



CASE NO. 88-INA-26

IN THE MATTER OF:

BELL COMMUNICATIONS RESEARCH, INC.,
Employer

on behalf of

JOE Z. CHENG,
Alien,

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

JAMES L. GUILL
Administrative Law 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. §656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under the 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 [AF herein] and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

Employer, Bell Communications Research, Inc., filed an application for alien labor certification on December 9, 1985, on behalf of the Alien, Joe Z. Cheng, for a position as a Research Systems Engineer (AF 8). Employer stated its minimum requirements as an M.S. degree in either Industrial Engineering or Electrical Engineering and either six months experience in the job offered or six months experience in the related occupation of "Research/Teaching-Statistical Techniques & Simulation Methodologies." (AF 8). On June 16, 1987, the Certifying Officer (C.O.) issued a Notice of Findings (N.O.F.) which proposed to deny certification on the basis of, inter alia, 20 C.F.R. §656.21(b)(7) which requires that U.S. applicants be rejected only for lawful job-related reasons.

Employer had rejected a U.S. applicant, Mr. Sarsalari, because his ""experience was in no way related to statistical techniques of stochastic simulation as advertised in the requirements for the job offered." (AF 30). In support of his determination that the rejection was for other than lawful, job-related reasons, the C.O. stated that "[Mr.] Sarsalari has extensive statistical techniques background (although neither statistical techniques nor stochastic simulation is listed as a special requirement to qualify related entry)." (AF 33). The C.O. then stated that Employer could rebut his finding by "clarifying [the] minimum requirements regarding experience and statistical techniques or stochastic simulation and readdressing [the] qualifications of [the] applicant." (AF 33).

In its rebuttal, filed on July 21, 1987, Employer submitted a letter which stressed that its function is as a research and development organization and that the job description on its ETA 750A made reference to certain activities, specifically to: "perform appraisals of new . . . digital transmission facilities; creation of system functional models for state-of-the-art transmission products; development of statistical and simulation methodologies. . . ; application of simulation." (AF 45) (emphases supplied). Again, Employer stated that Mr. Sarsalari was not qualified for the job because he lacked experience in stochastic simulation (AF 44). Employer did not, however, amend item #15 on its ETA 750A to include stochastic simulation as a minimum requirement for the job.

In the final determination, issued on July 29, 1987, the C.O. denied certification because, inter alia, experience in stochastic simulation had not been entered in item 15 and was not, therefore, an acceptable reason for rejecting Mr. Sarsalari (AF 48). On August 31, 1987, Employer submitted a request for administrative-judicial review (AF 85). Employer's brief, filed on December 30, 1987, has been duly considered.

DISCUSSION

In its brief, Employer makes two arguments. First, it argues that the related occupational experience prerequisites listed in Item 14 on the ETA 750A made clear that stochastic simulation was required (Employer's brief at 5). This is so, the argument goes, because

Simulation Methodologies (which was listed) includes both stochastic and deterministic methods and tools, and both types were listed under "The Duties" described at Form ETA 750A No. 13. Thus, anyone who carefully read the ETA 750A form would have understood that Simulation Methodologies is a term that necessarily refers to stochastic techniques.

(Id.). We disagree. Given the nature of Employer's position in the industry as a leader in research and development of state-of-the-art technology, it is not unreasonable that the C.O. would not know that simulation methodologies necessarily refers to stochastic simulation. And, as will be more fully explained below, the ETA 750A form gave Employer ample opportunity to notify the C.O. of that fact.

Alternatively, Employer argues that all applicants were on notice of the minimum requirements for the position (Id.). Apparently, Employer's position is that because the Notice of Job Opportunity and the advertisement explicitly indicated the two major simulation methodologies, deterministic and stochastic, no potential applicant would be prejudiced because they were not explicitly listed in Items 14 or 15 on the ETA 750A form.

Both of Employer's arguments misconstrue the purposes of Items 14 and 15 on the ETA 750A form, one of which is to notify the C.O. of Employer's minimum requirements so that the C.O. may, if necessary, challenge the stated requirements as unduly restrictive or as not the actual minimum. See 20 C.F.R. §§656.21(b)(2) and 656.21(b)(6). In this way the C.O. may protect potential U.S. applicants who may be discouraged from applying for the job by advertised requirements which are unduly restrictive or not the actual minimum.

In the instant case, Employer stated its minimum requirements as an M.S. degree in either Industrial Engineering or Electrical Engineering and either six months experience in the job offered or six months experience in the related occupation of "Research/Teaching-Statistical Techniques & Simulation Methodologies." (AF 8). Stochastic simulation is not listed as one of Employer's minimum requirements for the job. Therefore, Employer may not reject a U.S. applicant who meets the stated minimum requirements because the applicant does not have experience in stochastic simulation.

ORDER

Accordingly, for the foregoing reasons the C.O.'s denial of certification is hereby
AFFIRMED.

At Washington, DC

Entered: DEC 22 1988
by: JAMES L. GUILL
Administrative Law Judge

JLG/BDC