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 August 2004

BALCA Case No.: 2003-INA-143
ETA Case No.: P2001-CA-09515269

In the Matter of:

SOLECTRON CORP.,
Employer,

on behalf of

HARESH PATEL,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Donald H. Freiberg, Esquire
San Jose, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Haresh Patel ("the Alien") filed by Solectron Corporation ("the Employer") pursuant to § 212(a)(14) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based 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 of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On May 30, 2001, the Employer, through its Director of Corporate Staffing, Mr. Richard Cornejo, filed an application for labor certification on behalf of the Alien for the position of Manufacturing Engineer. (AF 34-39). The duties for the position were described as analysis, design, and development of "manufacturing processes for continuous quality improvement of in-house PCB (Printed Circuit Board) assembly." (AF 34). The Employer required a Master's degree or the equivalent foreign degree in Mechanical Engineering, Industrial Engineering or Systems Engineering. No experience or training was required. Evidence of pre-application recruitment was enclosed showing that the Employer advertised the position weekly from November 12, 2000 to April 29, 2001 in the San Jose Mercury News. (AF 43-60). The Employer also advertised the position in the San Francisco Chronicle on February 5, 2001, through its in-house posting from May 13, 2001 to May 24, 2001, on its internet website, and in advertisements for job fairs. (AF 61-76). With the submission of the application and supporting documentation, the Employer submitted a request for a reduction in recruitment. (AF 34-42).

On December 12, 2002, the CO issued a Notice of Findings ("NOF") advising the Employer of his intent to deny the application. (AF 30-32). The CO noted that prior to filing for labor certification, the Employer laid off 1,320 employees at its Milpitas facility, effective April 12, 2001. Subsequently, layoffs were made in August 2001, February 2002 and March 2002. The CO questioned whether the Employer laid off workers who may qualify for the job opportunity, in violation of 20 C.F.R. § 656.24 (b)(2). The CO also questioned whether a current job opening existed to which U.S. workers could be referred. The CO required the Employer to demonstrate that a bona fide job opportunity still exists and is open to any qualified U.S. worker. 20 C.F.R. § 656.20 (c)(8). To accomplish this, the CO required the Employer to provide

documentation showing that the sponsored job opportunity for a Manufacturing Engineer still exists. The Employer was required to: 1) provide the number of workers laid off from the occupation of Manufacturing Engineer and from related engineering positions; 2) provide documentation, by geographic area and worker, of the consideration given laid off workers for the sponsored job opportunity; 3) provide the names and the lawful, job-related reason(s) for the rejection and/or non-hire of any laid-off worker if the laid-off worker(s) were rejected; 4) list the number of vacancies, by occupation, which the Employer has, or anticipates due to a hiring freeze because of layoffs; and 5) provide documentation of additional efforts made by the Employer to identify individuals who may have been affected by reductions in other departments within the company. (AF 31).

The Employer submitted a rebuttal to the NOF on January 9, 2003. (AF 18-29). In its rebuttal, the Employer answered each request made by the CO. The Employer indicated that 123 workers were laid-off from the occupation of Mechanical Engineer and from related engineering positions nationwide since the layoffs began in April 2000. The Employer responded that each laid-off worker who might be qualified for the position of Mechanical Engineer was considered based on the combination of education, training, experience and knowledge to perform the duties of this position in minimum level. The Employer stated that the layoffs were a result of a reduction in force which was necessary for financial reasons at the company, due to reduced orders. The Employer provided a list with the names of the 123 workers who were laid-off. The Employer noted that a hiring freeze is in place and no layoffs had taken place since August 2002. The Employer stated that each individual from the various departments within the company affected by the various reductions was identified and discussed.

In addition, the Employer challenged the issuance of the NOF, indicating it adds illegal *ultra vires* requirements by: (1) going outside the qualifying period for consideration of qualified U.S. workers which the Department of Labor established as the six months immediately preceding the application being filed; (2) imposing an extra-regulatory and different time period for considering qualified U.S. workers from the time period imposed in EDD (non-waiver) applications as found in 20 C.F.R.§ 656.24; and (3)

prejudicing the Employer by failing to timely adjudicate its application which was filed on May 30, 2001. The Employer added that during the six months preceding the submission of the application there were no qualified U.S. workers.

The CO issued a Final Determination ("FD") on January 21, 2003 denying certification on the grounds that the Employer's rebuttal was inadequate to prove that qualified U.S. workers were not available for the offered position. (AF 11-14). The CO noted that the Employer laid off workers as late as April 2001, not April 2000, as stated by the Employer. The CO stated that the lay-offs raised questions because RIR processing requires the employer to show that it has been actively recruiting for a position and still has openings for that position. The CO questioned the appropriateness of the RIR request, given the fact that the Employer laid off workers one month prior to filing its application. In the NOF, the CO asked the Employer to indicate how many manufacturing engineers the Employer laid off in the six months prior to filing the application. The Employer responded that there were no qualified workers, a response that fails to provide a specific, job-related reason why each of the laid-off workers were not qualified, willing, able or available. As a result, the CO found that each worker laid off during this six-month period was qualified. (AF 12-14). The CO stated that the on-going layoffs raised questions about whether the sponsored job opportunity still exists, pursuant to 20 C.F.R. § 656.20(c)(8). The CO concluded that the on-going layoffs were enough to bring the Employer's application in question. With regard to the issuance of the NOF, the CO did not find the Employer's argument persuasive. The CO pointed out that it is within the scope of its authority to request information on layoffs that occurred prior to and subsequent to the filing of an application, as it relates to the question of whether a job opportunity still exists.

On February 6, 2003, the Employer requested review, and the matter was docketed in this Office on April 10, 2003. (AF 1-4). In its brief on appeal, the Employer argued that the CO failed to act on the RIR-processing request in a timely manner and disagreed with how the CO handled the request. The Employer also questioned the NOF, arguing that the CO relied on an incorrect understanding of the meaning of 20 C.F.R. §

656.21(i)(5). The Employer also argued that the CO made an erroneous determination in concluding that qualified workers were available for the offered position. (AF 2-4).

DISCUSSION

In *Compaq Computer Corp*., 2002-INA-249-253, 261 (Sept. 3, 2003), this panel held that where the CO denies a request for reduction in recruitment, the proper procedure is to remand the case to the State Workforce Agency ("SWA") for regular labor certification processing under the procedures specified in GAL, 1-97, Change 1 (popularly know as the "Ziegler Memorandum").

In the instant case, the application was presented to the CO as a request for reduction in recruitment. In the Final Determination, the CO denied the application outright.

We first analyze whether the CO properly denied the RIR request. If the RIR was properly denied, a remand under *Compaq Computer* is mandated.

In its request for review, the Employer presented a variety of contentions to support a finding of error on behalf of the CO.

The Employer's primary argument is that the CO was required to consider the labor market conditions for the six-month period preceding the application, and not at the time that the RIR request is considered by the CO.

The regulation at 20 CFR 656.21(i)(1)(i) provides that the employer must document its efforts for the six months prior to the filing of application when requesting an RIR. That provision, however, does not purport to limit the CO's discretion when considering whether to grant an RIR request. Clearly, the RIR rule is discretionary: the introductory paragraph to the RIR regulation at 20 CFR 656.21(i) states that the CO may

reduce the Employer's effort. Thus, the appeal of a CO's denial of an RIR is based on an abuse of discretion standard of review.

Moreover, the RIR regulation is premised on the CO being able to find that the employer had tested the labor market at "prevailing wage and working conditions." 20 CFR 656.21(i). It is unfortunate that RIR applications may be subject to changes in the job market occurring during SWA and DOL processing, but it cannot be said that the CO acts unreasonably in using his or her discretion to look more closely at RIR requests when there are layoffs in the industry close to the time that the RIR is first looked at by the CO. Indeed, such scrutiny of the RIR request is fully consistent with the CO's obligation to be able to certify that there are not sufficient United States workers, who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and that the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed. 20 C.F.R. §§ 656.1(a) and 656.2(c)(1).

Thus, we hold that the CO does not abuse his or her discretion when considering the prevailing labor market conditions near the time that the RIR application is actually reviewed rather than at the time the application was filed.

The Employer cites the Technical Assistance Guide ("TAG") for the proposition that the CO violated the TAG by failing to consider the Employer's RIR request in a "timely manner." TAG at p63. The TAG, however, is only a manual. *See Roger and Denny Phelps*, 1988-INA-214 (May 31, 1989) (en banc) (TAG is not binding on BALCA, although its policies may be adopted by BALCA when the reasoning is sound). It does not provide any legal rights to relief if a CO is unable to follow a guideline stated in that document. Moreover, given the large volume of labor certification applications pending before ETA, it is not obvious that the CO failed to consider the Employer's RIR request as timely as was possible given the available resources.

The Employer implies in its request for review that it is entitled to relief from the CO's determination because the SWA never questioned the validity of the recruitment effort. It is the CO, however, and not the SWA who makes the determination of whether an RIR may be granted. There is nothing in the SWA's handling of this matter that indicates that the CO abused his discretion in denying the RIR.

The Employer argues, essentially, that the CO violated the regulations because he treated the RIR request as an application subject to the NOF/rebuttal/Final Determination process rather than RIR process -- i.e., that the CO never articulated a reason or basis for denying the RIR request pursuant to 20 C.F.R. § 656.21(i). We concur that the CO's procedural treatment of the case was in error. Nonetheless, the CO's grounds for issuing the Final Determination are, for all practical purposes the equivalent of the grounds for denying the RIR. At most, this appellate argument would only entitle the Employer to a remand for the CO, who would inevitably refashion his Final Determination as a denial of the RIR. A remand for this purpose would only serve to further delay this matter.

In its request for review, the Employer parses the wording of the NOF and Final Determination to contend that the NOF was too vague for the Employer to adequately respond. It is true that the CO may have confused the issue by speaking of the problem as being whether a bona fide job opportunity still exists in view of the Employer's layoffs. However, the Employer cannot reasonably contend that it did not understand that the problem with its RIR request was that it had laid off numerous workers with the same job title as the position for which labor certification is presently being sought, thus strongly suggesting that there are in fact qualified U.S. workers available to fill the position.

Thus, we find that the CO did not abuse his discretion in denying the Employer's RIR request based on evidence of layoffs occurring subsequent to the filing of the application.

As noted above, however, the CO erred in denying the application outright rather than remanding to the SWA for regular, non-RIR processing. *Compaq Computer, supra*.

ORDER

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