U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 21 August 2006

In the Matters of:

ORACLE USA, INC.,
(formerly ORACLE CORPORATION),
Employer

on behalf of

DAVID MANTRAMURTHI, **BALCA No.: 2006-INA-00026**
ETA Case No.: P2003-CA-09553677/NDL

HIDEAKI HAYASHI, **BALCA No.: 2006-INA-00029**
ETA Case No.: P2003-CA-09553671/NDL

YUN LIN, **BALCA No.: 2006-INA-00030**
ETA Case No.: P2003-CA-09556041/VA

VIJAYAKUMAR GANAPATHY, **BALCA No.: 2006-INA-00031**
ETA Case No.: P2003-CA-09556027/NDL

ZHU WEIYING, **BALCA No.: 2006-INA-00032**
ETA Case No.: P2003-CA-09553672/VA

and

SHEETAL MATHUR, **BALCA No.: 2006-INA-00033**
ETA Case No.: P2003-CA-09559249/NDL

Aliens.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Warren R. Leiden, Esquire

Andreas Gerling, Esquire
Berry, Appleman & Leiden, LLP
San Francisco, California
For the Employer and the Aliens

Gary M. Buff, Associate Solicitor
for Employment and Training Legal Services
R. Peter Nessen, Attorney
For the Certifying Officer

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

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

These matters are appeals of denials of applications for alien labor certification by a federal Certifying Officer (CO). Permanent alien labor certification 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.).[1] The parties requested and were granted consolidation of these matters pursuant to 29 C.F.R. §18.11.[2] In the following Statement of the Case, we use the application of Vijayakumar Ganapathy as representative of all of the applications, which present essentially the same set of circumstances.

STATEMENT OF THE CASE

On May 21, 2002, the Employer, Oracle Corp., filed an application for alien labor certification on behalf of beneficiary, Vijayakumar Ganapathy, to fill the position of Software Engineer. (AF 112). The Employer requested Reduction in Recruitment (RIR) processing pursuant to 20 C.F.R. §656.21(i). RIR is an alternative to the basic labor certification recruitment process in which the CO may reduce or eliminate the employer's recruitment efforts

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

[2] When consolidated, appeals in case numbers 2006-INA-24, 2006-INA-25 and 2006-INA-28 were included. The Employer, however, withdrew those appeals because the Aliens no longer work for the Employer.

if the employer successfully demonstrates that it has adequately tested the labor market with no success at the prevailing wage and working conditions. 20 C.F.R. § 656.21(i).

A Notice of Findings (NOF) was issued by the CO on March 21, 2005, informing the Employer of the approval of its RIR request. The NOF also stated the Department's intention to deny the alien labor certification application. (AF 96). The CO's intent to deny was based on Oracle's layoff of workers within the six months preceding the NOF. The CO stated that Oracle may have laid off workers who qualify for the position for which labor certification was sought. (AF 98). The CO concluded that, absent evidence to the contrary, there appeared to be U.S. workers ready, willing, and able to fill the position. In addition, the layoffs prompted the CO to question whether a job opening actually existed to which U.S. workers could be referred. (AF 98). The CO directed the Employer to submit information concerning the number of workers laid off from the position of Software Engineer, the consideration given to laid off workers for the job opportunity by geographical area and worker, the names of laid off workers who were rejected from the position and the lawful job related reasons for their rejection, the number of vacancies by occupation that the Employer had or anticipated having due to a hiring freeze or layoffs, and any additional efforts made by the Employer to identify individuals who may have been affected by the reductions in other departments within the company. (AF 98).

In its rebuttal, dated April 21, 2005, the Employer relied on several BALCA decisions to argue that the provision cited by the CO, section 656.20(c), does not impose a requirement on the Employer to demonstrate that the reduction in workforce has not created an adverse impact on the job opportunity for which labor certification is being sought. (AF 74-80). Nor, the Employer argued, does the regulation require an explanation as to why none of the displaced individuals were qualified for the position described in the labor certification. *See Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (en banc). The Employer asserted that section 656.20(c)(8) infuses the recruitment process with the requirement of a "bona fide job opportunity," not merely a test of the job market. The Employer asserted that in previous cases BALCA looked at the totality of the circumstances to determine whether a bona fide job opportunity existed. *See Amger Corp.*, 1987-INA-545 (Oct. 15. 1987) (en banc); *Modular Container Systems, Inc.*, *supra*. (AF 79).

The CO issued a Final Determination denying certification on September 23, 2005, finding that the Employer had failed to establish that each laid off worker was considered for the petitioned position, or that they were not able, available or qualified for the job opportunity. (AF 9-10).

On October 25, 2005, the Employer submitted a request for review pursuant to Section 656.26. In the request, the Employer urges the Board to either reverse the denial of certification or remand for supervised processing in accordance with the rulings in *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003) and *Oracle Corp*., 2004-INA-103 (Dec. 14, 2004), in which this panel held that where a CO denies an RIR, with certain exceptions it is normally necessary to remand the case for supervised recruitment. (AF 2).

The Certifying Officer filed a brief dated March 20, 2006. The CO argues that the *Oracle* and *Compaq Computer* cases are inapposite, and that the applications were correctly denied under *Qwest Communications*, 2004-INA-361 (Dec. 16, 2004), in which a panel of the Board affirmed the denial of labor certification where the Employer failed to provide an explanation as to why it did not give consideration to laid off workers.

DISCUSSION

Although the Employer's argument on appeal is mostly focused on whether these cases should be remanded under *Compaq Computer* and *Oracle*, we first address the Employer's assertion during the rebuttal that the CO exceeded the scope of his authority in requiring the Employer, under Section 656.20(c), to demonstrate that the reduction in workforce did not affect the job opportunity or to explain why none of the displaced individuals qualified for the position.

Section 656.20(c) requires, *inter alia*, that the Employer clearly show that the job opportunity has been and is open to any qualified U.S. worker. Contrary to Employer's argument, the CO may reasonably ask for additional information in an analysis of whether a job is clearly open to U.S. workers. *See Carlos Uy III*, 1997-INA-304 (March 3, 1999) (en banc).

In the instant cases, the CO requested, among other things, a list of the displaced workers by area, as well as the lawful job-related reasons for rejecting those who applied for the position. These actions were reasonable and within the CO's discretion.

The Employer relied on the Board's decision in *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (en banc), to argue that it has no obligation to demonstrate that layoffs did not adversely affect the job opportunity of U.S. workers. However, the reliance on *Amger Corp.* is misplaced. *Amger* simply stands for the proposition that the Employer has the burden of providing clear evidence that a bona fide job opportunity and a valid employment relationship exist. *Amger* places an affirmative obligation on the Employer to demonstrate that a bona fide job opportunity exists, not a restriction on the CO's reasonable inquiry into whether the Employer has met that obligation. *Id*. In the instant cases, the CO made reasonable requests for documentation pertaining to the layoffs.

We find that the CO properly found that the Employer's responses to the document requests failed to establish adequate consideration of laid off workers. Thus, the CO correctly determined that it was not appropriate to grant certification. We find, however, that the CO's outright denial of the application cannot be affirmed.

The Employer contends that the facts in the instant cases are analogous to those in *Oracle Corp*., 2004-INA-103 (Dec. 14, 2004) and *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), and merit similar dispositions. As noted above, in those decisions this panel held that a <u>denial</u> of an RIR request normally mandates a remand to the local job service or State Workforce Agency (SWA) for non-RIR processing.[3]

In the instant cases, the CO <u>approved</u> the Employer's RIR requests but denied the applications. We find, nonetheless, that when a CO approves an RIR request, the CO cannot then deny the application outright based on deficiencies in the recruitment. In other words, in such a situation the CO did not actually grant a complete reduction in recruitment. When an RIR

[3] ETA has transferred to Backlog Processing Centers the applications that once were pending before the SWAs. Thus, under current ETA procedure, supervised recruitment would occur before an appropriate backlog center rather than a SWA. *See* 69 Fed. Reg. 43716 (July 21, 2004).

request is approved, any additional recruitment requirements imposed on the employer or denial of the application based on deficiencies in recruitment constructively operate to classify the CO's approval of the RIR as only a partial reduction in recruitment.[4] In effect, the CO is implying that the Employer has failed to demonstrate that it has completely and fully tested the labor market -- that the Employer has only partially satisfied the recruitment requirements. Under the regulation at 20 C.F.R. §656.21(h)(5), the granting of a partial RIR mandates a return of the application to the local job service or SWA. Accordingly, we hold that the CO's outright denial of the applications and failure to refer the matters for supervised recruitment was an error.[5]

The CO's reliance on *Qwest Communications*, 2004-INA-361 (Dec. 16, 2004) as grounds supporting denial of the application is misplaced. The panel in that case expressly noted that it was not before the Board as an RIR case, but rather as a supervised recruitment case. Thus, in *Qwest Communications* the Employer had been given a chance to show through supervised recruitment that there were no qualified U.S. workers, but failed to do so. In the instant cases, the CO's partial grant of the RIR, but denial of certification essentially on the ground that prevented a complete RIR, denied the Employer the opportunity to establish its case through supervised recruitment.

We pause to note, however, that the CO's error was in failing to give the Employer an opportunity to establish the bona fides of its application through supervised recruitment – not in raising the issue of layoffs under section 656.24(b)(2)(i), which provides the CO the authority to determine if there are other appropriate sources of workers. Where an employer lays off U.S. workers for the same or similar position for which a labor certification is sought, a CO would be

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[4] We observe that in *Sun Microsystems*, 2003-INA-302 (June 2, 2004), we granted the CO's unopposed motion on reconsideration to permit the granting of an RIR and the issuance of a new NOF rather than a remand for supervised recruitment. In that decision, however, we expressed strong reservations about the procedural fairness of proceeding in this fashion, and granted the motion only because it was not opposed by the Employer.

[5] In some circumstances, we have found that a remand for supervised recruitment was not mandated when an application is so fundamentally flawed that certification could not be granted. One such circumstance is where a job offer is found not to be bona fide. In the instant cases, the CO found lack of bona fide job opportunities. However, these findings were clearly related to the issue of the sufficiency of the Employer's recruitment efforts relative to company layoffs. In essence, the CO was concerned that the Employer's lack of serious consideration of laid off workers indicated that it had no intention of displacing the Aliens. Such a concern might be ameliorated by a supervised recruitment in which laid off workers were considered, and we therefore find that these cases do not fit into the "fundamentally flawed" exception to a *Compaq Computer* remand.

remiss in not requiring an employer to fully explain what steps were taken to consider the laid off workers for the position and why such workers were not selected. Thus, on remand, the CO may direct the Employer during supervised recruitment to take steps to consider laid off workers and to fully document the lawful grounds for the rejection of any such workers.

Based on the foregoing the Certifying Officer's denials of labor certification in the above matters are hereby **VACATED** and the matters **REMANDED** to the CO for regular labor certification processing.

SO ORDERED

For the panel:

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JOHN M. VITTONE
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, NW Suite 400
Washington, DC 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.