



DATE: April 11, 1989

CASE NO. 87-INA-558

IN THE MATTER OF:
LDS HOSPITAL, DEPARTMENT OF
MEDICAL INFORMATION
Employer,

on behalf of,
MUHAMMAD HASAN TARIQ,
Alien.

David E. Littlefield, Esq.
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, Guill, Schoenfeld
and Tureck and Williams, Administrative Law Judges

MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by Employer on behalf of the abovenamed Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

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 reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On November 4, 1986, Employer's application for alien labor certification was accepted for processing. Therein, Employer indicated that it was recruiting for the position of systems programmer. Employer listed the duties of that position as follows:

Hardware and software design for medical information BUS (MIB) system components. Develop and implement device communications controller (DCC) software for various medical devices. Develop MIB based report generation and alarming schemes. Modify the system to work on stand-alone mode. System efficiency and performance evaluation. Applications support. Upgrade and maintenance on ICU and clinical computers. ISU Staff training.

(AF69).

Employer stated, at Item #14 on its application form, that the minimum "education, training and experience qualifications" necessary for a worker to satisfactorily perform these job duties are: five years of college, with an M.S. in Electrical Engineering or Computer Science and one year training in systems design and development. The "other special requirements", listed at Item #15 on the application are: "experience on MIB system, ICU-clinical computer interfacing issues, microprocessor based on computer networking data transmission, error detection/recovery and BUS traffic management schemes." (AF69).

On April 6, 1987, the Certifying Officer ("CO") issued a Notice of Findings ("NOF"). Therein, she determined that Employer had not met the requirements of 20 C.F.R. §656. Specifically, the CO found, inter alia, that (1) Employer was in violation of §656.21(b)(2), which requires that the job opportunity be described without unduly restrictive requirements, because Employer's minimum requirements exceed those listed in the Dictionary of Occupational Titles ("D.O.T.") (4th ed.) for the position of Programmer, Information Systems, Code 020.187.010, which states that the position only requires two to four years of training and experience, and (2) Employer's posting of the job was deficient because it included requirements which were not documented as a business necessity. 20 C.F.R. §656.21(b)(2). (AF65-66).

On May 8, 1987, Employer submitted evidence in rebuttal maintaining that the job is being described without unduly restrictive requirements. Employer asserted that the position is not merely that of a computer programmer (AF12). According to Employer, it is in the process of developing a complete computerized system to be used in patient care which will provide for the automatic reporting of data, instead of requiring inputting by nurses. Employer states that it requires systems analysis and systems design and development to assist in the development of such of such a system. As evidence that the job cannot be performed without the experience set

forth in the job description, Employer submitted two statements from Alien's supervisors, a one-page informational description of its Medical Information Bus ("MIB") a five-page description and schematic of its MIB and a sixteen page MIB Load Study. Additionally, Employer clarified its listed job requirements by stating that it does not require one year of experience on the MIB system; rather, it requires background or experience on the system, without setting forth a minimum time period of experience. (AF10-A72).

On May 15, 1987, the CO issued a Final Determination, denying labor certification based on Employer's failure to meet the requirements of 20 C.F.R. §656. Specifically, the CO found that (1) Employer failed to submit documentation to support that the job has been, and is being described without unduly restrictive job requirements as required by 20 C.F.R. §656.21(b)(2), and (2) the job advertisements included the requirements which the CO deemed to be unduly restrictive (AF4-A5).

Discussion

In order to determine whether the job requirements are normal for this job in the U.S. are unduly restrictive, the correct title of the job must be ascertained. The CO contends that the position is that of "Programmer, Information Systems: Programmer, Information Systems" D.O.T. Code 020.187.010 (AF66). Although Employer titled its position "Systems Programmer" (AF69) it maintains that the position is not that of a mere computer programmer (AF12). Employer's brief asserts that the Final Determination does not allow for more than four years education and experience as job requirements, and that this is inadequate to perform the job duties.

In the Final Determination, the CO defended the assigned D.O.T. job title and code as follows:

The Certifying Officer has diligently reviewed the rebuttal statements and compared them to the DOT, and finds that the assigned job description and code were, in fact, proper to the job opportunity. Further support based on the wage offer¹ indicates that the local Job Service properly assessed the application.
(Footnote added.)

AF5. Nowhere does the CO explain her review of the D.O.T. job description nor does she explain how the job duties of the advertised position match those of the D.O.T. position of "Programmer, Informations Systems."

The Notice of Findings did attempt to describe the local Job Service's method of choosing a job title for the position. The NOF states that the local Job Service;

¹ This "further support" refers to a finding by an Alien Employment Specialist, of the Utah Job Service, that Employer's wage offer was within 95 percent of the prevailing wage. AF5.

compared the ETA 7-50A job duties; requirements to qualify; Other Special Requirements; and counsel's letter to the Dictionary of Occupational Titles, (DOT), 4th Edition, and its Supplements, and correctly assigned the title of Programmer, Information Systems, 020.187.010.

AF5.

Our own review of the record, including the D.O.T. leads us to find as a matter of fact that the D.O.T. job title assigned by the Alien Employment Specialist and relied upon by the C.O. is not the correct title of the job opportunity in this case. Our determination is based on a comparison of the duties of the job offered with those of the D.O.T. position description chosen by the C.O. The D.O.T., 4th Edition, describes the position of Programmer, Information System as follows:

020.187-010 Programmer, Information System (profess. & kin.)

Develops and writes natural and artificial language computer programs to store, locate, and retrieve specific documents, data, and information: Develops computer programs for input and retrieval of physical science, engineering or medical information, text analysis, and language, law, military, or library science data. Writes programs for classification indexing, input, storage, and retrieval of data and fact, display devices, and interfacing with other systems equipment. Devises sample input data to test adequacy of program and observes or runs test of program, using sample or actual data. Corrects program errors by altering program step and sequence. Confers with INFORMATION SCIENTIST (profess. & kin.) to resolve questions of program intent, input data acquisition, time sharing, output requirements, coding use and modification, and inclusion of internal checks and controls for system integrity.

In contrast, the duties to be performed by the employee to be hired in this case clearly include software (programs) and hardware design (AF 69). The inclusion of hardware design, in our opinion, significantly alters the nature of the occupation. That the D.O.T. recognizes the distinction between computer software and hardware development is demonstrated by a comparison of the duties for a Programmer, Information Systems and for Computer, Applications Engineer, D.O.T. Code 020.062.010, which includes the design of computers and computer systems hardware. The CO was thus in error when she discounted Employer's argument that the position was not that of a computer programmer. The D.O.T. job title relied upon by the CO is not the correct title for the position in this case. Until the correct job title is determined, it cannot be decided whether the job requirements are normal for the job in the United States, nor can it be determined if the requirements are those defined for the job in the DOT as required by 20 C.F.R. 656.21(b)(2). (See, Information Industries, Inc., 88 INA-82 (February 9, 1989) (en banc)).

Furthermore, neither the Notice of Finding nor the Final Determination detail which job requirements are allegedly unduly restrictive -- the requirement for an M.S. degree or the "Other Special Requirements."

The circumstances of this case necessitate that it be remanded to the CO. On remand, the CO shall determine the job title which best describes this job, and further determine whether the job requirements specified by the Employer in its application for alien labor certification are normal for that job title in the U.S. If the C.O. finds that the job requirements are not normal, and are thus unduly restrictive, a further Notice of Findings clearly setting out her findings and the reasoning behind them shall be issued. Employer shall then have the opportunity to file an appropriate rebuttal addressing the business necessity standard as set out in Information Industries, Inc., 88-INA-82 (February 9, 1989)(en banc).

The Board is mindful of the age of this case and recognizes that this decision will cause a further delay in its final disposition. Nonetheless, under the fact of this case and in light of our holding in Information Industries supra., we are required to remand this case. If on remand the Certifying Officer again denies labor certification and an appeal ensues, the Board would consider a request for an expedited decision.

ORDER

The Certifying Officer's denial of certification is vacated, and the case is remanded to the CO for further proceedings consistent with this decision.

For the Board:

MICHAEL H. SCHOENFELD
Administrative Law Judge

MHS/LS/mlc