U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 11 August 2004

BALCA Case No.: 2003-INA-94
ETA Case No.: P2001-CA-09505221/ML

In the Matter of:

INNOVA SOLUTIONS,
Employer,

on behalf of

SAILAJA AREKATLA,
Alien.

Appearances: Edwin J. White, Esquire
San Mateo, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Software Engineer.[1] The CO denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

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[1] 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 ("C.F.R.").

STATEMENT OF THE CASE

On April 27, 2001, the Employer, Innova Solutions, filed an application for labor certification to enable the Alien, Sailaja Arekatla, to fill the position of Software Engineer. (AF 36). A Master's Degree or equivalent foreign degree was required with the major field of study of computer sciences, engineering, or business administration. A Request for Reduction in Recruitment was requested. The instant application was one of five cases submitted with only one set of recruitment. (AF 109).

In an April 24, 2001, letter to the Employment Development Department ("EDD"), the Employer reported the results of its recruitment efforts. (AF 39). The Employer's recruitment activity for the past six months had resulted in approximately six hundred resumes being received "for the at-issue shortage occupation." Of those, one hundred and eighty applicants potentially had the skills required to fulfill its software engineering-related positions. The Employer claimed that all applicants were interviewed, with a percentage indicating that they were no longer interested. Only nine applicants were still available or had the required skills set and all nine were offered positions. Of those, four were hired. The Employer claimed it would have at least fifteen to twenty openings for software engineers during the next six months. The Employer claimed it could not recall why any specific person who was interviewed was not offered a position. The Employer urged that further recruitment efforts be waived, as it had no restrictive requirements, the position was one for which there was little or no availability of U.S. workers, the Alien met the minimum requirements at time of hire, and the offered salary met the prevailing wage requirements. (AF 39-44).

On October 17, 2002, the CO issued a Notice of Findings ("NOF") proposing to deny certification. (AF 32-34). Therein, the CO found that the request for reduction in recruitment could not be approved because of deficiencies in the application. The CO

Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision 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).

determined that the requirement of a Master's degree was unduly restrictive in violation of 20 C.F.R. § 656.21(b)(2)(i)(A), in that it was not normally required for the successful performance of the job in the United States. The CO also found that the Employer did not allow an equivalent qualification through a Bachelor's degree plus experience, and therefore, the requirement appeared to be a preference for the Employer's convenience and tailored to the Alien's background. To rebut, the Employer was required to amend the restrictive requirement or to justify the requirement based on business necessity. Alternatively, the Employer could submit documentation that the requirement was usual in the occupation/industry. (AF 33-34).

The Employer submitted rebuttal on November 13, 2002. (AF 24). Citing *Verifone*, 1991-INA-98, the Employer stated that it had the discretion to require either a Master's or a Bachelor's degree for an engineering position and that it could require a Master's degree without the need of showing business necessity or the need to list an acceptable alternative. The Employer pointed out that the Dictionary of Occupational Titles ("DOT") indicates that software engineers have an SVP level of 8, which is considered a Zone 5, allowing for a Master's degree. Relying on the DOL Region VI memorandum dated June 7, 2002, the Employer argued that an employer can require a Master's degree with experience for a Zone 5 position, and a Master's degree without experience for a Zone 4 position. The Employer pointed to the fact that the position at issue involved working independently, while positions requiring a Bachelor's degree involve "working under limited supervision." The requirement of a Master's degree bore a reasonable relationship to the duties being performed, given the requirement that the applicant work independently. Therefore, the Employer argued that business necessity had been established.

The Employer contended that it was not disqualifying U.S. workers for a failure to possess a Master's degree, pointing out that it had hired applicants with only a Bachelor's degree, as well as having made offers to applicants who were hired for openings which required advanced degrees. The Employer also contended that DOL national policy, as set forth in a March 18, 2002 memo from Dale Ziegler, dictated that

any retesting of the labor market concerning an RIR application should be done in a one-day ad under the supervision of DOL, without the application being remanded. The Employer contended that it should be given the option of amending the educational requirement without a remand.

Finally, the Employer argued that no U.S. worker could have known of the error of the excessive requirement and therefore, could not have been discouraged from applying, because the advertisement did not list educational requirements. The Employer contended that it did not fail to make an offer to any U.S. worker based on his or her educational degree. For these reasons, the Master's degree requirement or failure to allow for a Bachelor's degree alternative requirement was "harmless error." The Employer contends its application should be approved or a supplemental NOF should be issued allowing the Employer the option to amend its application without the need to remand this matter if the requirement of a Master's degree is not allowed.

A Final Determination ("FD") was issued on December 16, 2002. (AF 22-23). The CO determined that the finding that there was an unduly restrictive requirement had not been corrected. The CO noted that the Employer's argument on this issue was that the requirement was within the SVP, so no justification was necessary. According to the CO, his finding arose from the fact that the job duties did not appear to justify the advanced degree requirement. The CO stated that the requirement appeared to be tailored to the Alien's background, pointing out that concern about the advanced degree arose when the Employer submitted five petitions for similar positions. The other five applications required a Bachelor's degree plus two years of experience, the level of qualifications possessed by the Aliens. However, this petition required a Master's degree. The CO also found that the argument that the employee worked independently, while those with Bachelor's degrees worked with limited supervision, was without foundation, as the Employer failed to explain the origin of this distinction of supervision levels. The CO concluded that the Employer had failed to establish why a candidate with a Bachelor's degree and two years of experience would not be able to perform the job duties listed in the application. Therefore, the degree requirement was excessive and

non-compliant with the regulations. (AF 22).

On January 8, 2003, the Employer filed a Request for Review of the denial of certification and the matter was docketed in this Office on February 19, 2003. (AF 1-21).

DISCUSSION

In its request for review, the Employer contends that the NOF only raised one issue: the requirement of a Master's degree for the software engineering position. The Employer further contended that the FD was based mostly on the issue of tailoring the requirements to the Alien's qualifications, which was not raised in the NOF. The Employer points out that a denial cannot be based upon an issue not raised in the NOF. The Employer reiterates its argument that it should be allowed to amend its application without EDD remand, further contending that the CO failed to respond to the Employer's arguments regarding business necessity or harmless error, and providing only a response to the Employer's SVP code argument. The Employer claims that while it has required a Master's degree for some positions, and a Bachelor's degree with two years of experience in others, this is not inconsistent, and does not establish tailoring. The Employer restates the arguments made in its rebuttal and requests a reversal of the decision. The Employer has also attached to the request for review copies of approved applications wherein the Employer required Master's degrees. Those documents are not relevant to the instant case, however, as each case is decided on its own set of facts and this Board is not bound by the findings of a CO in a similar case. *Mary Ann Emmons*, 1994-INA-227 (May 25, 1995).

A CO's FD must take into account the employer's rebuttal evidence and argument. *Scientific Research Associates*, 1989-INA-32 (Feb. 9, 1990). The CO cannot deny certification on the basis of evidence not cited in the NOF. *Shaw's Crab House*, 1987-INA-714 (Sept. 30, 1988)(*en banc*). If a CO bases his FD on evidence not first discussed in an NOF, the matter may be remanded to the CO for clarification and the issuance of a new NOF. *Dr. Mary Zumot*, 1989-INA-35 (Nov. 4, 1991). In this case, the

CO raised the issue of the other positions being offered by the Employer in this batch recruitment for the first time in the FD. While the CO had mentioned tailoring in the NOF, he did not provide the Employer with the evidence on which he based this finding prior to issuing the FD.

The NOF did not provide fair warning to the Employer as to the basis for the finding that the position was tailored to the Alien. However, we further find that the requirements listed by the Employer for this particular position and in this particular application are not such that they must be deemed to be tailored to the Alien. The requirements are within the DOT definition and thus acceptable. This application cannot be compared to the four others which are not now before the Board. As was held in *Verifone*, 1991-INA-98 (July 9, 1992), if a requirement is one listed in the DOT, then the employer need not prove business necessity.

This matter will be remanded, however, in order to allow the CO to review the results of the Employer's recruitment efforts and whether any U.S. workers who applied were qualified and if so, the reason for their rejection. Given that the Employer has stated that it hired U.S. applicants as a result of this recruitment, also to be considered is whether a U.S. applicant was, in fact, hired for a position identical to the one at hand because that applicant would be deemed to have applied for the position at issue.

Given that the instant application was submitted with a request for RIR, this issue must also be re-addressed in light of this decision. The regulations at 20 C.F.R. § 656.21(i) provide that a CO "may" reduce or eliminate an employer's recruitment efforts if the employer successfully demonstrates that it has adequately tested the labor market with no success at least at the prevailing wage and working conditions. The purpose of the RIR regulations is to expedite applications in occupations where there is little or no availability of U.S. workers. In this case, however, the Employer claims it received over six hundred responses from U.S. workers for the job openings it had, with approximately one hundred eighty of those applicants being qualified for the software engineering

positions. While there does not appear to be a shortage of U.S. workers available for this position, this is a determination to be made by the CO on remand.

Finally, it should be noted that 20 C.F.R. § 656.21(i)(5) provides that "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." If, upon remand, the CO determines that RIR processing is not appropriate in this case, this application shall not be denied, but returned to the local office.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and this matter is **REMANDED** for further proceedings consistent with the foregoing.

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 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.