



DATE: December 19, 1988
CASE NO. 88-INA-159

IN THE MATTER OF

MEDICAL DESIGNS, INC.,
Employer

on behalf of

NARINDER PARKASH OHAWAN,
Alien

Indra M. Gandhi, Esquire
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 proceeding was initiated by the above-named Employer who requested review, pursuant to 20 C.F.R. §656.26, from the determination of the a Certifying Officer of the U.S. Department of Labor denying an application for a labor certification which the Employer submitted 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").

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.

The procedures whereby such immigrant labor certifications may be applied for, and granted or denied, are set forth in 20 C.F.R. Part 656. 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. 20 C.F.R. §656.27(c).

Statement of the Case

On December 10, 1986, the Employer, a company manufacturing orthopedic bracing systems and prostheses located in Azle, Texas, filed an application for alien employment certification (AF 208-13) to enable the alien to fill the position of Director, Product Design and Development. The requirements of the job were a B.S. degree in Metallurgical Engineering, five years of experience in the job offered, and being well versed in the biomechanics of the human body (AF 208).

Nine applicants responded to Employer's recruitment in a professional publication. The closest applicant to Employer's offices lived in Tennessee. Four other applicants lived on the east or west coasts of the United States, and two lived overseas. Employer contended that each of these applicants was invited to an interview on May 22, 1987 (AF 90). Six applicants refused to attend;¹ three never responded (see Id.).

In a Notice of Findings (NOF) issued on October 2, 1987 (AF 84), the Certifying Officer (CO), citing § 656.21(b)(7) of the regulations, required the Employer to provide written documentation that applicants Dettmar, Jacobs, Purkait, Shetty, Dubrul and Halls opted not to be interviewed. Employer also was told to contact applicants Shivanath, Gill and Marriott to offer them interviews, or obtain statement that they were not interested in the job.

Employer's rebuttal to the NOF, submitted on October 14, 1987, consistent of a one page affidavit from its President stating that the group of six applicants listed above "declined by telephone to be interviewed...." (AF 81), and that the latter three applicants "were contacted both by letter and mailgram and...never contacted me nor did they show up for the preset June 9, 1987

¹ The record up to and including the Final Determination does not indicate why the applicants declined to be interviewed. But in Employer's request for review, evidence was presented indicating that at least five of the applicants elected not to be interviewed because they were required to pay their own way to Texas. See AF 27-29, 37-38. We do not reach the issue of whether an employer may reject a job applicant solely because the applicant will not pay his or her own way to the employer's office for an interview.

interview here in Azle, Texas". (Id.). The Final Determination, finding this documentation insufficient, denied certification.

Discussion

It is clear that Employer made virtually no effort to comply with the NOF. In contrast to its one page response to the NOF, Employer's request for review is 76 pages long. Employer did not attempt to recontact the three applicants whom the CO told him to recontact until after the Final Determination was issued (AF 3-4). In regard to the other six applicants, the Employer provided no information that was not already in the record (compare AF 81-82 with AF 89-90). Under the circumstances of this case, where the record was extremely bare and uninformative, the CO was entitled to a more substantive response.

Since the record fails to substantiate Employer's contention that it rejected the nine applicants for lawful, job related reasons, the denial of certification is affirmed.

ORDER

The Certifying Officer's denial of alien labor certification is affirmed.

JEFFREY TURECK
Administrative Law Judge