U.S. Department of Labor

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

DATE: APRIL 18, 1989
CASE NO. 88-INA-253

IN THE MATTER OF

DICEON ELECTRONICS, INC.
Employer

on behalf of

JOSEFINA WRIGHT
Alien

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

LAWRENCE BRENNER
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 a 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.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 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 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

Diceon Electronics, Employer, is located in Irvine, California and is a manufacturer of printed circuit boards (PCB's). On September 18, 1986, Employer filed an Application for Alien Employment Certification on behalf of Josefina Wright to fill the position of In-house Inspector. The requirement for the position was one year of experience in the job offered (AF 15-16).

On June 5, 1987, the Certifying Officer (C.O.) issued his Notice of Findings (AF 8-9), and on June 16, 1987, Employer filed its Rebuttal (AF 4-7). On August 14, 1987, the C.O. issued his Final Determination denying certification based on two grounds (AF 2-3). First, the C.O. stated that Employer had not documented its contacts with U.S. applicants. Secondly, the C.O. stated that four U.S. workers were qualified and available at the time of the labor market test. The C.O. therefore denied certification based upon 20 C.F.R. §656.1

On September 3, 1987, Employer filed a Request for Review (AF 1). This has been duly considered.

Discussion

I

In his Final Determination, the C.O. found that Employer had not documented its contacts with U.S. applicants because Employer had not documented its assertions, e.g., it had not submitted a telephone bill showing that phone calls were made to those applicants (AF 3). In his Notice of Findings, the C.O. had required Employer to submit "convincing documentation" of its reasons for rejecting U.S. applicants but had not specifically mentioned telephone bills (AF 9).

We are of the opinion that this is an unlawful ground for the denial of certification. In Gencorp, 87-INA-659 (Jan. 13, 1988), the certifying officer required the employer to document its reasons for rejecting a U.S. applicant by submitting a transcript of a telephone interview. This interview was conducted after the issuance of the Notice of Findings, and the Final Determination was therefore the first occasion when the employer was put on notice that a transcript would be required. We found that the certifying officer was unreasonable in requiring the employer to submit a transcript of the telephone interview. Furthermore, we stated that where an employer is required to prove the performance of an act and its results, written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation, and that a certifying officer must thereafter weigh the credibility of such assertions.

If the C.O. did not wish to credit Employer's rebuttal and initial reports of contacts, together with written notes of telephone calls (AF 19-25), which constitute documentation in accordance with the Gencorp standard, he should have stated why not, and at the least issued a Second Notice of Findings.

II

In his Final Determination, the C.O. also found that four U.S. workers were able and available at the time of the labor market test, Nguyen, Swearingen, Kennicutt and Andruszko (AF 3). The Certifying Officer had made similar assertions in his Notice of Findings and had required Employer to establish job-related reasons for its rejection of these U.S. workers (AF 9). Employer responded by setting forth reasons for its conclusion that the workers were either unavailable or unqualified (AF 4-7).

We affirm the denial of certification based on the recruitment of Kennicutt. In its report of recruitment, the Employer stated it called Kennicutt at the main telephone number listed on his resume and it was busy on two attempts that day (November 12, 1986). Employer then called an alternate "message number" on Kennicutt's resume, and stated it spoke with his mother who told Employer the applicant had started a job that week and was no longer looking (AF 24). In his questionnaire response from early April 1987, Kennicutt stated he was never contacted by the Employer, and that he would have accepted the job if offered since the other job he took was one with no future (AF 12). As in Dove Homes, Inc., 87-INA-680, May 25, 1988 (en banc), it is unacceptable for an Employer to assume a U.S. applicant is not interested based on a phone conversation with another family member. The vice in such a procedure, the strong possibility of a misunderstanding or miscommunication, is evidenced by the instant case. As we stated in Dove Homes, supra: "An employer which wants to consider an applicant seriously would not abandon all efforts on the basis of a telephone conversation with [another family member]."

The Employer has not established that Kennicutt, a U.S. applicant whose qualifications are not challenged, was unavailable for the job.

ORDER

The Final Determination of the Certifying Officer denying labor certification is AFFIRMED.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/gaf