



ETA Case No.: **Issue Date: 29 September 2004** **BALCA Case No.: 2003-INA-288**
P2000-NH-01304050

In the Matter of:

HIGHDATA SOFTWARE CORP.,
Employer,

on behalf of

SIVAKUMAR SUBRAMANIAN,
Alien.

Appearance: Daniel Maranci
Boston, Massachusetts
For the Employer and the Alien

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer of an application for alien employment certification. Permanent alien employment certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and Title 20, Part 656 of the Code of Federal Regulations. We base our decision on the record upon which the Certifying Officer ("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 August 24, 2000, the Employer filed an application for alien employment certification on behalf of the Alien, Sivakumar Subramanian, to fill the position of “Systems Analyst/Administrator.” (AF 39). The Employer posted an internal notice of the job opportunity as well as listing the job opportunity with the New Hampshire Department of Employment Security (NHDES) Job Bank and advertising in a local newspaper. (AF 30-35). These efforts yielded one U.S. applicant for the position. In its October 24, 2000 report of the recruitment results, the Employer informed the NHDES that the U.S. worker was unqualified for the advertised position. (AF 30). .

On July 30, 2001, the CO issued a Notice of Findings (“NOF”) notifying the Employer that it intended to deny the Employer’s application because it appeared that a U.S. worker had been rejected for other than job-related reasons. (AF 14-15). The NOF instructed the Employer to submit additional documentation that might show that the U.S. worker was rejected for job-related reasons, or that an interview did in fact occur. (AF 15).

The Employer timely filed its rebuttal to the NOF on August 16, 2001. (AF 9-13). The Employer stated that it was not required to consider the U.S. worker for the position because her resume revealed that she lacked two requirements listed by the Employer in its description of the job opportunity. (AF 10). On November 1, 2001, the CO issued a Final Determination (“FD”) denying certification because of the unlawful rejection of a U.S. worker. (AF 7-8).

The Employer timely filed a Request for Reconsideration, or in the alternative, Request for Review by this Board on November 30, 2001. (AF 2). The CO denied the Request for Reconsideration and the matter was docketed in this Office on September 9, 2003. (AF 1).

DISCUSSION

An employer must clearly document that there are not sufficient United States workers who are able, willing, qualified and available to perform the work at the time of application. 20 C.F.R. § 656.1. An employer has the implied obligation to conduct a good faith effort of fully investigating an applicant's qualifications, thereby ensuring that it has obtained lawful, job-related reasons for rejecting U.S. applicants. *Showtech, Inc.*, 1995-INA-315 (Feb. 11, 1997).

The CO determined that the Employer failed to conduct a good faith effort of recruitment when it rejected a qualified U.S. applicant. (AF 8). The Employer maintained that the CO's denial of labor certification was erroneous because the sole U.S. worker that applied for the position was not qualified on the face of her resume and therefore was rejected for a lawful, job-related reason.

The Employer's application for certification described the job to be performed as follows:

Install, configure, and tune Unix and NT servers; [c]onfigure Unix and Windows machines for TCP/IP Network connectivity; write Unix shell scripts for various systems administration tasks; [d]esign and implement backup solutions, work with NIS/NIS+, DNS and Sendmail. Troubleshoot and resolve problems using knowledge of Solaris, Windows NT and TCP/IP networking. Provide training to junior level system administration staff.

(AF 39). Other special requirements were listed as:

Design, develop and implement customized software solutions on Unix and NT platforms using Oracle RDBMS Tools, TCP/IP, SQL, PL/SQL, and Unix Shell Scripts.

(AF 38-39). The ETA 750A required a Bachelor's of Science degree in Computer Science or the foreign equivalent as the minimum education for the position. (AF 38-39). The internal notice and newspapers advertisements of the position also required applicants to have a "B.S. or foreign equivalent in Computer Science, and one year experience or one year experience as a Systems Administrator." (AF 35-37). Neither the

internal notice nor the newspaper advertisements mentioned knowledge or experience in Oracle Relational Database Management Systems as a requirement for the Systems Analyst/Administrator position. (AF 34-37).

The applicant's resume showed that she held a B.S. in Business Management, rather than the B.S. in Computer Science specified in the internal notice and newspaper advertisement. (AF 30, 32). It also revealed that she had eighteen years of experience in the installation, management and oversight of computer systems, with the last seven years spent as System Manager and Senior IT Manager. (AF 30). Lastly, it cited her knowledge of various computer operating systems, languages and applications, including UNIX OS, Windows 98 and NT, and SQL.

Initially, it should be noted that the position as advertised in the internal notice and newspaper advertisement made no mention of the Oracle programming skills requirement that the Employer cited in its rebuttal as a basis for rejecting the U.S. worker. (AF 10, 34-37). Twenty C.F.R. § 656.21(b) requires an employer to document that the requirements it specifies for the job opportunity are its actual minimum requirements; an employer may not rely on a requirement not listed in its advertisement as a basis for rejecting the U.S. worker. The Employer's omission of Oracle programming as a job requirement in its advertisement of the position and subsequent rejection of the U.S. worker for not listing Oracle programming as a skill on her resume violates its obligation to conduct a good faith effort in recruitment.

The Employer's advertisements for the position clearly stated that either a B.S. in Computer Science or one year of experience working as a Systems Analyst/Administrator would meet its requirements. The U.S. worker who responded to the advertisement had at least seven years of employment experience as a Systems Administrator; in comparison, the Alien had only three years of employment experience as a Systems Administrator. (AF 32, 33). It is clear that the U.S. worker met the Employer's stated

job requirements for the position, and that the Employer rejected her without stating a lawful, job-related reason in violation of 20 C.F.R. § 656.21(b)(6)¹.

Even assuming that the Employer did not intend to equate an applicant's job experience with the requirement of a B.S. in Computer Science, we have held that where an applicant's resume shows such a broad range of experience, education and training that it raises a reasonable possibility that the applicant meets all the employer's requirements, an employer must further investigate the applicant's credentials. *Dearborn Public Schools*, 1991-INA-222 (Dec. 7, 1993) (*en banc*). The fact that a resume does not list all of the requirements for the position does not excuse the employer's failure to contact the applicant, if the resume raises the reasonable possibility that the applicant is qualified. *GE Aircraft Engines*, 1989-INA-12 (Apr. 20, 1990). The applicant's job experience as a Systems Administrator and computer skills raised the reasonable possibility that she was qualified for the position, such that Employer had the burden to further investigate her credentials. We concur with the CO's finding that Employer's rejection of the U.S. worker failed to adequately consider her abundant experience and apparent expertise in dealing with computer systems installation and management.

In view of the foregoing, labor certification was properly denied.

¹ Contrary to the Employer's brief, *Bronx Medical & Dental Clinic*, 1990-INA-479 (Oct. 30, 1992) (*en banc*) is inapposite here. That case concerned an employer's rejection of a U.S. worker because of the worker's lack of a specific degree listed as a job requirement. Here, the U.S. worker met Employer's stated job requirements for the position, therefore we need not address the issue raised in *Bronx Medical* of whether the Employer's job requirements are within the limits prescribed by 20 C.F.R. § 656.21(b).

ORDER

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

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 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, D.C. 20001-8002

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typed pages. Upon the granting of a petition the Board may order briefs.