U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 23 August 2004

BALCA Case No.: 2003-INA-249
ETA Case No.: P2002-CA-09519639/ML

In the Matter of:

CISCO SYSTEMS, INC.,
Employer,

on behalf of

MANISH SEHGAL,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Debra H. Baker, 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

Cisco Systems, Inc. ("the Employer") filed an application for labor certification[1] on behalf of Manish Sehgal ("the Alien") on June 26, 2001. (AF 25).[2] The Employer seeks to employ the Alien as a Network Consulting Engineer. This decision is based on

[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.

the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

In the application, the Employer described the duties of the position as consulting with customers on the design and implementation of networks. The position required detailed knowledge of network protocols such as IP, ATM, Frame Relay, VLANS, Dial, and Voice. The Employer required either a Master's degree or foreign degree equivalent in Computer Science, Electrical Engineering, or Computer Engineering and two years of experience in the job offered or a Bachelor's degree or foreign degree equivalent in one of these areas and five years of progressively related experience. (AF 25).

In the Notice of Findings ("NOF"), issued December 19, 2002, the CO stated that it had come to his attention that within the last six months the Employer may have laid off workers who were qualified for the job opportunity. The CO stated that lay-offs suggest that absent evidence to the contrary, qualified U.S. workers are able, willing and available for the occupation. *See* 20 C.F.R. § 656.24(b)(2). Accordingly, the CO directed the Employer to document the number of workers laid off from the occupation of Network Consulting Engineer, to provide documentation of the consideration given laid-off workers for the position, to provide the name(s) and the lawful job related reason(s) for the rejection of any laid-off workers, to list the number of vacancies by occupation which the Employer has or anticipates due to a hiring freeze because of the lay-offs, and to 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. The Employer was also advised that it could request remand for supervised recruitment, which required a statement indicating a willingness to retest the labor market and a draft advertisement. (AF 21-23).

The Employer's rebuttal, dated January 14, 2003, stated that there had been no workers laid off in the last six months. Therefore, the Employer stated that there was no documentation of any efforts to hire laid-off workers. (AF 18-20).

On February 21, 2003, the CO issued a supplemental NOF ("SNOF") agreeing the information submitted established that no lay-offs had occurred in the last six months. The CO then stated that the recruitment report did not quantify the response to the Employer's recruitment efforts. Therefore, there was no information as to how many, if any, qualified applicants responded to the advertisement or recruitment efforts and it could not be determined that "further recruitment would be unsuccessful." The CO stated that the Employer should submit detailed job-related reasons for rejecting any applicants or agree to undergo supervised Job Service recruitment, in which case the application would be remanded to the Job Service. The CO also found that the information submitted indicated that the Alien was hired without two years of experience as a network consulting engineer. The Employer was directed either to submit an amendment to the ETA 750B showing the Alien's experience, to amend the ETA 750A and to delete the requirement, or to document how it is not feasible to hire workers with less training or experience than that required by the job offer. If the Employer elected to request remand to the Job Service and to amend the job requirements, the CO stated that the Employer should submit two copies of the amendment letter, a statement that the Employer was willing to retest the labor market, and a draft advertisement. (AF 14-17).

On rebuttal, the Employer stated that during the six month period prior to the date of filing, the company had approximately 450 to 500 openings for its technical positions and had actually hired six individuals for this position during the six months of recruitment. The Employer reiterated its recruitment efforts as set forth in its initial request for RIR. The Employer stated "[p]lease approve the application under RIR. However, if that is not possible, we would like to request the application be remanded for supervised Job Service Recruitment." Also submitted with the Employer's rebuttal letter was a letter from Les Rehklau, Manager of Technical Support HTTS, Cisco Systems,

reviewing the Alien's experience and the knowledge and skills acquired with each prior job. (AF 8-13).

The CO issued the Final Determination ("FD") on April 22, 2003, denying certification. (AF 6-7). The CO found that the Employer's rebuttal response indicating that six applicants had been hired into similar positions in the six months prior to application proved that able and available U.S. applicants have responded to the recruitment efforts. The CO concluded that the rebuttal showed sufficient qualified applicants do exist. The CO also stated that the Employer did not request remand for supervised recruitment. Thus, the CO concluded that the Employer's rebuttal did not correct the first deficiency noted in the SNOF under either of the alternatives suggested. The CO also found that the evidence did not establish that the Alien met the terms and conditions of employment at the time of hire. Therefore, the Employer's application for labor certification was denied. (AF 6-7).

On May 27, 2003, the Employer requested review by this Board. (AF 1). The Employer noted that in the last sentence of its rebuttal to SNOF, it stated "we would like to request the application be remanded for supervised Job Service Recruitment." In addition, the Employer detailed the Alien's experience, noted his Master's degree and resubmitted the Alien's resume. (AF 1-3). The case was docketed by the Board on August 5, 2003.

DISCUSSION

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. On this basis, the Board has repeatedly held that 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*).

The SNOF specifically directed the Employer to submit two copies of an amendment letter, a statement that the Employer was willing to re-advertise and a draft advertisement if the Employer elected to retest the labor market. The Employer did not submit these items, but rather submitted a letter attempting to rebut the findings with a closing sentence requesting remand for supervised recruitment if the submitted documentation was not sufficient to establish the request for reduction in recruitment. However, we also note that when a request for reduction in recruitment is denied because the recruitment is not acceptable, the application shall be returned to the state job service for regular processing in the order in which it is received along with other applications. *See* 20 C.F.R. § 656.21(i)(5). Under the circumstances of this case, the Employer's failure to submit the documents requested by the CO shall not prevent this matter from being remanded to the CO to be further remanded and referred to the state agency for supervised recruitment.

We agree with the CO that the Employer's rebuttal evidence did not establish that further recruitment would be unsuccessful. Indeed, we note that the Employer's rebuttal evidence indicates an enormous pool of potential U.S. applicants since the Employer receives 4,000 to 7,000 resumes a month.

Considering all these facts, it is clear that the request for reduction in recruitment was properly denied by the CO and this matter should be remanded to the state agency for further supervised recruitment. The CO should not have issued a Final Determination, but rather should have remanded the matter.

ORDER

The Certifying Officer's denial of the Employer's request for Reduction in Recruitment is hereby **AFFIRMED** and this matter is **REMANDED** to the Certifying Officer for remand to the state agency for regular 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.