



Issue Date: 02 June 2004

In the Matters of:

SUN MICROSYSTEMS, INC.,
Employer,

on behalf of

SRINIVASAN SRINATH,

BALCA No. 2003-INA-302
ETA Case No. P2002-CA-09522523/VA

SAIFUL ALAM

BALCA No. 2003-INA-303
ETA Case No. P2002-CA-09523489/MF

SHIH-CHIN CHIU

BALCA No. 2003-INA-304
ETA Case No. P2002-CA-09522534/VA

PADMAJA NANDULA

BALCA No. 2003-INA-305
ETA Case No. P2002-CA-09519492/GH

ANDREW ARENGO

BALCA No. 2003-INA-306
ETA Case No. P2002-CA-09522549/VA

XIAO-DING CAI

BALCA No. 2003-INA-307
ETA Case No. P2002-CA-09522530/VA

ZUXU QIN

BALCA No. 2003-INA-308
ETA Case No. P2002-CA-09531202/VA

HELAL MUZUMDER

BALCA No. 2003-INA-309
ETA Case No. P2002-CA-09522522/VA

YUNG-CHING HSIAO

BALCA No. 2003-INA-310
ETA Case No. P2002-CA-09531143/GH

YONG JOON LEE

BALCA No. 2003-INA-311
ETA Case No. P2002-CA-09531142/GH

KIRITKUMAR PANCHAL

BALCA No. 2003-INA-312

ETA Case No. P2002-CA-09531126/GH

KETAKI RAO

BALCA No. 2004-INA-4

ETA Case No. P2002-CA-09523491/MF

OHSANG KWON

BALCA No. 2004-INA-5

ETA Case No. P2002-CA-09530559/MF

NISHANT NERURKAR

BALCA No. 2004-INA-6

ETA Case No. P2002-CA-09522847/MF

GIRISH DANGI

BALCA No. 2004-INA-43

ETA Case No. P2002-CA-09530639/MF

SRINIVAS DANGETI

BALCA No. 2004-INA-44

ETA Case No. P2002-CA-09530654/MF

GHUN KIM

BALCA No. 2004-INA-47

ETA Case No. P2002-CA-09531265/MF

Aliens.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Jeffrey Rummel, Esquire
San Francisco, California
For Employer and the Aliens¹

Debra Baker, Esquire
San Jose, California
For Employer and the Aliens²

Christopher DiGiorgio
Phoenix, Arizona
For Employer and the Alien³

Harry L. Sheinfeld
For the Certifying Officer

¹ Jeffrey Rummel filed a G-28 Notice of Appearance in BALCA Case No. 2003-INA-302.

² Debra Baker filed a G-28 Notice of Appearance in BALCA Case Nos. 2003-INA-303-312 and 2004-INA-5-6, 43-44, 47.

³ Christopher DiGiorgio filed a G-28 Notice of Appearance in BALCA Case No. 2004-INA-4.

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONI
Chief Administrative Law Judge

ORDER GRANTING RECONSIDERATION

This case arises from fifteen "reduction in recruitment" ("RIR") applications for labor certification⁴ filed by Sun Microsystems, Inc. ("Employer") for various engineering and computer positions. In these cases, the Certifying Officer ("CO") denied the RIR, and rather than remanding the cases to the State Workforce Agency for regular labor certification processing, denied the applications outright. On appeal to BALCA, the Employer argued that these cases were governed by *Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003), in which this panel had held that the CO was obligated to follow the procedures specified in GAL, 1-97, Change 1 (popularly known as the "Ziegler Memorandum"), which indicates that where the CO denies an RIR, only the RIR and not the labor certification should be denied at that point.

On March 12, 2004, this panel issued a Decision and Order finding that the Employer has correctly identified these cases as being governed by *Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003). The panel reversed the CO's denials of labor certification, and remanded the cases to the CO with a mandate to remand the applications to the State Workforce Agency for regular labor certification processing.⁵

On March 25, 2004, the CO filed a Motion for Reconsideration requesting that, rather than remanding the cases to the State Workforce Agency for processing, the CO be

⁴ 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 20 C.F.R. Part 656.

⁵ Case No. 2003-INA-256 was also associated with the other applications before this panel. The Employer withdrew its appeal in this case; however, after learning of the disposition of the other cases, it sought to revoke the withdrawal and join in the remand. This motion is dealt with by separate order also issued today.

permitted to grant the RIR requests and then reissue the Notices of Findings. The CO argued that "[s]uch an approach is compatible with the regulations and is more likely to provide for expeditious resolutions of these cases." Specifically, the CO cites 20 C.F.R. § 656.21(h)(5), which states:

(5) Unless the Certifying Officer decides to reduce completely the recruitment efforts required of the employer, the Certifying Officer shall return the application to the local (or State) office so that the employer might recruit workers to the extent required in the Certifying Officer's decision, and in the manner required by Secs. 656.20(g), 656.21(f), 656.21(g), and 656.21 (j) of this part (i.e., by post-application internal notice, employment service job order, and advertising; and a wait for results). If the Certifying Officer decides to reduce completely the recruitment efforts required of the employer, the Certifying Officer then shall determine, pursuant to Sec. 656.24 whether to grant or to deny the application.

The Board has no record of any response to the CO's motion by the Employer or any of the attorneys who made entries of appearance in this matter.

DISCUSSION

We concur with the CO that the regulation at section 656.21(h)(5) states that the CO has the option of granting the RIR and then proceeding to determine whether to grant or deny the application based the RIR documentation.

In the instant cases, however, the CO found that RIRs could not be granted based on recent layoffs. Nothing in the motion for reconsideration indicates that this circumstance has changed. Rather, it appears that the CO is now willing to grant the RIR solely on the basis that such a procedure will permit the CO to avoid a remand of the matter to the State Workforce Agency for regular processing. The CO states that his intention is to "reissue" the NOFs. Thus, it appears that the CO may intend to simply raise the same issues as were raised in the initial processing of these applications. Thus, ironically, the Employer may end up in a worse position by having the RIR granted than by accepting the denial of the RIR and a remand for regular processing.

The Employer, however, has not objected to this procedure, and we will not second guess an apparent tactical decision to accede to the CO's request for revision of the remedy ordered in the original panel decision. Thus, we will grant the CO's motion for reconsideration.

In granting the motion, however, we caution that we do so because it is unopposed. The panel notes that it has concerns about the procedural fairness of the CO's proffered remedy. We have declined, however, to engage in an in-depth analysis of the legal basis for the CO's motion as we have been presented with no briefing from any opposing viewpoint. Thus, this order should be limited to the circumstances of these cases, and not viewed as setting any binding precedent on whether a CO can routinely change a denial of an RIR only after the Employer seeks to have the matter remanded for regular processing.

ORDER

The Certifying Officer's motion for reconsideration is **GRANTED**, and this matter is remanded to the CO for further processing consistent with the above.

For the panel:

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JOHN M. VITTON
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Order Granting Reconsideration 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 ten 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.