



DATE: JAN 5 1989
CASE NO. 88-INA-293

IN THE MATTER OF:
HARRIS CORPORATION
Employer,

on behalf of,

EDWARD JOHN MARCHANT,
Alien.

Appearance:
Timothy J. Murphy, Esquire
For the Employer

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

MICHAEL H. SCHOENFELD
Administrative Law 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 a labor certification application. This application was submitted by 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 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 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.

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.

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 ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE FACTS

Employer, Harris Corporation, filed the application for alien labor certification on May 7, 1987 seeking certification for the employment of the Alien, Edward John Marchant. (AF 47) The title of the job opportunity was identified as "Manager, Quality and Release Engineering, Software Development." The minimum education, training and experience requirements set forth in the application by Employer were as follows; Education, Bachelors degree in Computer Science and 2 years' experience in the Job Offered or as "Senior Member Technical Staff-Software (Computer Systems Engineering)." In addition, Employer listed as "Other Special Requirements"

2 years supervisory/project lead experience or 2 years Sr. Software Engineer experience including Four years application programming in various high and low level languages, including at a minimum Cobol, Fortran, RPG, and Assembler.

Real time application software for computers.

Industry standard software testbeds.

Knowledge of one or more of the following communication protocols: Remote Job Entry, X.25, or Ethernet.

Employer's job opportunity advertising, published in a trade journal, contained the same requirements. (AF 38) In response to the advertising, 34 U.S. workers submitted resumes. Employer identified 16 applicants whom it rejected due to the lack of a Bachelor's degree in Computer Science and one who was rejected because he was not a U.S. citizen or resident. In addition, Employer contended that the other 17 applicants, whom it conceded met its degree requirement, were rejected for their failure to meet one or another of its "Other Special Requirements." Each of these 17 applicants was sent a letter setting forth the reasons it was felt that their resume did not show they met the requirements. Each of these letters stated, *inter alia*, "If we have not correctly interpreted your resume, please contact us" in writing within 10 days. Four of the applicants responded to the Employer's invitation and, upon recontact were interviewed by telephone. All four of these applicants, according to Employer, withdrew from consideration after their interviews.

In his preprinted form Notice of Findings dated February 22, 1988 ("NOF"), the CO proposed to issue a denial of certification pursuant to 20 C.F.R. §656.21(b)(7) on the grounds

that nine applicants, whom he identified by name, were rejected despite having submitted resumes which showed them to be qualified. (AF 28)

Employer's rebuttal took the position that "the resumes for the candidates identified (in the NOF) do not show them to have the necessary experience." In chart form, Employer listed the nine applicants identified by the CO and specified which of its five requirements, the Bachelor's degree and the four Other Special Requirements as identified above, each applicant failed to meet. In addition, Employer provided general information regarding its industry as well as technical definitions it used in its statement of requirements. The Employer then specified, in narrative fashion, the reasons it rejected each of the nine applicants identified by the CO. (AF 5-24)

The Final Determination, issued by the CO on April 29, 1988, denied the application on the sole ground that one applicant, Joshua Damon, had been rejected for the position despite being qualified. (AF 4) The CO, in pertinent part, stated the reasons for his "decision" that Joshua Damon was qualified as follows:

- 1) The job requires a bachelors degree in computer science. Mr. Damon has that degree.

- 2) The job requires two years experience. Mr Damon has over two years experience. To include an impressive background in computer software and languages (sic). He has sixteen years experience in ADP management, software, programming and software development.

It is recognized that Mr. Damon has not reached the level of expertise in the job offered acquired by the alien who has been in the job since 1983 and with the employer since 1977.

Employer requested review of the Final Determination and has filed a brief on appeal. The CO has not done so.

Employer takes the position on appeal that Mr. Damon was neither qualified for nor willing to take the job offered. It argues, inter alia, that the CO erred in concluding, on the basis of his resume, that Mr. Damon met the specific requirements for the position. Employer relies on the reasons for rejecting Mr. Damon stated in its rebuttal (AF 7-8, 10), and provides a further, detailed explanation. It maintains that the CO's determination was based upon a misunderstanding of the minimum requirements for the position.

DISCUSSION

This Board has held that where the job requirements stated in the application have not been found to be unduly restrictive, an applicant who does not meet the requirements is not qualified for the job. Concurrent Computer Corp., 88-INA-76 (August 19, 1988). This is true irrespective of whether the requirements are those stated in response to question 14 of the application in terms of "education, training and experience" or those stated in response to question 15 asking for "Other Special Requirements."

In this case, Employer set forth minimum education, training and experience job requirements as well as highly detailed and specific "Other Special Requirements." The CO has not alleged that the job requirements were unduly restrictive.¹ Nor has he clearly stated that Mr. Damon's resume shows that he meets all of the job requirements. Indeed, the Final Determination might be read as conceding that Mr. Damon's resume did not show the type of experience specified by Employer under the category "Other Special Requirements." Such a conclusion is also consistent with Mr. Damon's lack of response to Employer's June 25, 1987 letter explaining why it found his experience as described by his resume wanting and inviting his response if it misinterpreted the resume. (AF159). Whether so read or not, a careful reading of Employer's rebuttal with its explanation of technical terms and a comparison with Mr. Damon's resume (AF 14-19) demonstrates to us that the Employer's argument has merit. The resume does not show that the applicant meets all of the job requirements.² Thus, it was erroneous for the CO to have found him qualified for the job.

Based on the above, we find that the Employer rejected Mr. Damon for lawful job-related reasons and was thus not in violation of 20 C.F.R. §656.21(b)(7).

¹ We decline to interpret the statement by the CO, in the Final Determination that a rejected U.S. worker was nonetheless "qualified" as implicitly raising the claim that the requirements are unduly restrictive. Concurrent Computer Corp., Supra. Moreover, the Final Determination is too late in the process to raise such an issue where, as here, the Employer has been consistent in its position that rejected U.S. workers were unqualified. Cf. Downey Orthopedic Medical Group, 87-INA-674 (March 16, 1988).

² Nowhere did the CO acknowledge that Mr. Damon did not respond to the June 25, 1987 letter from Employer (AF 159). Nor do we find additional relevant information contradicting the resume or a request by the CO that Mr. Damon be interviewed. Thus, Employer was under no obligation to go beyond the resume and interview Mr. Damon pursuant to Anonymous Management, 87-INA-672 (September 8, 1988).

ORDER

The Final Determination of the Certifying Officer denying labor certification is REVERSED, and the application for labor certification is hereby GRANTED.

MICHAEL H. SCHOENFELD
Administrative Law Judge

MHS/mlc