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Issue Date: 08 June 2004

BALCA Case No.: 2003-INA-290
ETA Case No.: P2002-AZ-09528520/IW

In the Matter of:

MOTOROLA, INC.,
Employer,

on behalf of

PRIYA KUMARI,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Danielle Ventura-Fernandez, Esquire
Phoenix, Arizona
For Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONI
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from an application for labor certification¹ filed by Motorola, Inc. (“Employer”) on behalf of Priya Kumari (“the Alien”) for the position of software engineer. (AF 31-32).² The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification and Employer’s request for review, as

¹ 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.

² AF is an abbreviation for Appeal File.

contained in the Appeal File (“AF”), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On March 6, 2002, Employer filed this application as a Reduction in Recruitment (“RIR”). (AF 31). On April 21, 2003, the CO issued a Notice of Findings (“NOF”) relating to Employer’s layoffs within the last six months. (AF 26-28). The CO requested information regarding the laid-off workers and whether they had been considered for the position. (AF 27-28).

On May 27, 2003, Employer filed its rebuttal, arguing that the laid-off workers had been considered for the position, but none of them were qualified. (AF 17-25). Employer further 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. Employer stated that even if the CO did not accept Employer’s rebuttal as sufficient, the case should be remanded to the State Workforce Agency for regular processing, in accordance with the Ziegler memorandum. (AF 17).

On July 10, 2003, the CO issued a Final Determination (“FD”) denying the RIR and denying certification. (AF 14-16). 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 15-16).

On August 4, 2003, Employer filed a Motion for Reconsideration/Request for Review. (AF 3-13). 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 3-4).

The CO denied reconsideration on August 12, 2003 and the matter was docketed

in this Office on September 11, 2003. (AF 1-2). On October 22, 2003, Employer filed a Statement of Position, once again requesting 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 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 denial of labor certification is hereby **REVERSED** and this matter is **REMANDED** to the CO with a mandate to remand the application to the State Workforce Agency for regular labor certification processing.

For the panel:

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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.