U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: MAR 14 1989
CASE NO. 88-INA-107

IN THE MATTER OF

ALPINE ELECTRONICS OF AMERICA, INC.,
Employer

on behalf of

TAKESHI OJI,
Alien

Barry S. Morinaka, Esq.
Los Angeles, CA
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 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 Paul R. Nelson'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

[1] 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

The Employer, an electronics firm located in Torrance, California, submitted an application for labor certification on behalf of the Alien, which was accepted for processing on July 31, 1986 (AF 26). The position offered was an Electronics Engineer, D.O.T. Code 003.061-030 (AF 26). The position required a B.A. in Engineering with a major field of study in Electronics Engineering (AF 26). The job duties included designing computer systems using machine and assembly languages processed by NEC Toshiba (AF 26). As part of the job duties, the Employer required knowledge of computer architecture and computer alarm systems used in the auto industry (AF 26).

On March 31, 1987, the Certifying Officer ("CO") issued a Notice of Findings ("NOF") (AF 22-24) advising Employer that its recruitment was deficient. Specifically, the CO stated that:

> The electronics engineer job opportunity was advertised in the Electronic News. . . . For job openings such as electronic and electrical engineer, it is determined that the IEEE Spectrum is a more appropriate publication. The Electronic News focusus more on sales representatives, while the IEEE Spectrum focuses on actual engineering positions.

(AF 23 -- emphasis added). Employer then was instructed to advertise

> in a newspaper of general circulation or in the next issue of a professional, trade or ethnic publication, whichever is appropriate to the occupation and most likely to bring responses from available and qualified U.S. workers.

(Id. 23).

The Employer was also instructed to justify or delete certain job requirements which the CO alleged were unduly restrictive.

On July 1, 1987, the Employer submitted its rebuttal (AF 8-9). The Employer stated that the position had been readvertised in a publication entitled Electronic Engineering Times with the restrictive requirements deleted, and that the advertisement produced one applicant who was unqualified.

On July 9, 1987, the CO issued a Final Determination (AF 6-7) denying labor certification, noting that the Employer "failed to place an advertisement in a trade publication appropriate to the occupation and most likely to bring responses from available and qualified U.S. workers," citing violations of §§656.21(f) and (g). The CO stated further that:

> The [NOF] indicated that the publication determined to be the most appropriate for this type of job is the IEEE Spectrum.
>
> ....
>
> The employer has flaunted the [NOF] . . . . Since the IEEE [S]pectrum is demonstrated to be the leading publication in the electronics engineering industry for producing job applicants, it is the appropriate vehicle. The employer disregarded this instruction . . . .

(AF 7 -- emphasis added).

In its request for review, the Employer argues that it determined that the Electronic Engineering Times was the publication most likely to bring responses. (AF 2-4). According to the Employer, since the Notice of Findings states only that the IEEE Spectrum is a more appropriate publication, it was not required to advertise in the IEEE Spectrum, but was free to advertise in the most appropriate publication (AF 4).

Discussion

Under 20 C.F.R. §656.21(g), the employer must place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication, whichever is appropriate to the occupation and most likely to bring responses from able, willing, qualified, and available U.S. workers. Where the CO requires advertising different from or in addition to that which the Employer has run, the CO must provide a reasonable explanation of why the employer's advertising and recruitment efforts were inadequate and show how the additional recruitment efforts would add to the test of the labor market. See Intel Corp., 87-INA-570, 571 (December 11, 1987) (en banc); Pater Noster High School, 88-INA-131 (Oct. 17, 1988).

The problem in this case arises because the CO apparently failed to grasp the difference between what he alleges was stated in the NOF and what the NOF actually states. As the Employer contends, the NOF merely pointed out that the IEEE Spectrum was a more appropriate publication than Electronic News. Had the Employer again advertised in Electronic News, it may have have been proper to deny certification.

However, the IEEE Spectrum was not identified in the NOF as either "the most appropriate" or "the leading publication;" and Employer clearly was not instructed, either directly or by implication, to readvertise in that publication. In fact, the CO did not even require Employer to readvertise in a professional trade journal. Under these conditions, Employer had the discretion, in response to the NOF, to readvertise in any publication which it could show was appropriate, barring only Electronic News.[2] If the CO did not believe that Electronic Engineering Times produced an adequate test of the U.S. work force, he should have issued another NOF setting out his reasons and providing further instructions.

Since Employer already has advertised for the position on two occasions without finding any qualified and available U.S. workers, and has complied with the instructions in the NOF, Employer has met its burden of establishing that there are no qualified U.S. workers available to perform the job. Therefore, the denial of certification is reversed.

ORDER

The CO's denial of alien labor certification is reversed, and certification is granted.

JEFFREY TURECK
Administrative Law Judge

JT:jb

In the Matter of ALPINE ELECTRONICS of AMERICA, INC., 88-INA-107
Judge LAWRENCE BRENNER, joined by Chief Judge Litt and JudgeGuill, dissenting:

In our view, the C.O.'s Notice of Findings, read fairly, put the Employer on notice that it would have to do one of three things: Rebut the C.O.'s finding that the Electronic News was an inadequate publication for this job advertisement; or readvertise the job in the IEEE Spectrum which the C.O. suggested as a more appropriate publication; or readvertise the job in another appropriate publication at least as likely as the IEEE Spectrum to elicit responses from available and qualified U.S. workers.[1]

The Employer, in its rebuttal, simply readvertised the job in another publication, the Electronic Engineering Times. It received one response from an unqualified applicant. It

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[2] In fact, if Employer could have rebutted the CO's finding that Electronic News was geared more to sales representative than to actual engineering positions, then Employer could even have readvertised in Electronic News.

[1] We agree with our colleagues that the C.O.'s Final Determination mischaracterizes his Notice of Findings. The Notice did not limit the Employer's options on rebuttal to readvertizing in the IEEE Spectrum.

provided no reason why the Electronic Engineering Times was an appropriate publication "most likely to bring responses from . . . U.S. workers" (NOF, at AF 23, quoting 20 C.F.R. §656.21(g)), as compared to the IEEE Spectrum.

In the circumstances it is debatable whether the C.O. was required to do anything more than to issue a Final Determination denying certification because the Employer did not address in its rebuttal why its readvertisement in the Electronic Engineering Times was adequate. However, the Notice of Findings did not explicitly state what we find obvious -- that the Employer would have to explain its choice of publication if it elected the third option. For this reason, giving the Employer the benefit of any possible doubt, we would remand this case to give the Employer the opportunity to either justify before the C.O. its choice of publication or readvertise the job in the IEEE Spectrum.

We do not consider evidence presented for the first time in the appeal before this Board. 20 C.F.R. §656.26(b)(4). In any event, the Employer's assertion on appeal (AF 3-4) that the Electronic Engineering Times has a "substantially larger circulation" than the unacceptable Electronic News is immaterial both because it compares the wrong publications and because the C.O.'s well-stated reason in the Notice of Findings for rejecting the Electronic News was not based on its circulation.

LAWRENCE BRENNER
Administrative Law Judge