

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 12 March 2004

In the Matters of:

SUN MICROSYSTEMS, INC.,
Employer,

on behalf of

SRINIVASAN SRINATH,

BALCA No. 2003-INA-302

ETA Case No. P2002-CA-09522523/VA

SAIFUL ALAM

BALCA No. 2003-INA-303

ETA Case No. P2002-CA-09523489/MF

SHIH-CHIN CHIU

BALCA No. 2003-INA-304

ETA Case No. P2002-CA-09522534/VA

PADMAJA NANDULA

BALCA No. 2003-INA-305

ETA Case No. P2002-CA-09519492/GH

ANDREW ARENGO

BALCA No. 2003-INA-306

ETA Case No. P2002-CA-09522549/VA

XIAO-DING CAI

BALCA No. 2003-INA-307

ETA Case No. P2002-CA-09522530/VA

ZUXU QIN

BALCA No. 2003-INA-308

ETA Case No. P2002-CA-09531202/VA

HELAL MUZUMDER

BALCA No. 2003-INA-309

ETA Case No. P2002-CA-09522522/VA

YUNG-CHING HSIAO

BALCA No. 2003-INA-310

ETA Case No. P2002-CA-09531143/GH

YONG JOON LEE

BALCA No. 2003-INA-311

ETA Case No. P2002-CA-09531142/GH

KIRITKUMAR PANCHAL

BALCA No. 2003-INA-312

ETA Case No. P2002-CA-09531126/GH

KETAKI RAO

BALCA No. 2004-INA-4

ETA Case No. P2002-CA-09523491/MF

OHSANG KWON

BALCA No. 2004-INA-5

ETA Case No. P2002-CA-09530559/MF

NISHANT NERURKAR

BALCA No. 2004-INA-6

ETA Case No. P2002-CA-09522847/MF

GIRISH DANGI

BALCA No. 2004-INA-43

ETA Case No. P2002-CA-09530639/MF

SRINIVAS DANGETI

BALCA No. 2004-INA-44

ETA Case No. P2002-CA-09530654/MF

GHUN KIM

BALCA No. 2004-INA-47

ETA Case No. P2002-CA-09531265/MF

Aliens.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Jeffrey Rummel, Esquire
San Francisco, California
For Employer and the Aliens¹

Debra Baker, Esquire
San Jose, California
For Employer and the Aliens²

Christopher DiGiorgio
Phoenix, Arizona
For Employer and the Alien³

Before: Burke, Chapman and Vittone
Administrative Law Judges

¹ Jeffrey Rummel has filed a G-28 Notice of Appearance in BALCA Case No. 2003-INA-302.

² Debra Baker has filed a G-28 Notice of Appearance in BALCA Case Nos. 2003-INA-303-312 and 2004-INA-5-6, 43-44, 47.

³ Christopher DiGiorgio has filed a G-28 Notice of Appearance in BALCA Case No. 2004-INA-4.

JOHN M. VITTONI
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from fifteen applications for labor certification⁴ filed by Sun Microsystems, Inc. (“Employer”) for various engineering and computer positions. (AF 34-35).⁵ The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification and Employer’s request for review, as contained in the Appeal File (“AF”), and any written argument of the parties. 20 C.F.R. § 656.27(c). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

STATEMENT OF THE CASE

On July 12, 2001, Employer filed this application as a Reduction in Recruitment (“RIR”). (AF 34). On January 23, 2003, the CO issued a Notice of Findings (“NOF”) relating to Employer’s layoffs within the last six months. (AF 30-32). The CO requested information regarding the laid-off workers and whether they had been considered for the position. (AF 32).

On February 27, 2003, Employer responded with a letter from the corporate immigration manager of Sun Microsystems. (AF 21-29). In this letter, Employer noted that this was an application filed as an RIR and accordingly, should be governed by the procedures specified in GAL 1-97, Change 1, otherwise known as the Ziegler Memorandum. (AF 25). Employer argued that none of the laid-off workers were qualified for the position for which labor certification was sought. Employer further

⁴ 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 20 C.F.R. Part 656.

⁵ In this decision, AF refers specifically to the Saiful Alam Appeal File as representative of the Appeal File in all cases. Similar applications were filed for the Aliens and the issues raised and dealt with by the CO (*ie.*, NOF, FD, etc.) in the cases are identical.

stated that even if the CO determines that the RIR should be denied, only the RIR and not the labor certification should be denied, in accordance with the Ziegler memorandum. (AF 25-28).

On July 30, 2003, the CO issued a Final Determination (“FD”) denying the RIR and denying certification. (AF 18-20). The CO stated that Employer had failed to rebut the findings with respect to the laid-off workers and their qualifications for the position at issue. (AF 19).

On August 24, 2003, Employer filed a Motion to Reopen/Reconsider or in the alternative, Appeal of the CO’s Decision to Deny. (AF 1-17). Employer argued that it had sufficiently rebutted the CO’s findings with respect to the lay-offs and that even if Employer had not sufficiently rebutted the NOF, the case should have been remanded to the State Workforce Agency for regular processing, rather than being denied completely. (AF 1-4).

The matter was docketed in this Office on September 30, 2003. On December 23, 2003, Employer filed a Supplemental Statement of Position. Employer narrowed the issue and requested remand based on the procedures outlined in the Ziegler memorandum and in accordance with *Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003). Employer once again stated that the CO’s denial of labor certification was erroneous, as only the RIR should have been denied and the case remanded to the State Workforce Agency for regular processing. The CO did not file a brief in this matter or otherwise respond to Employer’s request for remand.

DISCUSSION

Employer is correct in his assertion that this matter is governed by *Compaq Computer Corp.*, 2002-INA-249-253, 262 (Sept. 3, 2003). In *Compaq*, the CO denied RIR and the application for labor certification. Although the denial of RIR was proper, the CO erroneously denied the application outright, rather than remanding the application

to the State Workforce Agency for further processing. Accordingly, the matter was remanded to the CO with instructions to remand the case to the State Workforce Agency. *See Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003).

This case presents a similar scenario in which the CO denied the application prematurely, as it was filed as an RIR. Employer has correctly noted that according to the DOL procedural policy, the case is to be remanded to the State Workforce Agency. If the RIR was denied, the correct process would have been to remand the application; the CO chose instead to deny the application outright. Based on the foregoing, labor certification was improperly denied.

ORDER

The Certifying Officer's denials of labor certification are hereby **REVERSED** and these matters are **REMANDED** to the CO with a mandate to remand the applications to the State Workforce Agency for regular labor certification processing.

For the panel:

A

JOHN M. VITTONI
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.