U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 July 2004

BALCA Case No.: 2003-INA-216
ETA Case No.: P2001-CA-09498577

In the Matter of:

RELIANCE TECHNOLOGIES, INC.,
Employer,

on behalf of

BHASKARAN SUBBIAH,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Nicholas A. Netty, Esquire
Orange, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Reliance Technologies, Inc. ("the Employer") filed an application for labor certification[1] on behalf of Bhaskaran Subbiah ("the Alien") on July 21, 2000. (AF 47).[2] The Employer seeks to employ the Alien as a computer programmer/analyst (DOT

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision, AF is an abbreviation for Appeal File.

Code: 030.1620-014).[3] This decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File, and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

In the application, the Employer described the duties of the position as designing and developing software solutions and providing technical support. The Employer required a bachelor's degree in engineering or computers and one year of experience. (AF 47, 50).

In the Notice of Findings ("NOF"), issued January 6, 2003, the CO found that the Employer had not documented a lawful, job-related reason for rejecting the one U.S. applicant. (AF 42-45). The Employer stated that, after the oral interview, the U.S. applicant rated 12 out of 40 (on a 1-10 scale in four technical subject areas) by the Employer. The CO stated that the Employer did not document that an individual would have to obtain any certain score on the interview evaluation or that a high score on the interview evaluation would be the measure of the required experience to perform the job duties. Also, the Employer had not shown how it arrived at the 1-10 scale or that using such a scale was a normal practice. (AF 43).

The CO also noted that the job was to be performed under supervision and the CO determined that the job appeared to be a learning opportunity to gain knowledge and skills, while working under direct supervision. The CO also noted that the applicant had a B.S. in computer science and two years of experience as a computer programmer; as such, the CO determined that she met the minimum qualifications for the job opportunity.

The CO noted that one member of the two person panel who interviewed the applicant was a senior manager with a different employer. The CO found that it was not

[3] In this decision, DOT is an abbreviation for the Dictionary of Occupational Titles.

common practice to allow other employers to participate in the interview process. (AF 43).

In the rebuttal, dated February 5, 2003, the Employer argued that the U.S. applicant was rejected solely for lawful, job-related reasons. (AF 19-41). The Employer stated that, at the interview, the applicant was found not qualified for the job opening. Specifically, she did not have experience in databases, database design, or SQL language as well as other computer languages. (AF 19-21). The Employer submitted numeric results from the interview; the Employer's representative gave the applicant a total of 12 out of a possible 40 on programming languages, RDBMS, web, and software engineering. (AF 29). The representative from the other employer noted the applicant's prior experience, but stated that her knowledge and experience of database design and C/C++Java languages was limited. This representative concluded that the applicant was not qualified for the job due to very limited experience. He stated that she would be suitable for a starter position working closely and under the guidance of experienced senior workers. (AF 28). In addition to these summaries, the results indicated that the applicant scored 50% on a written technical test. (AF 27).

The Employer stated that the use of a 1-10 scale was arbitrary. The Employer argued that the applicant was not rejected solely on the basis of the oral evaluation, but was offered the opportunity to take a written test as well. The Employer stated that giving written tests to software engineers is a normal practice of the Employer. Nevertheless, the Employer stated that the applicant was rejected on the basis of the oral evaluation. Finally, the Employer stated that the representative from the different employer participated in the interview to insure that the Employer "objectively" evaluated the applicant's qualifications. (AF 19-21).

The CO issued the Final Determination ("FD") on March 31, 2003, denying certification. (AF 16-18). The CO found that the Employer failed to submit documentation to substantiate any of its assertions on rebuttal on the issue of the rejection of the applicant. The CO noted that the Employer did not rebut the CO's finding that the

position is not one requiring the worker to work independently as a senior programmer analyst, but one requiring direct supervision, which would allow a learning opportunity to gain the necessary knowledge and skills to perform the job. The Employer did not address the fact that the U.S. applicant met the minimum requirements for the position, but found that the applicant had limited experience in databases, database design and various software languages. (AF 17-18).

The CO also noted that the Employer did not submit any documentation of its statement that administering a written test is a normal practice. The CO found that the Employer's statement that the 1-10 scale was arbitrary was unsatisfactory and insufficient to show how an individual would have any certain score on an interview evaluation or that a high score on the interview evaluation would be the measure of the required experience to perform the job duties. Finally, the CO objected to the use of the representative from another company because this practice is not a normal practice. (AF 17-18).

On April 23, 2003, the Employer requested review, arguing that the CO's position was inconsistent because the CO stated that the position allowed for learning on-the job, but also contended that the U.S. applicant met the minimum requirements for the job. (AF 1-15). In addition, the Employer argued that the applicant did not meet the minimum requirements for the job because knowledge of databases, database design and various software languages was necessary for the position. Along with the request for review, the Employer submitted the written tests taken by the U.S. applicant and the Alien to demonstrate both that the applicant was not treated differently and that the applicant's score of 50%, as compared to the alien's score of 77%, supported the Employer's argument that the U.S. applicant was not qualified for the job. (AF 8-15).

The case was docketed by the Board on June 13, 2003, and the Employer did not file an additional brief in support of its appeal, but submitted a copy of the request for review.

DISCUSSION

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 means in order to make a good faith test of U.S. worker availability. It is the employer who bears the burden of proving that all regulatory requirements have been satisfied, and this burden of proof must be met before any application for labor certification can be approved. 20 C.F.R. § 656.2(b).

Twenty C.F.R. § 656.25(e) provides that the employer's rebuttal evidence must rebut all of the findings of the NOF, and that all findings not rebutted shall be deemed admitted. A CO's finding which is not addressed in rebuttal is deemed admitted. *Belha Corp.,* 1988-INA-24 (May 5, 1989) (*en banc*). The employer must provide directly relevant and reasonably obtainable documentation that is requested by the CO. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*).

In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service,* 1990-INA-29 (Mar. 28, 1991). An employer may require experience in specific job duties; however, the employer must state all requirements for the position on the application. *Bell Communications Research, Inc.,* 1988-INA-26 (Dec. 22, 1988) (*en banc); Universal Energy Systems, Inc.,* 1988-INA-5 (Jan 4, 1989) (*en banc).* Twenty C.F.R. § 656.24(b)(2)(ii) applies where an applicant is competent to perform the job duties with a nominal period of on-the-job training, even though he or she does not possess all of the stated qualifications. *Mindcraft Software, Inc.,* 1990-INA-328 (Oct. 2, 1991).

In this case, the U.S. applicant met the stated minimum requirements for the job offered: a Bachelor's Degree in Computer Science and two years experience. The

Employer contends, however, that during her oral interview, she was determined to be unqualified because she could not meet certain job duties, such as answering questions accurately on four technical subjects. The Employer argues that the U.S. applicant is not qualified because she has had only limited experience in data base design, SQL language and C/C++/Java. These requirements, however, were not listed on the ETA 750A. Because these requirements were not included as minimum requirements on the application for labor certification, and because the U.S. applicant met the stated minimum requirements, the CO correctly determined that labor certification should be denied. On rebuttal, the Employer did not submit any documentation to support its assertion that experience in the specific computer languages and programs was necessary to perform this job opportunity. Thus, the CO reasonably concluded that the U.S. applicant who met the minimum requirements could meet the particular job duties with nominal on-the-job training.

The Employer also argues that the U.S. applicant performed poorly on a written test. The Employer submitted copies of the written tests with its request for review; however, evidence submitted with request for review that belatedly addressed other deficiencies will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7. 1992); *Integrated Business Solutions, Inc.*, 1994-INA-209 (June 22, 1995). In addition, we note that the Employer did not submit any documentation that establishes the foundation for the test questions or that the scores required are valid for this particular job opportunity. *Commercial Property Management,* 1993-INA-163 (Aug. 25, 1994).

The Employer failed to provide the documentation required in the NOF which was directly relevant to the issue of whether the Employer rejected the U.S. applicant for lawful job-related reasons. Specifically, the Employer did not provide any documentation to establish that the particular job duties required prior specific experience in the four technical subjects. The Employer also failed to provide any documentation that the questions asked on oral interview or the questions included on the written test were related to the particular job requirements. Thus, we find that the CO properly raised

the issue of whether the Employer had rejected the U.S. applicant for lawful job-related reasons and we agree that the Employer's rebuttal did not adequately rebut that issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

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.