



DATE: JAN 4 1989  
CASE NO. 88-INA-5

IN THE MATTER OF

UNIVERSAL ENERGY SYSTEMS, INC.,  
Employer

on behalf of

MYSORE L. RAMALINGAM,  
Alien

Appearances: Hope M. Frye, Esq.

BEFORE: Litt, Chief Judge, Vittone, Deputy Chief Judge, and Brenner, DeGregorio, Guill,  
Schoenfeld and Tureck,  
Administrative Law Judges

JOHN M. VITTONI  
Deputy Chief 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 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 purposes 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. The procedures governing labor certification are set forth at 20 C.F.R. Part 656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656.21 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 [hereinafter AF], and any written arguments of the parties. 20 C.F.R. §656.27(c).

### Statement of the Case

On July 10, 1986, Employer, Universal Energy Systems, Incorporated, filed an application for labor certification on behalf of Mysore Ramalingam, (AF 81), a citizen of India (AF 84). The position for which certification is sought is Mechanical Research Engineer (AF 82). Employer described the job duties as follows:

Perform basic research in experimental and analytical investigations of fundamental heat transfer mechanisms associated with multi-phase flow and thermionic emission phenomena associated with high temperature refractory materials for space applications. The work involves evaluation of advanced thermal energy and super alloy/refractory heat pipe/thermionic diode performance corrosion, thermophysical transport properties and thermionic diode (material) characteristics on a component and integrated systems basis. Develop instrumented ultra high vacuum systems for high temperature materials characterization and testing of thermal/thermionic control devices.

(AF 82). Job requirements were listed as a Ph. D. in Mechanical Engineering (AF 82).

The Notice of Findings ("NOF") was issued on August 3, 1987 (AF 60-62). The Certifying Officer determined that qualified U.S. workers had been rejected for other than lawful, job-related reasons, in violation 20 C.F.R. §656.21(b)(7). Therefore, there was no bona fide job open to qualified, available U.S. workers. The Certifying Officer reached this determination because each of the U.S. applicants had the one job requirement of a Ph. D. in Mechanical Engineering, and had been rejected for other reasons.

Employer submitted its rebuttal to the NOF on August 25, 1987 (AF 36-59). Employer stated that it had misinterpreted the term "Other Special Requirements" as meaning the requirements in addition to those implied by the job's stated duties. Employer further stated that it had presumed that only a candidate with what should have been listed as its "Special Requirements" could perform the job duties. Employer then listed its "Special Requirements" as follows:

- (a) Ph.D. in Mechanical Engineering - specialized in Thermionics as a major field and Heat Transfer as a minor field of study with graduate courses in Energy Conversion, Metallurgical Thermodynamics, Failure Analysis, Electron Microscopy, Convection and Radiation Heat Transfer.
- (b) The candidate must also possess at least 3 years of research and/or academic experience with research publications in each of the following

areas; i) Electron Emission/High Temperature Material Property Measurement for Thermionic Devices and ii) Heat Transport Characteristics of Low Temperature Heat Pipes and Thermal Diodes.

Employer also attached a letter from the supervisor of the Air Force contract project for which the Alien had been hired. The supervisor stated that "the successful applicant should have a Ph.D. in Mechanical Engineering and specialized training and experience in both heat pipes and thermionic technologies to successfully accomplish the planned research."

The Final Determination denying labor certification was issued on September 3, 1987 (AF 29-31). The Certifying Officer stated that "the ETA 750A form is designed in a manner which allows the employer to require experience in the job offered by merely indicating in item 14 the number of months or years required. This part of the form is easily identifiable under Experience." The Certifying Officer went on to note that at item 14, the only requirement listed was the Ph.D. in Mechanical Engineering, and concluded that "[t]he applicants rejected were screened against additional requirements not initially required. Therefore, this does not appear to be a bona fide job offer open to qualified U.S. worker."

On September 24, 1987, Employer filed its request for review (AF 1-2). After being granted an extension, Employer filed a Motion to Remand on December 14, 1987. On May 23, 1988, this office issued an order informing Employer that BALCA would not rule on its Motion to Remand in an interlocutory manner. Employer, however, was granted thirty days to file a legal brief to supplement its Motion to Remand. Thereafter, Employer filed its brief.

### Discussion

We first address Employer's Motion to Remand. Under the regulations which govern labor certification cases, one of the proper resolutions available to BALCA is to remand the case to the Certifying Officer for further consideration or factfinding and determination. 20 C.F.R. [656.27(c)(3)]. While an employer may properly argue in its appeal on the merits that the case should be remanded, a separate motion to remand is superfluous. Accordingly, we will determine within our consideration of the appeal on the merits whether remand is proper. In so doing, we note that we may not consider new evidence submitted with Employer's brief, see In the Matter of University of Texas at San Antonio, 88-INA-71 (May 9, 1988), and find that the same holds true for new evidence submitted with Employer's Motion to Remand.

Although an employer may contemplate that certain duties specified in the job description may require certain education and/or experience, those requirements must be specified by the employer; they will not be implied. See Veterans Administration Medical Center, 88-INA-70 (December 1988); see also In the Matter of Microbilt Corporation, 87-INA-635 (January 12, 1988). As the evidence shows that Employer rejected, without interviewing, eight U.S. applicants who met its stated minimum requirements, we must agree with the Certifying Officer that 20 C.F.R. §656.21(b)(7) has been violated.

Employer next faults the Certifying Officer for failing "in the NOF to advise the employer that it had the option to amend the Form ETA-750 and re-recruit." Employer's Brief at 14. Nothing in the regulations or in our previous decisions requires a Certifying Officer to allow an employer to re-recruit under more restrictive requirements after the employer has recruited and received applications from qualified U.S. workers, and we specifically reject any such duty here. To do otherwise would be to allow employers to search for unimportant distinguishing characteristics so as to defeat the application of any qualified U.S. worker and maintain the alien in his position, in contravention of the purpose of the Act and its regulations. Accordingly, we uphold the denial of certification.

ORDER

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

JOHN M. VITTONI  
Deputy Chief Judge

Washington, D.C.

JMV/AB/pay