



DATE ISSUED: JUN 1 1990

CASE NO: 88 INA 326

IN THE MATTER OF THE APPLICATION  
FOR AN ALIEN EMPLOYMENT CERTIFI-  
CATION UNDER THE IMMIGRATION AND  
NATIONALITY ACT

INMOS CORP.  
Employer

on behalf of

MARTIN BOOTH  
Alien

Thomas J. Hurley, Jr., Esquire  
For the Employer

Howard S. Myers, III, Esquire  
For the American Immigration Lawyers Association  
Amicus Curiae

BEFORE: Brenner, Guill, Litt, Marcellino, Marden, Romano,  
Silverman, and Williams  
Administrative Law Judges

NAHUM LITT  
Chief Judge:

DECISION AND ORDER

This matter arises from an application for labor certification submitted by the Employer on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (1982). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26 (1988).<sup>1</sup>

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<sup>1</sup> All regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

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 a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that there are not sufficient workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must apply for labor certification pursuant to §656.21. 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 the Appeal File (A1-A64), and any written arguments of the parties. See §656.27(c).

#### Statement of the Case

On October 22, 1986, the Employer, Inmos Corp., filed an application for alien employment certification on behalf of the Alien, Martin Booth, to fill the position of microcomputer software applications engineer. (A29-A64) The job duties as described by the Employer included conducting “research and development concerning applications of microprocessors, computing systems and programming languages to develop the transputer family of Inmos microcomputer products, Inmos's OCCAM programming language, and Inmos' other software tools.” (A29) The Employer required a BA/BS degree in either computer science, computer engineering, math, or electrical engineering, and one year of experience using transputers, including six months using OCCAM software. (A29)

The Employer's recruitment efforts yielded the referral of five U.S. applicants, all of whom were rejected by the Employer for not possessing experience with transputers or OCCAM software. (A33-A34) The ETA Form 750B, Statement of Qualifications of Alien, indicates that the Alien received a B.Sc. degree in computer science and math from the University of Bristol, U.K. (A63). Prior to being hired by the Employer, the Alien gained two years experience in research and development of parallel applications including transputer experience and OCCAM programming for Inmos Ltd., U.K. (A64).

On September 11, 1987, the CO issued a Notice of Findings, stating that the Employer was in violation of §656.21(b)(2) which requires that the job opportunity be described without unduly restrictive requirements. (A25-A27) According to the CO, the requirements of experience with transputers and OCCAM software were unduly restrictive. (A26) In addition, the CO found that absent the restrictive requirements, five U.S. applicants were qualified for the position, and that the Employer has not specified lawful, job-related reasons for rejecting them. (A26) Finally, the CO stated that the Alien did not possess the restrictive requirements prior to

being hired by the Employer; “[t]herefore, the employer cannot now require terms and conditions for hire which are less favorable to U.S. workers than those originally offered to the alien (20 C.F.R. 656.21(b)(6)).”

On October 11, 1987, the Employer submitted its rebuttal to the Notice of Findings consisting, in part, of a letter signed by the Employer's Personnel Manager. (A6-A24) In addition to justifying the uniqueness and necessity of the transputer and OCCAM software requirements, the Employer stated the following:

As an international corporation, INMOS frequently transfers personnel from the U.K. to the U.S., either temporarily or permanently. In the case of Mr. Booth, he gained transputer and OCCAM experience while employed at INMOS LTD. (the parent company of INMOS Corp. in the U.S.) in the U.K., prior to his transfer to the U.S. in E-2 status. He was not, then, trained 'on the job' in the U.S.; he came to the U.S. position with the required experience gained abroad. Even if this experience gained abroad is deemed 'on the job training', it would not be economically feasible to similarly train U.S. workers; if certification were denied, the only economically rational response by INMOS would be to 'import' a series of temporary E-2 workers in rotation from INMOS in the U.K. (A12).

The Employer concluded that its requirements arise from business necessity, that the workers who applied for the position were not qualified, and that it has not hired workers in the U.S. with less training or experience and that it is not now feasible to do so. (A12).

On December 24, 1987, the CO denied certification on the ground that the Employer was not willing to offer the same terms and conditions of employment to U.S. workers as were offered to the Alien. (A4-A5) While the CO accepts the Employer's rebuttal evidence that the requirements are unique, he stated that the Employer admitted that the alien learned its unique product with the Employer. (A5)

On January 8, 1988, the Employer requested review. (A1-A2) In its brief, the Employer argued, *inter alia*, that while Inmos Ltd., in England is an affiliate of Inmos Corp., in the United States, it is a separate corporate entity, and the Alien was not trained by Inmos in the United States.

By Order dated February 23, 1990, the parties were notified that the Board had decided to consider this matter *en banc*, specifically to consider whether experience gained with a parent corporation of an international company constitutes experience that would be disqualifying under §656.21(b)(6). On April 4, 1990, a brief of the American Immigration Lawyers Association (AILA), as *amicus*, was received in this Office.

#### Discussion and Conclusion

The CO denied certification on the ground that the alien gained qualifying experience with the Employer. Under §656.21(b)(6), the employer must document that the requirements for

the job opportunity represent the actual minimum requirements, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by employer's job offer. The Board has consistently held that where an employer hires an alien with less training or experience than that required for the job opportunity and fails to offer the same opportunity to U.S. workers, such disparate treatment violates §656.21(b)(6). In re Brent-Wood Products, Inc., 88 INA 259 (Feb. 28, 1989) (en banc); In re Mario Kopeiken, 88 INA 299 (Jun. 27, 1989).

In the instant case, the Employer required experience with transputers and OCCAM software. The Alien gained the experience prior to being hired by Inmos Corp., but he did not possess the experience prior to being hired by Inmos Ltd., U.K. While the Employer argues that the two companies are separate corporate entities, it also stated that INMOS is an international corporation, that Inmos Ltd., U.K., is the parent corporation of Inmos Corp., and that INMOS frequently transfers employees from the United Kingdom to the United States. It is apparent from these statements that, for the purpose of determining whether the Alien gained his experience while working for the Employer, these corporate entities are indistinguishable.

On this record, the argument that experience gained with the parent corporation of an international company does not constitute experience with a wholly-owned subsidiary of the same company is unconvincing. The labor certification process cannot be used by companies large enough to have more than one corporate entity in different countries to circumvent the fair testing of the labor market, by allowing them to simply shift an Alien from employment in one entity in another country into the same job with the American entity of the same company. The regulations do not allow an interpretation which provides a basis for discriminating against American workers to companies based solely on their international character. See In re Haden, Inc., 88 INA 245 (August 30, 1988).<sup>2</sup>

On brief, AILA urges the use of an “operational test” to determine whether the two corporate entities are distinguishable for purposes of §656.21(b)(6). AILA points out that corporate entities that are legally related frequently know little or nothing of each other's operations, have different job requirements, and function independently. AILA concludes that if the employer can show that the two entities are in fact independent entities unrelated to each other in any way other than corporate structure, experience with one company should not be considered disqualifying when certification is sought for a position with the other. AILA requests a remand to permit the Employer to show it meets this operational test.

Given the increasingly international nature of today's business world, and the frequent presence of large conglomerate corporations which serve merely as holding companies for a variety of separate and sometimes competing corporate entities, this approach may have merit.

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<sup>2</sup> Although we did not reach the issue in Haden of whether experience with another subsidiary of a parent corporation qualifies as experience with an American subsidiary of the same parent, there is language in that case strongly suggesting that such a result would have been reached had the CO specified this deficiency in the NOF. See Slip Op. at 5, fn. 2.

In this case, however, the application of such a standard would not alter our result. There appears to be no basis to support a theory that the two Inmos corporations are in different businesses with nothing in common except a corporate entity connection, such as a conglomerate or holding company relationship. Rather, the Employer argues that the fact that Inmos, Ltd. and Inmos, Corp. have separate corporate identities is sufficient to establish that the Alien's experience with the parent corporation in the United Kingdom is not disqualifying. It is with this blanket assertion that we disagree.

We recognize that cases may arise where the two entities involved are so unrelated that application of a blanket prohibition on experience with one of the corporations would be inequitable. This, however, is not that case. We also point out that the regulations always provide an employer in this situation, as discussed below, the opportunity to establish that it is not now feasible to provide U.S. workers with the experience the alien gained with the employer.

As such, on this record, Inmos Ltd., U.K. should be considered the Employer for the purposes of §656.21(b)(6). Therefore, the Alien did not possess the requirements for the position prior to being hired by the Employer. The Employer hired the Alien with less training or experience than is required for the position and has not offered the same opportunity to U.S. workers.

“The general rule is that labor certification will be denied under section 656.21(b)(6) when the alien has been employed in the position for which certification is sought and has gained experience which is required by the job offer while working for the employer in that position. The exception requires the employer to document that it is now not feasible to hire workers with less training or experience than that required by the employer's job offer.” In re MM Mats, Inc., 87 INA 540 (Nov. 24, 1987) (en banc). In the instant case, the Employer has not documented the infeasibility of hiring workers with less training or experience.

While the Employer has argued that training U.S. workers would be economically infeasible, it has not provided any further explanation or documentation to substantiate its conclusion. “To allow an employer to first train an alien for the job and then reject an untrained U.S. worker, on the ground that replacing the alien with the U.S. worker would result in a reduction of efficiency or productivity, would be to allow the circumvention of section 656.21(b)(6) in an egregious manner.” In re Admiral Gallery Restaurant, 88 INA 65 (May 31, 1989) (en banc).

The Employer has trained the alien in its parent corporation, in the United Kingdom, and has not offered the same opportunity to train U.S. workers. Such disparate treatment violates §656.21(b)(6). Accordingly, the CO properly denied certification.

ORDER

The Final Determination of the Certifying Officer denying certification is hereby  
AFFIRMED.

For the Board:

NAHUM LITT  
Chief Administrative Law Judge

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