U.S. Department of Labor

Board of Alien Labor Certification Appeals
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BALCA Case No.:   **2004-INA-12**
ETA Case No.:   P2003-VT-01333129

In the Matter of:

IBM CORPORATION,
Employer,

   on behalf of

IVAN IVOR CHOBOT,
Alien.

Appearances:	Stuart J. Reich, Esquire
	Fragomen, Del Rey, Bernsen & Loewy, P.C.
	New York, New York
	For the Employer and the Alien
Certifying Officer:	Raimundo A. Lopez
	Boston, Massachusetts
Before:	Burke, Chapman and Vittone
	Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by an Information Processing, Manufacturing, Sales and Services company for the position of Staff Software Engineer. (AF 97-100).[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.

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[1] Alien labor certification is governed by section 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".

STATEMENT OF THE CASE

On October 30, 2002, the Employer, IBM Corporation, filed an application for alien employment certification on behalf of the Alien, Ivan Chobot, to fill the position of Staff Software Engineer in a Vermont facility. The job to be performed was described as follows:

> Design, develop and implement applications and application modules utilizing Electronic Design Automation (EDA) tools such as Candence, Avanti and Synosys with Perl Programming on AIX and Windows operating systems. Diagnose and fix product defects and document and explain usability issues. Perform design and code walkthroughs to ensure accuracy and adherence to solid development methodologies and internal quality standards. Assemble documentation. Change system software and enhance system performance in order to meet clients' needs. Conduct system needs analysis and business studies and based upon analysis, provide recommendations. Liaise with other technical professionals. Utilize script languages such as Perl, Kshell, Cshell, Bshell and network architecture.

Minimum requirements for the position were listed as a Bachelor's degree in Computer Science, CIS or Engineering (any type) and two years of experience in the job offered. (AF 98-99). [3]

The Employer received 18 applicant referrals in response to its recruitment efforts, all of whom were rejected as disinterested or unqualified for the position. (AF 33-40). A number of the applicants were rejected, *inter alia,* for lack of experience with EDA tools such as Candence, Avanti and Synosys with Perl Programming on AIX and

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[3] At the time of application, Employer submitted a letter stating that "IBM Canada, while majority owned by IBM Corporation in the United States is operated as a separate company with separate management structure, separate hiring criteria, and a separate recruiting infrastructure. Therefore, this individual did not simply transfer within the company – he resigned his position with IBM Canada as a Centre of Competence (COC)(Software Engineer) and accepted a position with IBM Corporation in the United States to work as a Staff Software Engineer. It follows that reliance on his IBM Canada experience to demonstrate that he is qualified for the position offered does not violate 20 CFR 656.21(b)(5) as interpreted by BALCA." (AF 108-109).

Windows. The ETA Form 750B, Statement of Qualifications of Alien, indicates that the Alien received a BA in Education and a Diploma as an Electronics Engineering Technician. The application further reflects that the Alien gained experience in EDA tools and the duties as described in this position, with IBM Canada from May 1979 through January 2000. The Alien was hired by IBM in the U.S. in January 2000. (AF 102-103).

A Notice of Findings (NOF) was issued by the Certifying Officer on June 13, 2003, citing 20 C.F.R. § 656.21(b)(5), and proposing to deny labor certification on the basis that the Employer's stated requirement of two years of experience in the job did not appear to be its actual minimum requirement as the Alien did not meet this requirement at the time of hire. The NOF also cited as unlawful the rejection of three U.S. workers who appeared qualified for the position. (AF 23-25).

In Rebuttal, the Employer asserted that IBM Canada is a separate corporate entity from IBM Corporation in the U.S. so as to permit use of experience gained in a position with IBM Canada to qualify the Alien for the petitioned position. In support thereof, the Employer states that "IBM Canada has a separate President, a separate management structure, its own Research and Development Software Laboratory, and its own human resources personnel and systems." The Employer further stressed that the Alien was not transferred but independently chose to cease employment with IBM Canada and applied for an openly posted position with the Employer. The Employer asserts that the two positions are distinct in that the IBM Canada position was more of an administrative and advisory role concerning the EDA software tools used whereas the petitioned position is concentrated mainly on initial analysis of EDA requirements, architecture of EDA installations, and setup. With respect to the three U.S. workers cited as qualified, the Employer further documented their lawful rejection. (AF 9-22).

A Final Determination denying labor certification was issued by the CO on August 14, 2003, based upon a finding that Employer had failed to establish that IBM Canada and IBM Vermont are separate corporate entities, and hence had failed to

adequately document that the Alien met the two years of experience requirement at the time of hire. The CO also concluded that IBM Canada and IBM Vermont are the same entity, owned by the same stockholders. Thus, the CO concluded that experience gained with IBM Canada cannot be used to qualify the Alien beneficiary for the position. The CO further concluded the two positions were not dissimilar, the Employer having had provided training to the Alien following his original hiring. Hence the Alien was not being held to the same standards as possible U.S. applicants. The CO, however, found the evidence sufficient to show that the three cited U.S. workers were lawfully rejected for the position. (AF 6-8).

The Employer filed a Request for Administrative Review by letter dated September 17, 2003. The Request was considered as a Request for Reconsideration and denied, and the matter was then referred to this Office and docketed on November 18, 2003. (AF 1-5).

DISCUSSION

Pursuant to 20 C.F.R. § 656.21(b)(5), an employer is required to document that its requirements for the job opportunity are the minimum necessary for performance of the job and that it has not hired or that it is not feasible for employer to hire workers with less training and/or experience. Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn,* 1989-INA-105 (Feb. 14, 1990). The Board has consistently held that where an employer hires an alien with less training or experience than that required for the job opportunity and fails to offer the same opportunity to U.S. workers, such disparate treatment violates section 656.21(b)(5). *Brent-Wood Products, Inc.*, 1988-INA-259 (Feb. 28, 1989)(*en banc*); *Mario Kopeiken*, 1988-INA-299 (June 27, 1989).

In the instant case, the Employer set its requirements for the job at two years of experience with EDA tools such as Candence, Avanti and Synosys with Perl Programming on AIX and Windows operating systems. The Alien gained this experience prior to his hire with IBM Corporation in Vermont, but he did not possess the experience prior to being hired by IBM Canada. While the Employer argues that IBM Canada is a demonstrably separate corporate entity from IBM Corporation in the U.S. because IBM Canada has a separate President, a separate management structure, its own Research and Development Software Laboratory, and its own human resources personnel and systems, IBM Canada is majority owned by IBM Corporation in the United States. The Employer has repeatedly emphasized that this particular case was not an IBM-orchestrated transfer. Nonetheless, similar to the facts in *Imos Corp.,* 1988-INA-326 (June 1, 1990) (*en banc*), it is apparent from these statements that, for purposes of determining whether the Alien gained his experience while working for the Employer, these corporate entities are indistinguishable.

Moreover, similar to the facts in *Imos*, there appears to be no basis to support a theory that the two IBM corporations are in different businesses with nothing in common except a corporate entity connection. The Board noted in *Imos* that cases may arise where the two entities involved are so unrelated that blanket prohibition on experience with one of the corporations would be inequitable, but this is not that case. Although the Employer states that these are two separate positions, there are only two separate job duties and much overlap in the positions described.

On this record, it is determined that IBM Corporation of Vermont and IBM Canada are considered one and the same employer for purposes of section 656.21(b)(5). Therefore, the Alien did not possess the requirements for the position prior to being hired by the Employer. The Employer hired the Alien with less training or experience than is required for the position and has not offered the same opportunity to U.S. workers. Such disparate treatment violates 656.21(b)(5). Accordingly, it is determined that labor certification was properly denied.

ORDER

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

Entered at the direction of the panel by:

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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 of Labor 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, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.