U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 April 2004

BALCA Case No.: 2003-INA-127
ETA Case No.: P2000-CA-09499574/ML

In the Matter of:

DC COMPUTER CONSULTANTS CO.,
Employer,

on behalf of

HUBA HOROMPOLY,
Alien.

Appearances: Roni P. Deutsch, Esquire
Encino, 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 Computer Consultant.[1] The CO denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

STATEMENT OF THE CASE

On July 2, 1998, DC Computer Consultants Co. ("the Employer") filed an application for labor certification to enable Huba Horompoly ("the Alien") to fill the position of "Computer Consultant." (AF 77). The Occupational Title for the position was "User Support Analyst." The position required a Bachelor's degree in computer or production engineering and two years of experience in the job offered. The job duties included installation, implementation and configuration of business software, evaluation of user requirements, development of system specifications and system problem-solving.

The Employer originally required three years of experience, but amended that requirement to two years of experience upon a determination by the Employment Development Department ("EDD") that the experience requirement was excessive. (AF 83, 101).

On March 5, 2002, the CO issued a Notice of Findings ("NOF"), advising the Employer that while it had amended the experience requirement from three years to two years, the advertisement placed by the Employer required three years of experience. (AF 73). The Employer indicated its willingness to re-advertise and this application was remanded to the EDD. (AF 67, 69).

By letter dated June 26, 2002, the EDD forwarded to the Employer its Final Documentation Notice, with the names of twelve applicants being referred to the

[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."). 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).

Employer as a result of the advertisement of the position. (AF 57). The Employer was advised of the necessity to contact applicants within fourteen days of its receipt of the letter.

The Employer reported the results of its recruitment efforts by letter dated July 25, 2002. (AF 18). Applicant #1 failed to contact the Employer despite three telephone messages and an e-mail message, and therefore, the Employer assumed he was not interested in the position. Applicant #2 was interviewed and indicated that he did not wish to be considered for the position. Applicants #3-6 lacked university degrees and any experience on mainframe. Applicant #7 lacked the experience required. Applicant #8 lacked a university degree and listed operating systems and application expertise unrelated to the offered position. Applicants #9-11 had no mainframe background.

The CO issued his second NOF on October 7, 2002, proposing to deny certification. (AF 13-16). Specifically, the CO found that (1) it appeared that the Alien was hired without two years of experience with Legacy systems, in violation of 20 C.F.R. 656.21(b)(5)[2]; (2) U.S. workers were rejected because of undisclosed requirements; and (3) there was insufficient evidence that the Employer's efforts to contact U.S. applicants were timely. (AF 14-15).

With regard to the rejection of U.S. workers because of undisclosed requirements, the CO found that Applicants #3-11 were found not qualified because they did not possess experience in interfacing with mainframes. This was not a requirement on the ETA 750A and therefore, it could not be used as a justification for finding U.S. applicants not qualified. (AF 15). The CO pointed out that it was not clear that the Alien had this experience prior to hire. (AF 14). The Employer was directed to show that the U.S. workers who applied were not qualified based on their failure to possess the requirements as set forth on the ETA 750A. (AF 15).

[2] As the Employer successfully rebutted the issue of the Alien's experience, it will not be detailed herein.

The CO also found that the Job Service Office sent resumes to the Employer on June 26, 2002, yet there was insufficient evidence to establish that Applicants #1 and #2 were contacted in a timely manner. The CO noted that positive contact efforts include both attempts in writing (supported by dated return receipts) and by telephone (supported by telephone bills). The evidence was not convincing that efforts to contact these applicants took place at all or as early as possible. Recruitment was considered tardy and incomplete. The Employer was directed to give details of its attempts to interview these two applicants. (AF 15).

The Employer submitted rebuttal on October 25, 2002. (AF 6-12). The Employer stated that the term "Legacy" is synonymous with mainframe, pointing out that the ETA 750A referred to mainframe computers and that interfacing to Legacy systems was clearly included in the job duties. Therefore, applicants without experience with mainframe computers were lawfully rejected for failing to possess the minimum requirements for the offered position. The Employer noted that Applicants #3, #6 and #8 were rejected because they lacked the educational requirements of the offered position and Applicant #7 was rejected because he lacked two years of experience of any kind. (AF 6-7).

With regard to the contact of Applicants #1 and #2, the Employer stated that it received the resumes on July 1, 2002 and reviewed the resumes on July 9, 2002, as its offices were closed between July 4 and July 7, 2002. Applicant #2 was contacted on July 12, 2002 and messages were left for Applicant #1 on July 12 and July 15, 2002. An e-mail was also sent to Applicant #1 on July 12, 2002. The Employer submitted a telephone bill documenting its telephone calls to these two applicants. (AF 8-9).

The CO issued a Final Determination ("FD") on December 5, 2002. (AF 4-5). The CO found that Applicants #4, #6-9 and #11 showed familiarity with working with mainframes through their experience with UNIX, VAX, VMS and Legacy. Therefore, valid, job-related reasons had not been provided for their rejection. With regard to Applicants #1 and #2, the CO found that the Employer had established that it contacted

these applicants sixteen days after their resumes were sent to the Employer, but the Employer did not explain the delay in contact. The Employer also failed to show that it made any written attempt to contact the applicants. Therefore, convincing documentation of a good faith effort to recruit these two applicants had not been provided. (AF 5).

On January 22, 2003, the Employer filed a Request for Review of the Denial of Certification and the matter was docketed in this Office on March 6, 2003. (AF 1-3).

In its Request for Review, the Employer contends that it contacted Applicants #1 and #2 within fourteen days of receipt of their resumes, arguing that the contact was timely. The Employer argues that the number of resumes received which needed to be reviewed and the fact that there was a holiday during this time period should be considered in determining whether the contact was timely. The Employer also contends that the CO inappropriately raised an issued for the first time in the FD. Thus, in the FD, the CO stated that the NOF questioned the Employer's rejection of nine applicants for other than valid, job-related reasons, when, in fact, the NOF only questioned whether interface with mainframe computers or Legacy was a stated requirement for the offered position. The Employer was not asked to provide the job-related reasons for rejecting the applicants on the Legacy requirement, and therefore, the Employer did not provide those reasons. The Employer contends that it was not on notice that the rejection of U.S. applicants for job-related reasons was an issue. Therefore, the CO erroneously concluded that six of the rejected applicants were qualified, yet failed to provide the Employer the opportunity to address this issue. The Employer argues that it did not elaborate on the rejection of these applicants because the issue was not raised in the NOF. (AF 1-3).

With respect to the contact of Applicants #1 and #2, we find that the Employer has established that it contacted these two applicants in a timely manner. The fact that the contact occurred sixteen days after the issuance of the letter by EDD does not equate to a delay in contact, or lack of good faith recruitment. The "as soon as possible" standard does not incorporate an exact time period. *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991)(*en banc*). The timeliness of contact should be determined in the

context of a number of factors, such as the number of resumes received, the complexity of the experience and qualifications required, and whether the recruitment is local. *Id.* If an employer demonstrates that the time spent reviewing the resumes prior to recruitment was reasonable, certification should not be denied based on untimely contact. *Id.*

In this case, the Employer contacted the applicants sixteen days after the date of the EDD's referral of resumes. The Employer has noted that the contact was initiated within fourteen days of his receipt of these resumes. The Employer received eleven resumes and the qualifications required were fairly complex. Given these circumstances, the Employer has demonstrated that the time between his receipt of the resumes and the attempted contact was reasonable. As such, the Employer has demonstrated timely contact of Applicants #1 and #2.

The only remaining issue which was raised in the NOF was that of an unstated job requirement. The Employer provided rebuttal on that issue, which does not appear to have been addressed by the CO. In the FD, the CO raised, for the first time, a finding that Applicants #4, #6-9 and #11 showed familiarity with working with mainframes and that a valid, job-related reason had not been given for their rejection. A CO cannot raise an issue for the first time in the FD. *See Marathon Hosiery Co., Inc.*, 1988-INA-420 (May 4, 1989)(*en banc*).

In this case, it would appear that the CO should have issued another NOF, rather than an FD, to allow the Employer to rebut the CO's finding that the Employer had rejected these applicants for other than lawful, job-related reasons. *See Mohawk MFG. Corp.*, 1994-INA-580 (June 5, 1996); *Tarmac Roadstone (USA), Inc.*, 1987-INA-701 (Jan. 4, 1989)(*en banc*). The CO should consider this issue prior to authorizing re-recruitment in this matter.

ORDER

We **REVERSE** and **REMAND** the CO's Final Determination denying alien labor certification 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.