UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D.C. 20001

DATE: 02/03/97

CASE NO. 95-INA-79

In the Matter of:

THE CARL GROUP
Employer

on behalf of

ROLAND ARAJS
Alien

Before: Holmes, Neusner and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, 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 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.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 29, 1993, The Carl Group ("Employer") filed an application for labor certification to enable Roland Arajs ("Alien") to fill the position as Senior Technical Writer for a technical documentation/training service (AF 741). The job duties for the position, as stated on the application, are as follows:

> Design and write technical hardware manuals (up to 700 pages) for hardware engineers; interface with engineers, graphic designers.

(AF 741).

The stated job requirements for the position include: 5-7 years in the job offered or in the related occupation of Technical Writer; and Other Special Requirements, as follows: "Must have experience writing voluminous technical manuals (excess of 500 pages) which describe PC BIOS & test software. Must have ability to analyze schematics, analyze ASIC & PLA equations, develop timing & state diagrams; knowledge of Ventura desktop publishing, PC BIOS specs; ability to write code in C, C++, Assembler code; excellent written & oral communication skills (AF 741).

In a Notice of Findings ("NOF") issued on November 10, 1993, the CO proposed to deny certification on the grounds, **inter alia,** that the requirements are "essentially tailored" to the Alien's background and are unduly restrictive, pursuant to §656.21(b)(2). Furthermore, in light of such tailoring, the CO found that the job opportunity is not clearly open to any qualified U.S. workers, as provided in § 656.20(c)(8). Accordingly, the CO directed the Employer either to document the business necessity for the special requirements or to delete the restrictive requirement(s) and retest the labor market (AF 734-739).

The Employer submitted its rebuttal on or about December 14, 1993 (AF 672-727). The CO found the rebuttal unpersuasive and issued a Final Determination on March 8, 1994, denying certification (AF 665-671).

By letter dated April 11, 1994, which was stamped as received by the CO on April 12, 1994, the Employer filed a "'request' to review/appeal" the application for labor certification and

requested a 60-day extension to file a brief. (AF 657).

In addition, under cover letter, dated April 11, 1994 (AF 4-17), which was stamped as received by the CO on April 13, 1994 (AF 3), the Employer submitted a "Motion to Reopen and Reconsider Decision Denying Application for Alien Employment Certification, or, in the Alternative, Appeal of Denial" together with numerous exhibits covering hundreds of pages of documentation in support of its motion and/or appeal (AF 4-656).

By letter dated April 14, 1994, the CO found that the Employer had not filed a timely request for reconsideration and/or review. In so finding, the CO overlooked the April 11, 1994 letter which was received on April 12, 1994 (AF 657), and noted that the request for reconsideration/review had only been received on April 13, 1994, which was more than 35 calendar days from the date of the Final Determination. Therefore, the CO determined that the denial of March 8, 1994 had become the final determination of the Secretary. 20 C.F.R. §656.25. (AF 1).

Similarly, this Board issued an Order of Dismissal, dated May 24, 1995, in which we also concluded that the request for review was untimely, because it was received on April 13, 1994, **i.e.,** one day after the deadline, and that Employer had failed to show good cause for the untimely filing. However, upon reconsideration, we issued an Order Vacating Dismissal, noting that the Employer had, indeed, established that the request for review had been timely filed on April 12, 1994.

Discussion

In the Final Determination, the CO concluded as the sole basis for denial: (1) that the special requirements for the job opportunity are tailored to the Alien's background; (2) that the rebuttal fails to demonstrate that the requirements bear a reasonable relationship to the occupation in the context of Employer's business and are essential to perform, in a reasonable manner, the job duties; and, (3) by tailoring the requirements to the Alien's background, the job opportunity is not clearly open to any qualified U.S. worker (AF 665-671).

Having carefully reviewed the relevant evidence, in particular the Employer's rebuttal, we find that the Employer addressed these issues and documented the business necessity for each of the special requirements, as set forth in Employer's letter, dated December 14, 1993 (AF 675-684), and buttressed by the documentation attached thereto (AF 685-696), and Employer counsel's cover letter, also dated December 14, 1994 (AF 672-674). Information Industries, Inc., 88-INA-82 (Feb. 9, 1989)(en banc).

In making this determination, we note that the CO began with the faulty premise that the stated requirements "mirror" those of the Alien. The CO apparently reached that conclusion based upon the fact that no U.S. applicant was deemed qualified for the job opportunity. Specifically, the CO stated, in pertinent part, "These special requirements mirror the alien's

background, and only the alien can apparently meet them, as evidenced by the wholesale rejection of every U.S. worker applying for the instant job offer." (AF 735, 666). We find such reasoning to be circular and unpersuasive. Furthermore, as stated by the Employer in its rebuttal (AF 681-682) and as provided in the Statement of Qualifications of Alien (AF 773-781), the Alien clearly had other qualifications and related experience which were not required for this job opportunity. More importantly, as set forth above, we find the Employer has adequately documented that the listed special requirements arise from business necessity (AF 676-681, 685-696).

In view of the foregoing, we find that the stated job requirements are not unduly restrictive, and that notwithstanding the Employer's inability to find a qualified U.S. applicant, the job opportunity is clearly open to any qualified worker. Accordingly, denial of labor certification cannot be sustained in this case.

ORDER

The Final Determination of the Certifying Officer denying labor certification is **REVERSED**. The Certifying Officer is directed to **GRANT** certification.

Entered at the direction of the panel:

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Todd R. Smyth, Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five

double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.