

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 18 November 2004**

**BALCA Case Nos.: 2004-INA-271 through 2004-INA-274**  
ETA Case Nos.: P2002-CA-09520147/JB, P2002-CA-09519852/JB,  
P2002-CA-09519848/JB, P2002-CA-09520137/JB

*In the Matters of:*

**SUN MICROSYSTEMS, INC.,**  
*Employer,*

*on behalf of*

**YIOU LI, LOKESH MADHU, HARSHAVARDHAN KAUSHIKKAR,**  
*and*

**BO TANG,**  
*Aliens.*

Appearances: Debra Baker, Esquire  
San Jose, California  
For the Employer and the Aliens<sup>1</sup>

Lori Melton Dawson, Esquire  
Phoenix, Arizona  
For the Employer and the Alien<sup>2</sup>

Certifying Officer: Martin Rios  
San Francisco, California

Before: Burke, Chapman and Vittone  
Administrative Law Judges

JOHN M. VITTONI  
Chief Administrative Law Judge

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<sup>1</sup> Debra Baker has filed a G-28 Notice of Appearance in BALCA Case Nos. 2004-INA-271, 2004-INA-272, and 2004-INA-273.

<sup>2</sup> Lori Melton Dawson has filed a G-28 Notice of Appearance in BALCA Case No. 2004-INA-274.

## **DECISION AND ORDER**

This case arises from four applications for labor certification<sup>3</sup> filed by Sun Microsystems, Inc. (“the Employer”) for the position of computer hardware engineer. (AF 40-41).<sup>4</sup> 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 arguments 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 June 20, 2001, the Employer filed this application as a Reduction in Recruitment (“RIR”). (AF 40). On December 30, 2002, the CO issued a Notice of Findings (“NOF”) relating to the Employer’s layoffs within the last six months. (AF 35-37). The CO requested information regarding the laid-off workers and whether they had been considered for the position. (AF 36).

On February 24, 2003, the Employer responded with a letter from the corporate immigration manager of Sun Microsystems. (AF 27-30). In this letter, the Employer noted that this was an application filed as an RIR and accordingly, should be governed by the procedures specified in GAL 1-97, Change 1, otherwise known as the Ziegler Memorandum. (AF 28-29). The Employer argued that none of the laid-off workers were qualified for the position for which labor certification was sought. The Employer further stated that even if the CO determines that the RIR should be denied, only the RIR and not

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<sup>3</sup> 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.

<sup>4</sup> In this decision, AF refers specifically to the Yiou Li Appeal File as representative of the Appeal File in all cases. Similar applications were filed for the Aliens and the issues raised and dealt with by the CO (*i.e.*, NOF, FD, *etc*) in the cases are identical.

the labor certification should be denied, in accordance with the Ziegler memorandum. (AF 30).

On July 15, 2003, the CO issued a Final Determination (“FD”) denying the RIR and denying certification. (AF 19-21). The CO stated that the Employer had failed to rebut the findings with respect to the laid-off workers and their qualifications for the position at issue. (AF 20). The CO also noted that a request for remand to the state agency was not an option provided in the NOF. (AF 21).

On August 19, 2003, the Employer filed a Motion to Reopen/Reconsider or in the alternative, Appeal of the CO’s Decision to Deny. (AF 2-18). The Employer argued that it had sufficiently rebutted the CO’s findings with respect to the lay-offs and that even if the Employer had not sufficiently rebutted the NOF, the case should have been remanded to the State Workforce Agency for regular processing, rather than being denied completely. (AF 2-5). The CO denied the Motion for Reconsideration on March 2, 2004. (AF 1).

The matter was docketed in this Office on June 3, 2004. On July 20, 2004, the Employer filed a Statement of Position. The Employer narrowed the issue and requested remand based on the procedures outlined in the Ziegler memorandum and in accordance with *Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003). The Employer once again stated that the CO’s denial of labor certification was erroneous, as only the RIR should have been denied and the case remanded to the State Workforce Agency for regular processing. The CO did not file a brief in this matter or otherwise respond to the Employer’s request for remand.

## **DISCUSSION**

The Employer is correct in his assertion that this matter is governed by *Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003). In *Compaq*, the CO denied the RIR and the application for labor certification. Although the denial of RIR was proper,

the CO erroneously denied the application outright, rather than remanding the application to the State Workforce Agency for further processing. Accordingly, this matter was remanded to the CO with instructions to remand the case to the State Workforce Agency. *See Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003).

This case presents a similar scenario in which the CO denied the application prematurely, as it was filed as an RIR. The Employer has correctly noted that according to the DOL procedural policy, this case is to be remanded to the State Workforce Agency. If the RIR was denied, the correct process would have been to remand the application; the CO chose instead to deny the application outright. Based on the foregoing, labor certification was improperly denied.<sup>5</sup>

## **ORDER**

The Certifying Officer's denials of labor certification are hereby **REVERSED** and these matters are **REMANDED** to the CO with a mandate to remand the applications to the State Workforce Agency for regular labor certification processing.

For the Panel:

**A**

**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

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<sup>5</sup> This case presents an identical factual scenario to *Sun Microsystems, Inc.*, 2003-INA-256, 302-312, 2004-INA-4-6-, 43-44, and 47 (Mar. 12, 2004) *and on reconsideration* (June 2, 2004). The Panel initially remanded the case to the CO with a mandate to remand to the State Workforce Agency for regular labor certification processing. Upon request for reconsideration by the CO, to which the Employer did not object, the Panel remanded the case to the CO for granting of the RIR and issuance of the NOF. The Panel noted that it was cautious of this procedure, given the apparent procedural fairness issues. However, as the Employer did not object, the Panel granted the motion for remand for regular processing. Although this matter involves an identical fact pattern, there has been no request for remand to the CO for regular processing.

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.