



DATE: August 19, 1988
CASE NO. 88-INA-76

IN THE MATTER OF

CONCURRENT COMPUTER CORP.
Employer

on behalf of

MOHAMMAD-REZA YOUNESI
Alien

Appearance: Austin T. Fragomen, Jr., Esquire
New York, NY
For the Employer

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

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. § 656.26 of United States Department of Labor Certifying Officer Austin L. Miller's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-name Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter "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 Case

On January 12, 1987, the Employer, Concurrent Computer Corp., filed the application for labor certification on behalf of the alien, Mohammad-Reza Younesi, for the position of software performance analyst. The alien had been working for the Employer since July 1985 (AF 180). The Employer required an M.S. in Computer Science. The Employer also listed as special requirements the following courses: computer architecture; operating systems, including multiprogramming operating systems; performance evaluation of computer systems, including modeling of computer systems; and design and analysis of algorithms. The Employer did not require any work experience (AF 60).

In his July 27, 1987 Notice of Findings ("NOF") (AF 51-55), the Certifying Officer ("C.O.") denied the Employer's application for labor certification because he found that six U.S. applicants -- James Flynn, Mani Gopalakrishnan, Peggy Gaylord, Yagnesh Pathak, Ellen Shields, and James King - have the basic training and/or experience for the job for which they were rejected and can learn the job in a reasonable transition period that will not cause undue hardship to the Employer. Therefore, the C.O. found that the Employer was in violation of sections 656.21(b)(7) and 656.24(b)(2)(ii).

In its Rebuttal (AF 15-50), the Employer stated that each of the six applicants named by the C.O. is missing at least one of the courses listed as job requirements on the Form 750A (see AF 20-25). Employer then explained how each course is necessary for its business (AF 15-19,20-26).

In his October 16, 1987 Final Determination (FD) (AF 13-14), the C.O. denied the Employer's application for labor certification. The C.O. found that any U.S. worker with an M.S. in computer science could perform this entry level job for which no experience was required in a reasonable transition period, and reiterate that the six U.S. workers listed in the NOF were therefore qualified for the position (AF 14).

Discussion

In its rebuttal, the Employer stated that it rejected James King, Ellen Shields, and Yagnesh Pathak for not meeting all of the job requirements, i.e., they did not take all four of the required courses.¹ It also explained, in layman's terms, what it does, what the required courses

¹In its rebuttal, the Employer stated additional reasons for rejecting Peggy Gaylord (did
(continued...))

teach, and how the required courses are related to its business. Based on this explanation, we disagree with the C.O.'s finding that these three U.S. applicants have the basic training and/or experience for the job for which they were rejected.

This Board has held that, where job requirements on the ETA Form 750A are "not found to be unduly restrictive, an applicant who does not satisfy the requirement[s] is not qualified." University of Utah, 87-INA-702, slip op. at 3 (May 9, 1988).² The C.O. has not alleged that the applicants he found qualified met all the job requirements. Moreover, until the Final Determination he had not alleged that the job requirements were unduly restrictive. It was too late to do so at that time, particularly since Employer has alleged the same grounds for rejecting the U.S. workers throughout the certification process (see AF 62-67). Cf. Downey Orthopedic Medical Group, 87-INA-674 (March 16, 1988) (en banc); Teh Tung Steamship (Houston), Inc., 88-INA-73 (May 23, 1988). Therefore, since none of the applicants met the job requirements, it was erroneous for the C.O. to have found six of them qualified for the job.³

In addition, even if the C.O. had contended in a timely manner that the requirements for the job were unduly restrictive, his findings would be rejected for he offers no basis whatsoever for concluding that "any U.S. workers with an MS in Computer Science could perform this job in a reasonable transition period" (AF 14). In light of Employer's detailed explanation of why it is necessary for the employee in the applicable position to have taken the four courses listed on the Form 750A (see AF 15-20), the CO's unexplained conclusion that these courses are unnecessary cannot be upheld.

¹(...continued)

not meet degree requirements), Mani Gopalakrishnan (not available), and James Flynn (failed Employer's quiz and admitted that he was not qualified). See AF 21-23). The CO did not challenge these additional reasons in his FD. Therefore, we find that Peggy Gaylord, Mani Gopalakrishnan, and James Flynn were either not qualified or not available for the job.

²Judge Brenner's attempt to distinguish University of Utah, a decision in which I also participated, from the present case is unconvincing. The requirement of a Ph.D. in Metallurgy in that case is no different substantively from the requirement in this case of taking four specific courses. The holding in University of Utah is equally applicable to any job requirements listed on the 750A.

³This decision is distinguishable from the Board's decision in Unisys (formerly Sperry, Inc.), 87-INA-555 (April 6, 1988). In Unisys, we found that even though a U.S. applicant's resume and accompanying detailed report did not establish that he satisfied the Employer's "special requirements", it did provide a basis to allow "the CO [to] reasonably conclude that he would be capable of performing the job duties within a reasonable period of on the job training, such as that given to the alien." (Emphasis supplied) Here, unlike in Unisys, there is no allegation that the employer provided the alien with on-the-job training but was unwilling to so train a U.S. applicant.

Based on the above, we find that the Employer rejected James King, Ellen Shields, and Yagnesh Pathak for lawful, job related reasons, and thus did not violate sections 656.20(c)(8) and 656.21(b)(7).

ORDER

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

JEFFREY TURECK
Administrative Law Judge

JT/gaf

In the Matter of CONCURRENT COMPUTER CORP., 88-INA-76
Judge LAWRENCE BRENNER, dissenting:

As found by the Certifying Officer (C.O.), the Employer is seeking labor certification for an entry level position. The only requirements were a Master's of Science in Electronic Engineering and certain specified courses. Section 656.24(b)(2)(ii) provides that "[t]he Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner and duties involved in the occupation as customarily performed by other U.S. workers similarly employed... ." Although James King, Ellen Shields, and Yagnesh Pathak have not taken all of the four courses that the Employer requires, the C.O. found that they would be capable of performing the job duties within a reasonable period of on-the-job training without causing undue hardship to the Employer. I agree with that finding.

Implicit to the C.O.'s findings that the U.S. applicants can perform the job even though they do not meet all of the Employer's specific course requirements, is a finding that the course requirements which the U.S. applicants do not satisfy are unduly restrictive. To find otherwise is to elevate form over substance.¹

This position is consistent with the Board's decision in University of Utah, 87-INA-702 (May 9, 1988), which I authorized. In that case, the Employer's education requirement was a well recognized educational milestone -- a Ph.D. in Metallurgy. The present case involves an employer's subjective and unusually specific requirement as to the number and type of courses the successful applicant must have taken. The requirements of all of these four specific courses, in addition to the M.S. degree, is not claimed to be generally normal for the occupation or

¹Indeed, in this case the Employer's extensive rebuttal focused on its justification for imposing the course requirements. The implication of the C.O.'s Notice of Findings was certainly clear to the Employer.

justified by the rebuttal. It is an impermissible attempt to tailor the job for the alien, and exclude the qualified U.S. applicants.

Moreover, recent Board cases have required the Employer to allow applicants who are generally qualified by education and training a reasonable period of on the job training to learn the specifics of a job. See Unisys (formerly Sperry, Inc.), 87-INA-555 (April 6, 1988). This rationale is even more compelling where, as here, the job is an entry level one requiring no work experience. See Gould Semiconductors, Inc., 87-INA-631 (January 29, 1988).

Therefore, I agree with the C.O. that the Employer has violated sections 656.20(c)(8), 656.21(b)(7), and 656.24(b)(2)(ii). I would affirm the C.O.'s Final Determination in this case.

In terms of general principles, I agree with the majority that C.O.'s must make clear and explicit findings. That is the lesson of this, and other cases.

LAWRENCE BRENNER
Administrative Law Judge

LBN/gaf