



DATE: APR 14 1989
CASE NO. 88-INA-7

IN THE MATTER OF

LIN & ASSOCIATES, INC.,
Employer

on behalf of

FURE-LIN JEANG,
Alien

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

JOHN M. VITTONI
Deputy Chief 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 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. 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

On November 7, 1986, Employer, Lin and Associates Incorporated, filed an application for Alien Labor Certification on behalf of Fure-Lin Jeang (AF 84), a citizen of the Republic of China (Taiwan) (AF 86). The position for which certification is sought is Structural Engineer (AF 84). Employer listed the job requirements as a Master of Science in Civil Engineering and either one year experience as a research assistant in the field or one year's experience in the industry (AF 84).

The Notice of Findings (NOF) was issued on May 26, 1987 (AF 30-41). The Certifying Officer found that Employer's letter to job applicants listed the job requirements incorrectly. While the 750A form and the job advertisement required one year of experience as a research assistant in the field or one year of experience in the industry, the letter required one year experience as a research assistant and one year experience in the industry. The Certifying Officer also determined that Employer had received 37 referrals from the Washington State Employment agency but had only reported on the disposition of 36. The Certifying Officer reviewed Employer's evaluation comments and found some inconsistency between Employer's comments and the applicants' resumes. The Certifying Officer concluded that there were United States workers available who were able, willing and qualified for the job opportunity.

The Certifying Officer instructed Employer that it must conduct a ""positive" recruitment effort. Employer was instructed to interview, by telephone, letter, or in person, those applicants that the Certifying Officer determined to be qualified on the basis of their resumes. The Certifying Officer further instructed Employer that "inviting someone to appear at their own expense, and the applicant's subsequent declining to pay for such trip and its attendant expenses is not an acceptable reason for rejection." (AF 41).

On June 10, 1987, Employer notified the Certifying Officer that it was in the process of communicating with all applicants that the Certifying Officer deemed qualified to correct the misquotation in letters previously sent (AF 26). Employer requested an extension until July 30, 1987 to submit rebuttal. On June 29, 1987 Employer requested an additional fifteen day extension (AF 24). Both extensions were granted by the Certifying Officer (AF 23, 25).

On August 14, 1987, Employer submitted its rebuttal to the NOF (AF 11-22). Employer asserts that there is nothing in the regulations which requires that a prospective employer provide travel and related expenses so that an applicant may appear for an interview, and that, therefore, it need not pay expenses for personal interviews. Employer asserts further that a personal interview is necessary, that it has never hired an engineer without a personal interview and that it is certain no engineering firm would do so (AF 12). Finally, Employer contends that "the procedures, used in this recruitment effort are standard in the engineering industry and no

different than those used in any recruitment effort regardless of whether alien employment certification is involved." (AF 12).

The Final Determination was issued on August 21, 1987 (AF 4-7). The Certifying Officer determined that Employer violated 20 CFR § 656.21(b)(7) by rejecting U.S. workers for other than job-related reasons (AF 5). The Certifying Officer concluded that Employer had not conducted a "positive" recruitment effort. Specifically, the Certifying Officer indicated that a sufficient recruitment may entail "going beyond what the employer normally considers standard." (AF 5). The Certifying Officer reasserted its preliminary finding that Employer could not reject applicants who refused to pay their own interviewing expenses. The Certifying Officer explained that if Employer would not pay for a personal interview, it should have explored other options to conduct its interview e.g. two-way video, sending a representative to various geographical areas to conduct interviews, shared costs, etc. (AF 6).

On November 16, 1987, Employer submitted a Brief in support of its appeal.

Discussion

The purpose of the alien labor certification process is to determine whether there is an able, willing, qualified and available U.S. worker to fill a position for which Employer seeks to hire an alien. 20 CFR § 656.1(a)(1). In pursuit of this goal, the regulations require that an Employer seeking to hire an alien must document that U.S. workers who have applied for the job opportunity were rejected "solely for job-related reasons." 20 CFR § 656.21(b)(7).

BALCA has not yet directly addressed the question of whether an employer conducting a national recruitment may reject an otherwise qualified U.S. applicant because that applicant does not agree to travel to the location of the employer's business for a personal interview at the applicant's expense. However, we have indicated that when an employer imposes such a requirement on job applicants, it is up to the employer to take steps to minimize the burden of this requirement. See L.A. United Investment Co., 87-INA-738 (Apr. 20, 1988).

Approximately half of the applicants for this position were rejected solely or primarily because they did not appear for a personal interview at their own expense; and employer made no effort to try to reduce the impact of this requirement on the pool of job applicants. Clearly, through telephone interviews or by other means, employer could have weeded out unqualified applicants and/or determined which of the applicants had the best chance of meeting its requirements. Then Employer could have invited the best applicants for interviews. Instead, insisting that it has a right to require personal interviews but has no duty to pay for applicants to come to Seattle to be interviewed, Employer failed to carry out or propose any procedure to mitigate the hardship on job applicants. We find that the rejection by employer of so many seemingly qualified U.S. workers for failing to appear for personal interviews at their own expense, without attempting to limit the burden on this pool of applicants, is inconsistent with §§656.21(b)(7). Because Employer must hire a qualified U.S. worker if one is available, and so many seemingly qualified workers were available, its failure to somehow arrange to interview

even the most qualified applicants suggests that Employer was using the interview requirement as a means to reject U.S. workers.

ORDER

For the foregoing reasons, the determination of the Certifying Officer is AFFIRMED and alien labor certification is hereby DENIED.

JOHN M. VITTON
Deputy Chief Judge

Washington, D.C.

JMV/GHS/kat