



DATE: APR 5 1989  
CASE NO. 88-INA-115

IN THE MATTER OF

UTAH STATE UNIVERSITY,  
Employer

on behalf of

CRAIG BURTON FORESTER,  
Alien

David E. Littlefield, Esq.  
Salt Lake City, UT  
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge;  
and Brenner, Tureck, Guill, Schoenfeld and Williams,  
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 Rebecca A. Stuart'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

On May 25, 1987, Employer, a university, filed an application for alien employment certification to enable the Alien to be hired as an Assistant Professor teaching and conducting research in Geology. The qualifications for the position, as set forth in Form ETA 750-A, were a doctorate in Hydrogeology (AF 28-29).

Following the issuance of a Notice of Findings ("NOF") by the Certifying Officer ("CO") on July 23, 1987 (AF 23-24), and the filing of a rebuttal by Employer on October 15, 1987<sup>2</sup> (AF 7-18), the CO issued her Final Determination on November 12, 1987, denying certification (AF 5-6). The denial was based upon a finding that the employer's recruitment efforts failed to clearly state the employer's actual minimum requirements and that the employer rejected U.S. workers for other than lawful, job-related reasons.

### Discussion

As this application involves a job offer as a college or university teacher, it is subject to the regulations at §656.21a for "occupations designated for special handling." Under subsection (a)(1)(iii) of that section Employer is required to "to show clearly that the employer selected the alien for the job opportunity pursuant to a competitive recruitment and selection process, through which the alien was found to be more qualified than any of the United States workers who applied for the job."

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<sup>2</sup> Employer timely requested and was granted an extension of time in which to respond to the NOF from August 27, 1987 to October 15, 1987, to allow for the reconvening of and subsequent report from the University's search committee (AF 19-22).

The evidence in this matter shows that Employer received resumes from 20 applicants in response to its recruitment efforts (AF 60-163, 168-71). Employer selected the Alien for the position based upon its determination that he was the most qualified for the position.<sup>3</sup>

In her NOF, the CO determined that Employer failed to document that the Alien was selected pursuant to a competitive process; Employer also failed to document the process through which the Alien was found to be more qualified than any of the U.S. workers applying for the job. The CO further found that the documentation submitted did not support that the Alien meets the stated minimum requirement for the job opportunity, *i.e.*, a Ph.D. in Hydrogeology. Employer was advised:

This finding may be rebutted by:

1. Employer submitting the final report of the search committee making the recommendation or selection of the alien at the completion of the competitive recruitment and selection process.
2. A written statement attesting to the degree of the alien's educational qualifications.

In rebuttal, Employer submitted a statement together with the Final Report of the Search Committee and written documentation of the Alien's educational qualifications as required by the NOF. The educational documentation projected that the Alien would be awarded a Ph.D. in Geological Sciences in November 1987. In its rebuttal, Employer contends that "[s]ince the permanent employment offer envisions an Assistant - Professor level appointment, the Ph.D. requirement was included on the Application for Alien Employment Certification. The actual appointment of Mr. Forster was made at the Instructor level, pending his acquisition of the Ph.D. Degree." The Final Report of the Search Committee states:

During the recruitment process, candidates were informed that the Ph.D. degree was required to be hired at the Assistant Professor level. Applicants without the Ph.D. would be considered but if an offer of employment was made, it had to be at the level of instructor. Completion of the P.h.D. was expected to obtain permanent employment and when completed, the level of employment would be changed to Assistant Professor. (AF 13).

Finding that Employer had failed to sufficiently rebut the NOF, the CO issued a Final Determination denying labor certification. The CO determined that "the employer's recruitment efforts failed to clearly state what its minimum requirements were for the job opportunity." (AF 6). She added, "[n]one of the employer's advertisements in the professional journals made it clear

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<sup>3</sup> A list of reasons for non-selection of the remaining 19 applicants was submitted and includes as bases for rejection: inappropriate research interest (15 applicants); limited publication record (1 applicant); inability to teach some depth of courses and less innovative in research than alien (1 applicant); and withdrawal of application (2 applicants) (AF 57-60).

to potential U.S. applicants that applicants would be considered for the position even if they did not, at the time, actually possess the Ph.D. degree." (AF 6). The CO also determined that Employer had rejected U.S. workers for other than lawful, job-related reasons since Employer listed a Ph.D. in Hydrogeology as its actual minimum requirement in its recruitment, yet hired the Alien without this requirement.

Employer filed a request for Review on December 11, 1987 (AF 3-4). Statements in its support were received on February 22 and 29, 1988. The appeal was based on the premise that "it is common practice in the academic community to consider and hire well-qualified teaching staff who have yet to complete their Ph.D. despite the fact that this degree is usually the minimum requirement for a permanent tenure-track position." (letter from Donald W. Fiesinger to David Littlefield, Feb. 18, 1988, at 3). Thus Employer contends that it is unlikely than any candidates were discouraged from applying for the job solely because they had yet to complete their degree.<sup>4</sup>

Employer's application for alien employment certification is for the position of Assistant Professor. Employer stated that the minimum requirement for the job opportunity is a Ph.D. in Hydrogeology. The evidence establishes that the Alien was hired to begin work in December 1986, yet did not get his Ph.D. degree until sometime after October 1987 (AF 14, 17), almost a full year later. Thus, the Alien clearly did not meet the job requirement.

Labor certification under §656.21a requires that the employer establish that the alien was found to be more qualified than the U.S. workers who applied. A majority (13) of the rejected applicants held Ph.D. degrees at the time they applied for the job (AF 60, 69, 72, 81, 84, 91, 94, 99, 112, 118, 120, 124, 151). An additional four applicants were expected to receive their degrees prior to commencement of the job opportunity (AF 64, 109, 115, 162). Thus, nearly all of the applicants except the alien met the job requirement.

Employer having failed to establish that the alien met the minimum job requirement and that the alien was more qualified than the U.S. workers that applied, it follows that the denial of labor certification must be affirmed.

### ORDER

The determination of the Certifying Officer denying labor certification is affirmed.

JEFFREY TURECK  
Administrative Law Judge

JT/jb

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<sup>4</sup> Employer offers support for its position in the form of survey data based on the University's faculty members. Since this data was first filed before this Board, it will not be considered. See, e.g., In re University of Texas at San Antonio, 88-INA-71 (May 9, 1988).