U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 03 September 2009

In the Matters of:

AMSOL, INC.,
Employer,

on behalf of

HARI SIVA PRASAD BAYIREDDY,
BALCA Case No. 2008-INA-00112
ETA Case No. D-04344-07684

as a substitute for:

SRINIVAS GUTTA,
Alien

and

CHAITANYA TOTTEMPUDI,
BALCA Case No. 2008-INA-00113
ETA Case No. D-05209-53425

as a substitute for:

RUSSEL SUJIT D'SOUZA,
Alien

and

SRIRAMAKRISHNA PRASAD GORANTLA,
BALCA Case No. 2008-INA-00114
ETA Case No. D-04342-07623

Alien

and

PAYAL KAPADIA, **BALCA Case No. 2008-INA-00115**
ETA Case No. D-04344-07689

as a substitute for:

RENUKA MANTHA,
Alien

and

SAIBABU KOYA, **BALCA Case No. 2008-INA-00116**
ETA Case No. D-05098-57499

as a substitute for:

HARIBABU KATRAGADDA,
Alien

and

PHANI MADHAV BURRA, **BALCA Case No. 2008-INA-00117**
Alien ETA Case No. D-04344-07729

and

VARALAKSHMI SINGAM, **BALCA Case No. 2008-INA-00118**
Alien ETA Case No. D-5209-54933

and

MADHUKAR THOPUCHERLA, **BALCA Case No. 2008-INA-00119**
ETA Case No. D-04344-07679

as a substitute for:

MADHAVI LAKKAMRAJU,
Alien

and

RAMA KRISHNA RAJU MUDUNURI-VENKATA, **BALCA Case No. 2008-INA-00120**
ETA Case No. D-04345-07836

as a substitute for:

PRABHAKARARAO,
Alien

and

USHARANI KANUMURI, **BALCA Case No. 2008-INA-00121**
ETA Case No. D-05098-57527

as a substitute for:

SUMANTH GOGINENI,
Alien

and

RAGHURAM ALAPATI, **BALCA Case No. 2008-INA-00122**
Alien ETA Case No. D-05209-55207

and

VENKATA SATYANARAYANA RAJU INDUKURI, **BALCA Case No. 2008-INA-00123**
ETA Case No. D-04344-07713

as a substitute for:

VANKATASWARA PRASAD VALLURUPALLI,
Alien

and

VENKATESHA NITHYANANDA REDDY, **BALCA Case No. 2008-INA-00124**
ETA Case No. D-05098-57521
Alien
and

PRAVEENA VEGIRAJU, **BALCA Case No. 2008-INA-00125**
ETA Case No. D-05098-57488

as a substitute for:

SUNIL KRISHNA KAZA,
Alien

and

NAGALAKSHMI BOBBILLAPATI, **BALCA Case No. 2008-INA-00126**
Alien ETA Case No. D-05209-55138

and

RAJESH KUCHARLAPATI, **BALCA Case No. 2008-INA-00127**
ETA Case No. D-05209-54112

as a substitute for:

MURALI KRISHNA SUNKU,
Alien

and

SRIKANTH TIRUVURI, **BALCA Case No. 2008-INA-00128**
ETA Case No. D-05209-55323

as a substitute for:

VIJAYA REDDY RONDLA,
Alien

and

SRINIVASA RAJU PENMETSA, **BALCA Case No. 2008-INA-00129**
ETA Case No. D-04345-07826

as a substitute for:

VENKATESHWAR RAO KANDIKONDA,
Alien

and

RAJAIAH KANDI, **BALCA Case No. 2008-INA-00130**
ETA Case No. D-05019-32894

as a substitute for:

MAHESH BABANRAO NANAWARE,
Alien

and

SATYEN RAINA, **BALCA Case No. 2008-INA-00131**
ETA Case No. D-04345-07794

as a substitute for:

SRINIVAS RAJU CHOKKARAJU,
Alien

and

GURUBHASKAR REDDY DUGGIREDDY, **BALCA Case No. 2008-INA-00132**
ETA Case No. D-05210-59114
Alien

and

SIDDAIAH THOTA, **BALCA Case No. 2008-INA-00133**
ETA Case No. D-04345-07821

as a substitute for:

SHEKHAR KALLA,
Alien

and

ARJUNA SINGH BATTULA, **BALCA Case No. 2008-INA-00134**
ETA Case No. D-0529-54460

as a substitute for:

HARIKRISHNA NARISETTI,
Alien

and

VENKATA SUNEEL ALLURI, **BALCA Case No. 2008-INA-00135**
ETA Case No. D-05220-88692

as a substitute for:

BADRINATH DEVUNI,
Alien

and

RAMESH RAYALA, **BALCA Case No. 2008-INA-00136**
ETA Case No. D-04345-07785

as a substitute for:

UPENDRA ADDEPALLE,
Alien

and

RAGHUPATHI KOLUKULURI, **BALCA Case No. 2008-INA-00137**
ETA Case No. D-04345-07845

as a substitute for:

RAJASEKHARA REDDY VUYYURU,
Alien

and

SATISH INDUKURI, **BALCA Case No. 2008-INA-00138**
Alien ETA Case No. D-05209-54467

and

MADHAVI REDDY BYREDDY, **BALCA Case No. 2008-INA-00139**
Alien ETA Case No. D-05217-84939

and

FAROOK MOHAMED, **BALCA Case No. 2008-INA-00140**
Alien ETA Case No. D-04344-07737

and

VENKATA CHINTALAPATI, **BALCA Case No. 2008-INA-00141**
ETA Case No. D-05209-54268

as a substitute for:

SRINIVASARAO VENKATA VASAMSETTI,
Alien

and

NAGA VENKATA MOHANA KRISHNA KADIYALA,
BALCA Case No. 2008-INA-00142
ETA Case No. D-05208-51023

as a substitute for:

CHINA NAGA VENKATA RATNAM VINNAKOTA,
Alien

and

NAGARAJU KANCHANAPALLI,
BALCA Case No. 2008-INA-00143
ETA Case No. D-04345-07827

as a substitute for:

MOHAN VENKATA PRASAD PASUPULATI,
Alien

and

VIJAYA RAMA RAJU ADDALA,
BALCA Case No. 2008-INA-00144
ETA Case No. D-05098-57479

as a substitute for:

SREEPADA MUDGAL,
Alien

and

RAVI KUMAR NARRA,
Alien
BALCA Case No. 2008-INA-00145
ETA Case No. D-05220-88665

and

MOHAN DHANA RAJ INDUKURI,
BALCA Case No. 2008-INA-00146
ETA Case No. D-05208-51666

as a substitute for:

RAJA BANERJEE,
Alien

and

UDAYA BHASKAR UPPALURI, **BALCA Case No. 2008-INA-00147**
Alien ETA Case No. D-05098-57619

and

GEORGE BIMALROY MANOHARAN, **BALCA Case No. 2008-INA-00148**
Alien. ETA Case No. D-05220-88735

Appearance: Ravi Mannam, Esquire
Mannam & Associates, LLC
Suwannee, Georgia
For the Employer and the Alien

Certifying Officer: Jenny Elser
Dallas Backlog Elimination Center[1]

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

These appeals arise from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its applications for labor certification in the above captioned matters. Permanent alien labor certification is governed by section 215(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C.

[1] The Backlog Elimination Centers closed effective December 21, 2007.

§1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[2] Because of the similarity of the facts and issues raised, these appeals have been consolidated for decision. *See* 29 C.F.R. § 18.11.

The following Statement of the Case is based on the Hari Siva Prasad Bayireddy application, 2008-INA-00112, which is representative of the Appeal Files in all of the cases. The applications are nearly identical in regard to the issues raised and dealt with by the CO in the Notice of Findings and Final Determinations, and the evidence and argument presented by the Employer in the rebuttals, requests for reviews, and appellate briefs. "AF" is an abbreviation for "Appeal File."

STATEMENT OF THE CASE

The Application

On October 14, 2004,[3] the Employer, Amsol, Inc., filed applications for labor certification to enable the Aliens to fill the position of "Software Engineer,"[4] at the basic rate of pay of $47,000 per year.[5] (AF 1672). The Employer listed its address on the ETA

[2] These applications were filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

[3] The dates that each application was accepted for processing are as follows: (The cases are identified by the last three numbers of the BALCA Case number.)
113 – Nov. 16, 2004; 114 – Sept. 21, 2004; 115 – July 14, 2004; 116 – June 23, 2004; 117 – June 14, 2004; 118 – Nov. 9, 2004; 119– Sept. 14, 2004; 120– June 23, 2004; 121– June 11, 2004; 122– Nov. 15, 2004; 123– June 18, 2004; 124– Sept. 9, 2004; 125– June 8, 2004; 126– Nov. 15, 2004; 127– Nov. 22, 2004; 128– Dec. 13, 2004; 129– June 18, 2004; 130– Oct. 8, 2004; 131– Aug. 2, 2004; 132– Jan. 20, 2005; 133– June 2, 2004; 134– Nov. 29, 2004; 135– Mar. 24, 2005; 136– June 28, 2004; 137– June 23, 2004; 138– Nov. 29, 2004; 139– Mar. 22, 2005; 140– July 21, 2004; 141– Nov. 5, 2004; 142– Dec. 29, 2004; 143– June 8, 2004; 144– June 3, 2004; 145–Mar. 24, 2005; 146–Dec. 22, 2004; 147–July 21, 2004; and 148– Mar. 24, 2005. Accordingly, the dates of submission and receipt of various other documents also vary.

[4] For BALCA Case No. 2008-INA-00132, the job title is "Senior Software Engineer."

[5] This wage of $47,000/year was for the Aliens in BALCA case numbers 112, 114 and 119. The wage offered was $49,000/year for the Aliens in BALCA case numbers 113, 115, 116, 117, 118, 121, 122, 124, 125, 126, 127, 128, 129, 130, 131, 134, 136, 137, 138, 140, 141, and 144. The wage offered was $46,000/year for the Aliens in BALCA case numbers 120, 123, 133, and 143. For case 132 the wage

750A as Casper, Wyoming, and the address at which the Aliens would work was to be "Casper, WY and any other unanticipated location in the US." (AF 1672).

The Employer requested a Reduction in Recruitment ("RIR"). (AF 1662).

The Notice of Findings

The CO issued a Notice of Findings on June 6, 2007, proposing to deny certification.[6] (AF 1642). The CO noted that the application for labor certification indicated that the Alien would work at "Casper, WY and any other unanticipated location in the US." Based on this work location, the CO stated that she was unable to determine whether or not the jobs offered constituted full-time, permanent employment. The CO pointed out that the Employer had not provided any evidence of a specific client or clients with whom the Alien would consult, the length of time those consultations would be performed, or how the Alien's employment status or compensation would be affected when a contract ended and no imminent assignment for the Alien existed. The CO was also unable to determine whether the location listed as the Employer's address constituted an actual place of work or was simply being used for the purpose of filing an application for labor certification.

The Employer was advised that it could rebut these findings by providing various documents, including:

> (1) a copy of the basic agreement executed by the Employer with its clients, indicating the terms and conditions of the consulting services being provided;

---

offered was $73,000/year; for case 135 it was $45,000/year; for cases 139, 145 and 148 it was $55,000/year; and for case 142 it was $48,000/year.

[6] The date on the Notice of Findings (and all subsequent filings) refers only to the lead case. These dates vary for each case.

(2) a copy of the actual agreement between the Employer and a client representing the job the Alien would be assigned, as well as all agreements to which the Alien could be assigned for the next three years;

(3) a copy of an executed lease and proof of lease payments for the Employer's location at which the Alien would be based and from where the Alien's payroll originated;

(4) a weekly and monthly work schedule for the job offered;

(5) a copy of the Employer's Federal income tax returns for the past three years;

(6) a copy of the Employer's quarterly Federal withholding tax reports for the last three years for the work location;

(7) copies of the last four quarterly reports of the Employer filed with the State(s) for unemployment insurance and which provided the Employer's State account number;

(8) copies of the Alien's W2 forms for the years employed by the Employer in the job offered and for the years in the United States as an employee of the organization in any capacity; and

(9) the Employer's payroll reports for the entire period the Alien had been employed by it, detailing the hours worked and the rate of pay.

The Rebuttal

The Employer submitted rebuttal on July 2, 2007. (AF 123-1641). In this rebuttal, Counsel for the Employer contended that the Employer has enough funds available to pay the Alien's salary. As evidence, the Employer submitted tax returns for 2004 and 2005, and bank statements from 2006, all showing ample funds to afford a payroll of $1.4 million, $3 million, and $8 million, respectively. (AF 149-215). The

Employer further asserted that it would be able to place the Alien on the payroll on or before the date of the Alien's proposed entrance into the U.S., which was evidenced by its corporate tax returns. The Employer also included evidence of its corporate status, including its Articles of Incorporation and a Certificate of Incorporation. (AF 218-225).

The rebuttal also included Quarterly Reports to show that the position offered was for a permanent position. These reports indicated that the company was continuously hiring and expanding its business, rather than periodically contracting its business as would be the case with temporary or seasonal employees. (AF 161-207). Additionally, the Employer asserted that the job site listed on the ETA Form 750 was a bona fide job site. The Employer contended that where positions require work to be performed at unanticipated client sites, the ETA Field Memorandum No. 48-94 instructs employers to indicate that the alien will work at various unanticipated locations throughout the United States. The Employer stated that Line 7 of ETA Form 750A was incorrectly filled out and it should simply read "unanticipated client sites" and not the Employer's Wyoming address. The Employer also asserted that it has corporate offices in both Delaware and Wyoming and submitted leases for office space for these two locations. (AF 233-260).

Also included with the rebuttal were: an agreement between the Employer and a client that represented the jobs to which the Alien would be assigned; state unemployment reports furnished by Automatic Data Processing, Inc. ("ADP"); Board of Immigration Appeals ("BIA") and Board of Labor Certification Appeals ("BALCA" or "Board") decisions; business contracts between the Employer and various clients; and several articles showing job growth in the area of information technology.

The Amended Application and Substitution of the Alien

On July 12, 2007, the Employer requested to substitute another beneficiary on Form 750 Part B and to amend forms ETA 750A and B. (AF 118).[7] On the amended forms, the Employer changed the address at which the Alien would work to "unanticipated locations in the U.S."

The Final Determination

On August 10, 2007, the CO issued a Final Determination denying the Employer's application for labor certification. (AF 113-116). The CO stated that, although the Employer submitted voluminous job contracts between the Employer and its clients, only one such contract was submitted to which the Alien was assigned.[8] The CO noted that this contract contained no client name, physical address, job description, job duties, or work schedule. The CO also asserted that the Employer did not submit copies of actual agreements between the Employer and its clients that represent jobs the Alien would be assigned to if he was to be hired today.

Regarding the job site, the CO contended that even though the Employer amended the address where the Alien will work, it had still not documented that Casper, Wyoming is an actual job site where a U.S. worker could be referred, considered and hired.

Concerning the issue of full-time employment, although the Employer submitted quarterly tax returns, the CO asserted that they did not show that deposits were made in Wyoming. Additionally, the CO contended that the ADP State Unemployment Reports did not show that the Employer is offering permanent full-time employment in the State of Wyoming. The CO argued that based on the number of employees shown on the Unemployment Reports and the size of the office location of 448 square feet, at no time

[7] Several of the applications involved a substitution of the original Alien on the ETA Form 750. The Employer would have been barred from substituting the Alien if it had submitted the substitution after July 16, 2007. See 20 C.F.R. § 656.11(a) (2009) (PERM regulation).

[8] No contracts listing the Alien (either the original Alien or the substitute Alien) were submitted in BALCA Case numbers 127, 134, 142, 146, and 147.

were Amsol employees performing and conducting work at the Casper, Wyoming location.

The CO concluded that "the Casper job site was a virtual location used to file labor certifications where the test for U.S. worker availability in the technology field would be slim to none." (AF 116). Accordingly, the CO denied the application for permanent labor certification.[9]

The Request for Reconsideration/BALCA Review

The Employer filed Requests for Review on September 13, 2007. (AF 1-112). In these Requests, the Employer argued that the CO failed to consider its response to the Notice of Findings in its entirety.

Regarding the denial ground that the position is not permanent and full-time, the Employer provided quarterly reports, which it claimed indicated that the Employer was continuously hiring employees and expanding its business. The Employer pointed out that the reports do not show a pattern of employee expansion and contraction that would be indicative of temporary employment. Further, the Employer argued that due to a shortage of workers in the information technology field and the fact that it is a growing field, the Employer's practice of providing temporary consulting services creates permanent jobs. The Employer also asserted that its quarterly reports are evidence that the jobs are full-time jobs. The Employer stated that when the payment of wages is divided by the number of employees, both of which are shown on the quarterly tax returns, then the average wage, which meets the prevailing wage requirement for Casper, Wyoming, can be inferred. The Employer further asserted that the positions for which the calculated wages are received is "probably indicative of full-time rather than part-time employment."

[9] In BALCA Case No. 145 and 148, there was also an issue regarding the prevailing wage determination (PWD). The CO found that the proper prevailing wage for these two cases was $72,675, which is at level II for a Software Engineer. (For all other cases, the PWD was at level I. However, these two cases also required additional work experience.) Although this issue was never resolved, since we are remanding all of these cases for other reasons, we will not discuss it here. On remand, the CO may decide whether or not she accepts the Employer's argument for these cases or whether additional recruitment must be conducted.

With regard to the CO's contention that the Employer's business contracts do not state the client's name, physical address, job description, or work schedule, the Employer asserted that such agreements typically do not detail such information, but rather only include essential terms, such as an hourly rate and the anticipated duration of the contract. The Employer reiterated that this is the standard method through which business is conducted in the IT consultant field. In response to the CO's argument that the job is not permanent because the Employer has not presented a contract to which the Alien would be assigned, the Employer argued that it has submitted voluminous contracts to indicate that it has sufficient business to sustain its operations over a multi-year term. Although the Employer stated that it could not present a contract where the Alien was assigned for a 3-year term, it asserted that it has presented a contract where the Alien would be assigned for a 2-year term. The Employer also contested the assertion that it did not provide a job description, asserting that in its rebuttal, it indicated that the job duties involved analysis, design, development, and testing of software applications. Concerning the contention that no work schedule was provided, the Employer stated that information technology is based on a "software lifecycle" approach. Consequentially, the Employer argued, the schedule for a particular week or month depends on the stage of software development and the complexity of the particular project. In response to the CO's finding that the Employer's temporary contracts did not show that the job was permanent, the Employer reiterated its argument that because of the shortage of employees in the information technology field, and because it is a growing field, it can be inferred that the Employer will have ample business opportunities in the future and be able to provide the Alien beneficiary with permanent employment.

The CO also stated that he was unable to determine whether the Casper, Wyoming location constitutes an actual place of business or is simply being used to file the application for labor certification. In response to this, the Employer asserted that in its rebuttal, it clarified that the current position is not in Casper, Wyoming, but at unanticipated client sites across the United States. To show its positions across the U.S., the Employer submitted unemployment compensation reports for several states. The Employer also asserted that it was unsure as to which location to use to file its labor certification since the DOL Field Memo does not define or state what an Employer's

main or headquarters office is. The Employer further argued that it first filed its Article of Incorporation in Wyoming, and only secondarily filed in Delaware when its business expanded.

Docketing With BALCA

The matters above were forwarded to the Board of Alien Labor Certification Appeals, which issued Notices of Docketing on January 25, 2008. Neither the Employer nor the CO filed appellate briefs.

DISCUSSION

1. Legal Authority Relating to Roaming Employees and Appropriate Location for Filing of Labor Certification Application

The Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), provides that "[a]ny alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is excludable, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that … there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor …." (emphasis added). Thus, the Department of Labor's regulations require an employer to prove through a test of the labor market that there are not sufficient workers in the United States who are able, willing, qualified, and available 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, and that employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed. Moreover, under 20 C.F.R. § 656.20(c)(8), an employer must clearly show that the "job opportunity has been and is clearly open to any qualified U.S. worker." This provision requires an employer to prove that a *bona fide* job opportunity exists and is clearly open to U.S. workers. *Amger*

Corp., 1987-INA-545 (Oct. 15, 1987) (*en banc*); *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*).

Where the alien's work site is unanticipated locations rather than a fixed location, the question arises as to where the application should be filed. The filing location is very important because it will dictate the prevailing wage determination and influence where the labor market test is performed. Since the statute and regulations are silent on this issue, the Employment and Training Administration issued Field Memorandum No. 48-94 (May 16, 1994) § 10, which provided that "[a]pplications involving job opportunities which require the Alien beneficiary to work in various locations throughout the U.S. that cannot be anticipated should be filed with the local Employment Service office having jurisdiction over the area in which the employer's main or headquarters office is located." In *eBusiness Applications Solutions, Inc.*, 2005-INA-87, et al., slip op. at 12 (Dec. 6, 2006), the panel held that, while not a regulation with the force and effect of law, this "Memorandum fills a gap in the statute and implementing regulations by recommending the proper location for filing of the application in circumstances where the location for the proposed employment of the Alien is uncertain." The panel held that the Memorandum constituted "a reasonable construction of the regulations given the underlying purpose of the statute."[10] *Id.* at 12. The panel observed that the Memorandum did not impose an inflexible mandate about a filing location, but also observed that "nothing in the regulatory scheme obliges a CO to process an application at a location where an employer happens to choose to file, especially where it appears that the employer chose that location to avoid recruiting in a more relevant labor market." *Id.* at 12.

In *Paradigm Infotech*, 2007-INA-3, 4, 5 and 6 (June 15, 2007), the Employer used its office in Erie, Pennsylvania to file labor certifications for several IT positions. Though the Board found that the Employer did have some business connection to the Erie, Pennsylvania area and there was no evidence that the Erie office was established solely for purposes of supporting the filing of labor certification applications, the panel

[10] *Accord Infomerica*, 2007-INA-264 and 265 (Apr. 22, 2009) (employer filed applications in Iowa, but failed to show that a bona fide job opportunity existed for a position with a work base in Iowa).

held that "a mere business connection with a location, standing alone, does not establish that such a location is the appropriate place to make a labor market test." *Id.* at 7. The panel also held that "the use of the Erie, Pennsylvania MSA [Metropolitan Statistical Area] prevailing wage was artificial and misrepresented the appropriate wage rate for this job of potentially national scope. Where a job will involve various unanticipated work sites, the policy stated in ETA Field Memorandum 48-94, § 10, that the appropriate venue for filing the application is the jurisdiction covering the employer's main or headquarters office is reasonable, and the mere business presence of an employer in a different MSA is not, in itself, sufficient reason for departing from that policy." *Id.* at 8.

2. Casper, Wyoming as the Filing Location

In the instant cases, it is clear that the applications were filed with the intent to designate Casper, Wyoming as the location for recruitment and determination of the prevailing wage. As the Employer asserted, its Wyoming office was its first office and its place of incorporation. Although the Employer's Wyoming office was small, this does not refute the contention that it was a legitimate office used by the Employer, nor does it alter its ability to consider and hire U.S. workers. Further, the Employer does not claim that the employee will necessarily be working at the office, but rather that he will be working at "unanticipated locations in the U.S."

Regarding the prevailing wage, the Wyoming SWA determined the local prevailing wage to be $34,362 annually based on the Occupational Employment Statistics (OES),[11] and the Employer's wage offer was $47,000. (AF 1660). We take administrative notice that according to the FLC Online Wage Library, for calendar year 2004, the prevailing wage for a level 1 Applications Software Engineer in Newark, Delaware was $39,416 annually. Thus, whether the application was filed in Wyoming or Delaware, where the company's other office was situated, would not have made a

[11] The PWD for the position listed in BALCA Case No. 139 was $52,146 annually. For Cases 145 and 148, the PWD was $72, 675.

significant difference in the wage offered. Further, the wage offered by the Employer exceeds both the prevailing wage in Casper, Wyoming and Newark, Delaware.

Regarding recruitment, the CO has suggested that the Employer chose Casper, Wyoming as a filing location because "the test for U.S. worker availability in the technology field would be slim to none." (AF 116). However, the Employer did not test exclusively in the Casper, Wyoming market as the CO implied, but rather placed two advertisements in Computerworld, a national magazine. Moreover, this job advertisement did not state that the employee would be working in Casper, Wyoming, but that the employee "must be willing to travel and/or relocate to various places in the United States." (AF 1671). If anything, this suggests that the employee will not be working at the Employer's Casper, Wyoming office.

Based on the record as a whole, we find that the Employer did present bona fide job opportunities for positions with the proper filing location as Casper, Wyoming.

3. Whether the Job Opportunities are Permanent Full-time Positions

According to 20 C.F.R. § 656.3, "[e]mployment means permanent full-time work by an employee for an employer other than oneself." The employer bears the burden of proving that a position is permanent and full-time. If the employer's evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988). Regarding employees who perform work of a temporary nature, the BIA noted in *Matter of Artee Corp.*, 18 I. & N. Dec. 366 (Comm. 1982), that a temporary employment service "must have a permanent cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand."

In the CO's Notice of Findings, she stated that she found that the job offered was not permanent and full-time, but that the Employer could rebut this finding by providing copies of agreements between the employer and its clients indicating the terms and conditions of the consulting services, a copy of an executed lease and proof of payments

where the Alien's payroll originates, a weekly and monthly work schedule for the job offered, income tax returns for the past 3 years, copies of the last 4 quarterly reports filed for the State's unemployment insurance, a copy of the Alien's W-2 forms, and payroll reports for the entire time the Alien has been employed with the company. In response, the Employer submitted income tax returns and bank statements for the previous 3 years, quarterly reports for the previous eight quarters, W-2s for the Alien beneficiary, copies of state unemployment reports by ADP, copies of its leases, and evidence of its corporate status. The Employer also submitted numerous contracts with clients, showing the substantive amount of work it had at present and in the near future, articles showing the growing trends in the information technology field, and a subcontractor agreement with the Alien beneficiary listed as one of the key personnel.[12] While the Employer did not submit a weekly and monthly schedule, the Employer did address this issue in its assertion that information technology development is based on the "software lifecycle approach," and that the weekly and monthly schedules for each employee would vary depending on the stage of software development.

Despite the significant amount of documentation produced by the Employer, the CO rejected the Employer's rebuttal and argued that the contract which listed the Alien beneficiary did not provide an address, location, job description, job duties, or work schedule. While the Employer has the burden of proving that the job opportunity is permanent and full-time, requiring an employer to change the nature of its contracts and how it does business in order to meet such a specific demand is not realistic. In addressing the issue of a work schedule, in both its Rebuttals to the Notice of Findings and its Appeals, the Employer contended that it did not have specific hours set for its employees and explained that an employee's work schedule depended on which stage of the project the employee was working on. The Employer also asserted that its contracts typically contain only essential terms, such as an hourly rate and the anticipated duration of the contract. With the exception of the work schedule and specific contract details, the Employer produced every document requested by the CO. The CO also stated in the Final Determination that the Employer failed to indicate how the Alien's employment

[12] As stated in Footnote 8, no contracts listing the Alien (either the original Alien or the substitute Alien) were submitted in BALCA Case numbers 127, 134, 142, 146, and 147.

and compensation would be affected when one contract ended. In response, the Employer offered numerous contracts showing it had a substantial amount of business, articles showing the growing trends in the information technology field, and tax returns evidencing its high profits and that it could afford to employ numerous full-time employees. While this evidence was not specific to the Alien beneficiary in question, the CO had not specified what type of evidence she was seeking, and to demand a detailed contract for a specific number of years was unrealistic given the nature of the business. Thus, considering the production of evidence and the nature of the Employer's business, we find that the Employer met its burden in proving that the job offered was both full-time and permanent.

4. Posture of the RIR Request

The instant cases were before the CO in the posture of a request for reduction in recruitment. Pursuant to section 656.21(i)(5), unless the CO decides to reduce completely the recruitment efforts required of the Employer, the CO shall return the applications to the local (or State) office so that the employer might recruit workers to the extent required in the CO's decision and in the manner required under the regulations. Normally when the CO denies an RIR, such denial should result in the referral of the application for regular processing. *Compaq Computer Corp.*, 2002-INA- 249-253, 261 (Sept. 3, 2003). We have ruled in other cases, where the Employer used a virtual location or did not present a bona fide job opportunity, that a remand for supervised recruitment is not mandated. *Smith Group Inc.,* 2005-INA-39 (Nov. 27, 2006). However, the facts in this case are different, as there are bona fide work sites and a bona fide job opportunities. Accordingly, we remand these cases. We will leave it to the CO's discretion as to whether the recruitment in the RIRs was sufficient or whether supervised recruitment will be required.[13]

[13] When serving the Notices of Docketing in these matters, BALCA received returned mail for Aliens with the following BALCA Case numbers (only the last 3 digits are listed): 117, 122, 123, 126, 132, 139, 140, 145, 147, and 148. The returned Notices suggest that the Aliens have moved or no longer work for the Employer. Prior to proceeding with supervised recruitment, it may be warranted for the CO to require the Employer to verify the addresses of the Aliens and whether they are still being sponsored for certification.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denials of labor certifications in the above-captioned matters are **VACATED** and that these matters are returned to the CO for additional proceedings consistent with the above.

For the panel:

A

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 twenty days from the date of service a party petitions for review by the full Board. 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, DC 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.