

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-282
ETA Case No.: P2001-CA-09502962

In the Matter of:

GEOGEA ELECTRONICS,
Employer,

on behalf of

FLORIN APRODU,
Alien.

Appearance: Judith Foster, Esquire
Encino, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an 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 ("CFR"). Unless otherwise noted, all regulations cited in this decision are in title 20. The following decision is based 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 March 5, 2001, Geogea Electronics (“the Employer”) filed an application for labor certification on behalf of Florin Aprodu (“the Alien”) to fill the position of Electronics Engineering Technician. (AF 167). The job duties for the position required designing, developing, testing and supervising the repair and construction of electronic equipment, much of it highly computerized. (AF 56). The minimum requirements for the position were two years of college, with a major in the field of electronics engineering or a related field, three months of formal training in electronics technology, circuit board repair and computer programming, and two years of experience in the duties described or in a related occupation such as electronic repair, computer programming/reprogramming, and troubleshooting. The Employer originally filed a Request for Reduction in Recruitment, which was denied by the CO, and the matter was remanded to the state agency for supervised recruitment. (AF 104-105).

The CO issued a Notice of Findings (“NOF”) on March 24, 2003, proposing to deny certification. (AF 46). The Employer was given an opportunity to 1) amend or justify its actual minimum requirements,¹ 2) clarify the job offer by describing and stating the number of occupational positions to be supervised, explaining and documenting whether the job is full-time employment and how overtime at one and one half the basic rate can be paid for a thirty-five hour work week, or 3) amend or justify a restrictive combination of duties, as well as show that the combination of duties is the Employer’s normal requirement where no labor certification is involved by providing a copy of its in-house job descriptions with specifications. (AF 47-49). The Employer was advised that the failure to comply fully with the requirements of the notice may result in the denial of the application. (AF 49).

The Employer’s rebuttal was received on April 26, 2003. (AF 12). The Employer amended its actual minimum requirements to three months of training in electronics technology,

¹ The *Dictionary of Occupational Titles* (“DOT”) classified the position as Electrical and Electronics Repairers, Commercial and Industrial Equipment. The normal amount of training and/or experience required for this occupation was from one year up to but not exceeding two years. (AF 47). The CO concluded that the job requirements exceeded the established amount of training required by three months, and was therefore unduly restrictive.

plus either eighteen months of college in electronics engineering or eighteen months of experience in the job offered or in a related occupation of electronics repair and troubleshooting. (AF 13). In addition, the Employer explained that the worker does not directly supervise any other employees, but rather has a key role in quality control of the completed work product. (AF 14). As to the overtime paid for a thirty-five hour work week, the Employer stated that if the Employer desires to be more generous than the minimum required by state and federal labor laws, this is legally permissible. While the Employer did not respond as to whether the job was full time, she explained that due to the technical nature of the work, a shorter work week was necessary to keep employees fresh and alert at all times. Lastly, the Employer argued that the holder of this position cannot perform the actual job duties without the necessary programming and reprogramming experience. (AF 15). The Employer further stated that it did not have the time or the resources to train an incompetent applicant in programming and reprogramming. The only documents submitted by the Employer were samples of the electronics reconstructed and repaired by the Employer. (AF 17-45).

The CO reviewed the Employer's rebuttal and issued a Final Determination ("FD") on June 18, 2003. (AF 4). The CO denied labor certification on the grounds that the Employer's rebuttal was not responsive to the NOF. Specifically, the Employer failed to meet its burden of describing fully the job to be performed and failed to submit documentation substantiating the combination of job duties and assertions with respect to how overtime is paid.² (AF 5-6).

The Employer filed a request for review on July 28, 2003 and the matter was docketed in this Office on August 19, 2003.

DISCUSSION

If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the document must be adduced. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is grounds for the denial of certification. *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 1988-INA-40 (July 5,

² The CO determined the Employer's rebuttal satisfied the actual minimum requirements issue. (AF 5).

1988). The denial of certification is not appropriate if the CO requests documentation which is difficult to obtain and the employer submits other evidence sufficient to rebut the CO's challenge. *Engineering Measurement Co.*, 1990-INA-171 (Mar. 29, 1991). In the instant case, the CO denied labor certification on the grounds that the Employer's rebuttal was not responsive and the documentation submitted contained insufficient information to substantiate any of its assertions.

Pursuant to 20 C.F.R. § 656.21(b)(2)(i)(A), job requirements are considered unduly restrictive when they are not normally required for the successful performance of the job in the United States. In the NOF, the CO found that the Employer's requirement of computer programming and reprogramming experience was unduly restrictive because these duties are not normally required duties of Electrical and Electronic Repairers, Commercial and Industrial Equipment. (AF 48). The Employer was given an opportunity to rebut this finding by either deleting the combination of duties of programming and reprogramming and retesting the market or justifying the combination of duties as a business necessity. The Employer was specifically instructed to provide documentation of the company's own in-house job descriptions with specifications. In its rebuttal, the Employer limited its argument to the belief that the holder of this position cannot perform the actual job duties without the necessary programming and reprogramming experience. (AF 15).

While the Employer's arguments may ring true, she failed to provide evidence to substantiate her assertions. The CO requested the supporting documentation as it had a direct bearing on determining whether the job requirements were the Employer's normal requirements where no labor certification application was involved. The CO did not ask for unreasonable or unusual information. Indeed, the Employer was required to submit information that required little or no effort to compile. Rather, the Employer merely submitted numerous pages taken from various equipment service manuals as proof of the type of equipment serviced by the Employer. (AF 17-45). None of these documents demonstrated that programming and reprogramming was a normal part of the service to be done with the equipment. The Employer's failure to provide the requested documentation led the CO to conclude there was insufficient evidence to rebut the finding that the job requirement was unduly restrictive.

Therefore, based on the foregoing, we find that the Employer failed to meet its burden. Accordingly, labor certification was properly denied and the remaining issues need not be addressed.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFRIMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

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.