

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 27 September 2004**

**BALCA Case No.:** 2003-INA-258  
**ETA Case No.:** P2000-CA-09502637

*In the Matter of:*

**CHIRON CORPORATION,**  
*Employer,*

*on behalf of*

**RU ZHOU,**  
*Alien.*

**Appearance:** William May, Esquire  
San Francisco, California  
For the Employer and the Alien

**Certifying Officer:** Martin Rios  
San Francisco, California

**Before:** Burke, Chapman and Vittone  
Administrative Law Judges

JOHN M. VITTONI  
Chief Administrative Law Judge

**DECISION AND ORDER**

This case arises from the Employer's request for review of the denial by a United States Department of Labor Certifying Officer ("CO") of his application for alien labor certification. Permanent alien labor certification is governed by § 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. 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 July 7, 2000, the Employer filed an application for labor certification on behalf of the Alien to fill the position of Chemist. The job duties were described as follows: "[a]nalyze purity and identities of in-process samples and final products [sic] under federal regulations GMP by using High Pressure Liquid Chromatography (HPLC), Ion Chromatography High Pressure Liquid Chromatography (IC-HPLC) and Capillary Electrophoresis." In the ETA 750A, Item 14 statement of minimum job requirements, the Employer listed a Bachelor's degree in chemistry or in another closely related field of study, as well as six months of experience in the job offered. In the Item 15 statement of "other special requirements" there is a notation #14 Experience: 6 months of GMP [Good Manufacturing Practices] lab experience." (AF 92).

According to the statement of recruitment results, eight U.S. applicants applied for the position, but none were hired because they either lacked experience or were unwilling to accept the position at the stated salary. (AF 125-126).

The CO issued a Notice of Findings ("NOF") on April 12, 2002, proposing to deny certification on the grounds that the Employer's rejection of three qualified U.S. applicants based on their lack of experience with Capillary Electrophoresis ("CE") was for other than lawful job-related reasons. (AF 87-89). The CO also found that the Employer failed to describe the actual minimum requirements for the position because the Alien appeared not to have six months of GMP lab experience when hired. (AF 89).

The Employer submitted its rebuttal on May 10, 2002. (AF 50-52).

The CO found the rebuttal insufficient with respect to whether the Employer had articulated lawful job-related reasons for its rejection of the U.S. applicants, and accordingly issued a Final Determination ("FD") on June 19, 2002, denying certification. (AF 47).

Specifically, the CO found that the Employer violated 20 C.F.R. § 656.21(b)(6) in rejecting the applicants because of their lack of knowledge of CE, when the ETA 750A did not list such knowledge as a special requirement, but only as a job duty. (AF 47).

The Employer requested reconsideration of the FD, which was denied on April 28, 2003. (AF 1).

## **DISCUSSION**

The Employer asserts that knowledge of CE is essential to performing the job's principal duties, and contends that its rejection of U.S. applicants on the basis of their inexperience with CE is lawful. (AF 51-52). Generally, an employer cannot rely on lack of experience in a particular job duty to reject U.S. workers where such duty was not listed in ETA 750A, item 14 or 15. *Chromatochem Inc.*, 1988-INA-8 (Jan. 12, 1989) (*en banc*); *Bell Communications Research, Inc.*, 1988-INA-26 (Dec. 22, 1988) (*en banc*). In *Bel Air Country Club*, 1988-INA-223 (Dec. 23, 1988), however, the Board held:

[W]here an employer believes that the job could only be performed by applicants who have, in the past, performed essentially the same job duties, it may indicate so by limiting the MINIMUM requirements (in item 14 of the application) to a number of years of experience in the "job offered". Reasonably interpreted, such an application would be taken to mean that the employer believes that only applicants who have actually performed the same or similar job duties for any employer may be assumed to be able to perform the job duties of the offered job with a minimum of training.

In the instant case, the Employer did precisely that: it listed 6 months of experience in the job offered as a minimum requirement for the job. The Employer may have confused the matter by listing 6 months of experience in GMP in item 15 of the ETA 750A, suggesting that it was limiting its experience requirement to that aspect of the job duties. Nonetheless, the job duties very clearly include using Capillary Electrophoresis for analysis, and our review of the documentation of record suggests that this is not a case where the Employer is using a detailed subsidiary job requirement as an artifice to reject otherwise qualified U.S. applicants. Thus, we

find that the Employer did not improperly reject U.S. applicants based on an undisclosed job requirement.

Although we find that the CO erred in denying labor certification under 20 C.F.R. § 656.21(b)(6), when an employer makes experience in a specific job duty a job requirement, the CO may reasonably question whether that requirement is unduly restrictive under 20 C.F.R. § 656.21(b)(2)(i). If a job requirement is presumptively unduly restrictive under section 656.21(b)(2), the CO may require the employer to adequately document the requirement as arising from business necessity. To establish business necessity under §656.21(b)(2)(i), an employer must demonstrate that the job requirement bears a reasonable relationship to the occupation in the context of the employer's business and is essential to perform, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*).

In the instant case, the record is not sufficiently developed for us to make a determination whether Capillary Electrophoresis is an unduly restrictive job requirement or is justified by business necessity. It would be reasonable, for example, for the CO to inquire into how long it takes for an otherwise qualified and experience lab technician to learn this technique. If it is a skill that could be acquired with a short period of on-the-job training, the six month experience requirement may not be justified. The CO could reasonably require that the answer to this question be bolstered by supporting documentation rather than a bald assertion of the employer.

Thus, it is necessary to remand the application to the CO for a consideration of whether he wishes to raise the issue of whether that job requirement is unduly restrictive and, if so, to provide the Employer an opportunity to establish the business necessity of the requirement under the *Information Industries* criteria stated above.<sup>1</sup>

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<sup>1</sup> Although the NOF also raised the issue of whether the Alien had the required experience when hired, the Employer supplied relevant documentation on this issue in its rebuttal and the CO did not mention the issue again in the FD. Thus, we find that the Alien's experience issue was successfully rebutted.

## **ORDER**

The CO's denial of labor certification is hereby **VACATED** and this matter **REMANDED** for further proceedings consistent with the above.

For the panel:

**A**

**JOHN M. VITTON**  
Chief Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.