response to these resumes cannot be found to be a lack of good faith without other evidence to point to. A denial of certification cannot be sustained in this case based solely on the length of time between Employer's receipt of the resumes and its contact of the applicants.<sup>2</sup>

Second, the CO also denied certification because Employer failed to provide lawful job-related reasons for rejecting at least nine of the applicants (he did not mention applicant Chambers). In regard to five of the applicants -- Bennett, Wright, Maculans, Zulrick and Chok -- the CO apparently found that Employer did not offer a legally sufficient reason for rejecting them, since he offered no explanation of why Employer's reasons for rejecting these applicants were unacceptable. Since Employer did, in fact, give reasons which obviously were acceptable, if credible, for rejecting each of these applicants, both in response to the second NOF (AF 45-47)

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<sup>2</sup> The CO did not indicate how long a period to contact the applicants would have been acceptable.

and immediately following its recruitment (AF 59-60), the CO's findings in regard to these applicants demonstrates an unacceptable lack of responsiveness to the evidence presented by the Employer.

The CO also displays this lack of responsiveness concerning applicants Hayes and Stewart. In regard to both of these applicants, the CO contends that Employer is not in a position to determine their lack of qualifications since it did not interview them (AF 43). But Employer indicated in its initial report of its recruitment that it spoke to both Hayes and Stewart (AF 60).

Finally, the CO's discussion of the qualifications of Reusser and Gholampour ignores the job requirements listed on the Form ETA 750-A. Employer argued that neither of these applicants had the required degree and/or experience to meet the job's minimal requirements. Yet in finding Reusser to be qualified, the CO specifically found that he has only 4 1/2 years of architectural design experience (AF 43). Since Mr. Reusser apparently does not have a degree in Architecture (see AF 90, which does not indicate that he graduated from college; see also AF 46), he would have needed six years of architectural design experience to qualify for the job. Likewise, although Gholampour may have the required degree, all of his work experience was as an engineer (see AF 76). The CO has not alleged anything to the contrary. Since the position required at least two years of experience in the job, Gholampour clearly does not qualify. See, e.g., Concurrent Computer Corp., 88-INA-76 (Aug. 19, 1988) (en banc).

Since all of the reasons given by the CO for denial of certification have been rejected, his denial of certification is reversed.

#### ORDER

The Certifying Officer's determination denying alien employment certification is reversed, and certification is granted.

JEFFREY TURECK  
Administrative Law Judge

JT:jb