



DATE: DECEMBER 29, 1988
CASE NO. 88-INA-287

IN THE MATTER OF

MODGRAPH, INC.,
Employer

on behalf of

JEAN-MARC MATTEINI,
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 Claire Sala Ayer's denial of a labor certification application pursuant to 20 C.F.R. §656.26.¹

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

¹ 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, and any written arguments of the parties [see §656.27(c)].

Statement of the Case and Discussion

The Employer, a computer terminal manufacturer, filed an application for alien labor certification to enable the Alien to work as a Senior Engineer. The position was advertised in The Boston Globe but, in violation of §656.21(g)(2) and (4), the advertisements contained the Employer's name and failed to specify the rate of pay.² Nonetheless, 25 applicants responded to the advertisement, although all were found to be unqualified.

In a Notice of Findings ("NOF") issued on November 11, 1987, the CO listed all nine requirements regarding the content of job advertisements found in §656.21(g), and instructed Employer to readvertise in conformance with these requirements. The deadline for filing rebuttal evidence was listed as December 16, 1987, in accordance with §656.25(c)(3).

On November 20, 1987, Employer responded to the NOF by stating that, due to the risk of applying to an ad run by its own employer, potential employees in the computer graphics industry would not respond to a blind ad. Employer also argued that it did not want to run an ad listing a specific salary because it did not want to discourage job applicants who currently earn more.

By letter dated December 18, 1987, Employer informed the CO that:

as you know we re-ran the advertisement on November 29, 30 and December 1 to meet the objections raised concerning company name and exact salary, and received no response. This was not unexpected as per our earlier conversations and my letter of November 20 (Emphasis added).

On January 8, 1988, the CO issued a Final Determination denying certification, stating:

In rebuttal, the employer chose to explain his rationale for not specifying the wage and for identifying the employer, both contrary to the regulations. The employer chose not to readvertise as instructed. The application cannot be approved since the employer has not complied with the regulations. (Emphasis added).

² In contravention of §656.26(c)(1), the pages of the administrative file were not numbered. As a result, no citations to specific pages of the record will be found in this decision. The CO is urged to comply with this seemingly minor -- but actually quite important -- directive.

The Final Determination ignored Employer's letter of December 18, 1987.³ In a subsequent letter to Employer dated February 2, 1988, the CO explained that she did not consider that letter because it "was not timely and therefore could not be considered." Presumably, the CO found the December 18 letter untimely because the NOF required Employer's rebuttal to be filed by December 16.

We hold that this case must be remanded for the CO to consider whether the December 18, 1987 letter and the attached evidence were submitted in a timely manner.

Following the Employer's November 20th rebuttal to the NOF, it appears that the CO and Employer entered into discussions which culminated in Employer's readvertising the position absent its name and with a stated wage, in conformance with the regulations.⁴ Neither the exact nature of these discussions nor just when they took place are clear from the record before us. Nevertheless, it appears that the CO or her staff may have stated or implied to the Employer that the results of its recent recruitment could be filed subsequent to December 16, 1987. If that was the case, then Employer's December 18th rebuttal letter detailing its post-NOF recruitment should have been considered.

Since the untimeliness of this response is the only reason given for denying certification, this case will be remanded to the CO to determine whether the Employer, directly or by implication, was given an extension of time in which to file further rebuttal evidence or otherwise was misled into believing that it could report the results of its post-NOF recruitment when completed. In this regard, should another NOF be issued on remand, the CO should include in the record copies of any reports of telephone calls between her staff and the Employer, and indicate whether she was aware, prior to December 18, 1987, that Employer was readvertising the position in conformance with the terms of the NOF.

ORDER

The denial of alien labor certification is vacated, and the case is remanded to the CO for further consideration.

For the Board:

JEFEREY TURECK
Administrative Law Judge

³ That letter is stamped as received by "USDOL - ETA" on December 22, 1987. Therefore, the CO received the letter within days of its being written.

⁴ See Employer's letters to the CO dated December 18, 1987 and January 11, 1988. The December 18th letter is quoted in pertinent part at p. 2 supra.

In the Matter of MODGRAPH, INC., 88-INA-287
Judge LAWRENCE BRENNER, concurring.

I concur in the decision but add my view that if the C.O. on remand concludes that the Employer was not given an extension of time to complete the filing of its rebuttal, the C.O. further should consider whether the Employer had good cause for not being able to complete its rebuttal in time due to the need to wait for responses to the required second advertisement.

LAWRENCE BRENNER
Administrative Law Judge