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Issue Date: 27 September 2004

BALCA Case Nos.: 2003-INA-259, 261

ETA Case Nos.: P2000-CA-09509451/ML, P2000-CA-09509449/ML

In the Matters of:

ORANGE COUNTY SANITATION DISTRICT,
Employer,

on behalf of

BALACHANDRA RAO,

and

JAGADISH ORUGANTI,
Aliens.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Nicholas Netty, Esquire
Orange, California
For the Employer and the Aliens

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONI
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from two applications for labor certification¹ filed by Orange County Sanitation District (“the Employer”) on behalf of two aliens for the position of

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.

Programmer Analyst. (AF 98-99).² The following 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 (“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 May 25, 2000, the Employer filed an application for alien labor certification on behalf of the Alien for the position of Programmer Analyst. (AF 98-99). The Employer required a Bachelor’s degree in computer engineering and two years of experience in the job offered. The duties of the job included analysis, design, and programming of applications, management of software system projects and database structure, providing technical guidance to programming staff, and overseeing work of outside computer consultants. (AF 98).

On November 1, 2002, the CO issued a Notice of Findings (“NOF”) indicating the intent to deny certification based on a number of grounds. (AF 92-96). The CO stated that the Employer had not conducted recruitment in accordance with standard civil service recruitment and had rejected two qualified U.S. workers for other than lawful, job-related reasons. The CO also determined that the Alien was hired by the Employer without the required two years of experience in custom service control applications. The CO noted that the Alien had worked as an outside consultant at the Employer’s place of business and then the Employer hired him directly. The Employer was instructed either to delete the experience requirement and to rerecruit or to amend the ETA 750B to show the Alien’s experience. (AF 93-94).

² In this decision, AF refers specifically to the Balachandra Rao Appeal File as representative of the Appeal File in both cases. A virtually identical application was filed for the Aliens and the issues raised and dealt with by the CO (*ie.*, NOF, FD, etc.) in these cases are identical.

On December 9, 2002, the Employer filed rebuttal to the NOF, arguing that it had complied with the recruiting procedures for the Orange County Sanitation District. (AF 77-89). The Employer also explained why the two U.S. applicants were rejected as not qualified for the position. Further, the Employer amended the ETA 750B to show the Alien's experience working in India before arriving in the United States and working as a contractor at the Employer's place of business. (AF 90-91).

On January 27, 2003, the CO issued a Supplemental Notice of Findings ("SNOF"), again indicating the intent to deny the application. (AF 69-71). The CO found that it was unclear whether the Employer had complied with the appropriate recruiting procedures. The CO also pointed out that the Alien had worked for a different employer as a consultant to the Employer. The CO stated that because the Alien had been employed to develop custom software for the Employer, it would be difficult for U.S. workers to show a similar level of experience with this software. The CO questioned whether the position was clearly open to U.S. workers. (AF 70).

By letter dated February 27, 2003, the Employer responded with documentation regarding the recruitment procedures of the Orange County Sanitation District. (AF 39-49). The Employer also argued that the Alien possessed qualifying experience prior to being hired by the consulting firm which placed him at the Employer's business. The Employer submitted a letter from the Alien, detailing his experience with previous employers, a letter from the previous employer, the consulting firm who placed the Alien at the Employer's business, detailing the Alien's qualifications prior to being hired by the firm, and a letter from the Information Technology Manager of the Employer, stating that the Alien possessed the requisite education and experience prior to hire. (AF 50-54).

On April 9, 2003, the CO issued a Final Determination ("FD") denying certification on the grounds that the job opportunity was not clearly open to qualified U.S. applicants. (AF 37-38). The CO stated that it was unlikely that another worker would be able to gain the same experience as the Alien because the Alien had been working as a contractor for the Employer to design the custom software. The CO stated

that the Employer required two years of experience with this custom design software, which the Alien was instrumental in creating. In addition, the CO noted that the Employer was not offering training in the software. Therefore, the CO determined that the job was not clearly open to U.S. workers. (AF 38).

The Employer filed a Request for Reconsideration on April 23, 2003. (AF 29-36). The Employer argued that the CO had ignored the evidence presented regarding the Alien's previous experience in India, as well as the documentation from the Alien's former employer regarding the Alien's qualifications at the time of hire. The Employer asserted that the experience requirement was not experience designing the Employer's custom software, but experience designing custom software in general. The Employer noted that custom software is merely software designed to meet the needs of the customer, not necessarily software designed specifically for the Employer. The Employer contended that the CO was incorrect in his interpretation of qualifying experience. (AF 29-34).

The CO denied reconsideration on May 15, 2003. (AF 28). The Employer filed a Request for Review on June 12, 2003 and reiterated the arguments made in the Request for Reconsideration. (AF 1-27). The matter was docketed in this Office on August 5, 2003 and the Employer filed a Statement of Position on September 9, 2003.

DISCUSSION

Twenty C.F.R. § 656.21(b)(5) requires that the employer document that the job requirements are the employer's actual minimum requirements for the position. The employer must show that it has not hired workers with less training or experience or that it is not feasible to hire workers with less training or experience than the requirements for the position offered. If the employer demonstrates that the alien gained the requisite experience prior to being hired, certification should be granted. *National Institute for Petroleum and Energy Research*, 1988-INA-535 (Mar. 17, 1989) (*en banc*).

The CO took issue with the Alien's qualifications for the position and argued that prior to working for a consultant to the Employer, the Alien did not possess the relevant experience. Therefore, the CO found that the requirements as listed on the ETA 750A, specifically the requirement of two years of experience in the job offered, were not the Employer's actual minimum requirements. The CO determined that at the time of hire, the Alien did not have experience in the job duties of designing and programming using the Employer's custom source control application. Further, the CO found that it would be very difficult for a worker to gain the required experience without working for the Employer, as the Alien had done.

The Employer argued that the Alien had obtained the necessary experience while working for a software company in India. (AF 39-42). The Employer presented a letter from the Alien detailing his experience and duties working at this position. (AF 53-54). The Employer also submitted a letter from the Alien's supervisor at the consulting company who placed the Alien with the Employer, stating that the Alien possessed the required experience and qualifications when he was hired. (AF 51-52). The CO did not refer to the Employer's evidence in the FD. Rather, the CO noted that the Alien had been involved with the creation of the Employer's custom software while employed as a contractor. The CO stated that the Employer was not offering training in the software, but required experience with it. Therefore, the CO determined that it would be very difficult for other applicants to obtain such experience.

The Employer has demonstrated that the Alien possessed experience with custom applications prior to being hired. However, it is clear that the CO believed that the Employer's experience requirement referred to experience with the Employer's own software, which the Alien had a part in designing. The Employer repeatedly stated that the requirement of experience designing and using custom applications did not refer to its own custom application. (AF 40-42). The CO did not acknowledge this in the FD and instead denied certification based on the grounds that the job opportunity was not clearly open to U.S. workers.

When the CO makes an erroneous assumption regarding the nature of the job duties, the denial of certification can be reversed and certification granted. *Kater Kitchen, Inc.*, 1988-INA-435 (July 27, 1989). In this case, the CO has failed to note that the Employer required experience designing and programming software based on customer specifications, not necessarily experience designing and programming software based on the Employer's specifications. As such, the Employer has demonstrated that the job was clearly open to U.S. workers and certification was improperly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and labor certification is **GRANTED**.

For the Panel:

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JOHN M. VITTON
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.