Date: November 7, 1995

Case No.: 94-INA-00248

In the Matter of:

WESTERN ELECTRIC SUPPLY COMPANY,
Employer

On Behalf of:

HILLA GOHARY,
Alien

Before: RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, 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.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On August 17, 1993, Western Electric Supply Company ("Employer") filed an application for labor certification to enable Hilla Gohary ("Alien") to fill the position of Office Manager (AF 63-64). The job duties for the position are:

> Will be responsible for coordinating all office activity including placing, receiving orders, arranging terms and billing with clients, handling accounts payable/receivable, typing letters and correspondence, arranging calendar and appointments. Will use computerized system for office records and billing.

The requirements for the position are eight years of grade school, four years of high school, and two years of experience in the job offered. Other Special Requirements are:

> Must be fluent in spoken Farsi & English, type 45 wpm., operate IBM software, have basic bookkeeping skills, familiar with electrical supply products, terminology and prices. Must know Charter House Acct. Syst. software.

The CO issued a Notice of Findings on September 17, 1993 (AF 52-61), proposing to deny certification on the grounds of restrictive job requirements and foreign language requirement. The restrictive requirement is knowledge of "Charter House Acct. System Software." This requirement appears to be a personal preference, unduly restrictive, tailored to meet the Alien's background and qualifications, and not a normal or customary requirement for the occupation in the United States, thereby precluding the referral of qualified U.S. applicants. Additionally, the CO found that the foreign language requirement (Farsi) appears to be excessive, unduly restrictive, and tailored to meet the Alien's background and qualifications. The CO stated that usually a foreign language is not needed "since most national & international employers conduct their affairs in the english language."

Accordingly, the Employer was notified that it had until October 22, 1993, to rebut the findings or to cure the defects noted. By letter dated October 22, 1993, Counsel for the Employer/Alien requested a 30-day extension of time to respond to the NOF as the Employer is amending the job requirements and readvertising the position in the *Los Angeles Times* (49-50). The request was granted by the CO on November 3, 1993, and rebuttal was now due on or before December 14, 1993 (AF 48).

In its rebuttal, dated December 6, 1993 (AF 9-47), the Employer contended that the Employer has deleted the requirement for knowledge of specialized "Charter Software System" and replaced it with any type of computerized accounting system. Additionally, the Employer has

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

readvertised the position in the *Los Angeles Times* and reposted the job offer with the change. The Employer further contended that the requirement of the Farsi language remains because: (1) the owner and staff of the Employer are of Iranian descent and use the Farsi language as the primary language of communication among themselves and with more than 50 percent of their customers and suppliers; (2) the use of an ethnic language to accommodate business customers is a means of attracting and maintaining business; (3) the Farsi-speaking customers are a major sector of the Employer's business - doing business with the Employer because of the language accommodation. The Employer then related its recruitment efforts and its rejection of five U.S. applicants after interviewing them.

The CO issued the Final Determination on December 27, 1993 (AF 6-8), denying certification because the Employer has failed to adequately rebut the NOF and remains in violation of the regulations at 20 C.F.R. § 656.21(b)(2)(i)(A)(B)(C), § 656.21(b)(2), § 656.25(e)(1)(3), and § 656.26(g). Specifically, the CO determined that the Employer's rebuttal failed to address the entire elected "Corrective Actions" for the foreign language issue and show how the foreign language requirement is justified by business necessity.

On January 27, 1994, the Employer requested review of the Denial of Labor Certification (AF 1-5). The CO, in March 1994, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). On April 17, 1994, the Employer submitted a Brief in Support of Appeal.

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish a business necessity for the requirement.

Here, the CO correctly determined that the Employer's requirement that the employee be fluent in Farsi is not normally required for the position (Office Manager) and is, therefore, unduly restrictive unless supported by evidence of business necessity. Thus, the burden of proof rests with the Employer to establish the business necessity.

We have defined how an employer can show "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. In relation to a foreign language requirement, the first prong of the *Information Industries* standard involves

whether and what percentage of the employer's clients, co-workers, or contractors speak a foreign language, and the second prong involves whether the employee's job duties require communicating or reading in a foreign language. *Coker's Pedigreed Seed Co.*, 88-INA-48 (Apr. 19, 1989) (*en banc*).

In the Notice of Findings (AF 56-57), the CO requested that the Employer provide the following information regarding the foreign language requirement:

*How will the foreign language be used in the job duties?
(What must be explained, and why can't it be explained in English).
*Where & when will the language be used and with whom?
*How was the work completed in the past without the language?
*Will the absence of the language adversely impact the business?
*How is the language handled with other ethnic groups?
*What percentage of the business is dependent on the language?
*Submit a list of employees who speak the foreign language.
*Submit independent statistical data showing the population amount of persons in your community who speak the foreign language.
*Submit a map showing where the population that speaks the language is located in relation to the employer's address.

In its Rebuttal (AF 10-11), the Employer offered a signed statement "made under penalty of perjury" which asserted:

1. The owner and his staff are of Iranian descent and Farsi is the primary language of communication among themselves and their customers.
2. More than 50% of the customers and suppliers to the business use the Farsi language as their primary means of communication.
3. Farsi is used to accommodate customers who prefer or are compelled to do business in their native tongue. Former Iranians who are middle aged or older own many commercial and residential properties, are major customers of the employer, and are very uncomfortable and incompetent when having to do business in English.
4. Without the language accommodation, these customers would take their business elsewhere.
5. A list of Farsi speaking customers and suppliers (previously supplied) is submitted indicating a presence of more than 50% of the customers and suppliers being of Iranian descent (AF 68).

The Board has held that an employer's clients' preference to do business in a foreign language supports a finding of business necessity where the employer has established that it would lose a significant portion of its business. See *Mr. Isak Sakai*, 90-INA-330 (Oct. 31, 1991); *Raul Garcia, M.D.*, 89-INA-211 (Feb. 4, 1991); *Jung Gil Choi, C.P.A.*, 88-INA-254 (Mar. 27, 1990). However, in all those cases the employers established that the foreign language

requirement had a direct bearing on the nature of their respective businesses (*Mr. Isak Sakai* (import-export of antiques); *Raul Garcia, M.D.* (doctor/therapist); *Jung Gil Choi, C.P.A.* (tax accountant)). The Board has not quantified what "significant" portion of foreign-speaking clients justifies business necessity, but it is usually between 80 and 90 percent (*Tel-Ko Electronics*, 88-INA-416 (July 30, 1990) (*en banc*); *Chris and Cary Enterprises*, 88-INA-134 (Sept. 3, 1991)), although it has been as low as 20 to 30 percent (*Mr. Isak Sakai, supra)*. The Board has also held that where the employer is credible and offers evidence that at least a significant portion of its clients are foreign speaking, it need not document that they comprise a particular percentage. *Raul Garcia, M.D., supra*.

In this case, the Employer stated in rebuttal that "more than 50%" of his customers and suppliers "communicate primarily" in Farsi (AF 10). The Employer's only evidence to support this assertion is a handwritten list of 19 selected "customers, contractors and others," most with Middle Eastern surnames (AF 18). This list does not show that these customers prefer to do business in Farsi, will only do business in Farsi, or what percentage of the Employer's total business is represented by this list. See *Coker's Pedigreed Seed Co*., *supra*; *Prestige Cars Corp.*, 88-INA-351 (July 17, 1989). In *Mr. Isak Sakai, supra*, the Board found that the employer had documented that 20 to 30 percent of its import-export contacts preferred to communicate in Farsi. In *Raul Garcia, M.D., supra*, the Board found that the employer had documented a significant portion of his patients' preference to speak in Spanish, when the employer provided over 100 billing statements from Spanish-surnamed patients. In *Jung Gil Choi, C.P.A., supra*, the Board found that the employer had documented that the Korean language is used extensively in mailings to clients by providing "translated statements and advertisements given to the clients which describe tax information and tax application forms." Although the employer's statements must be considered, here the Employer has provided no advertisements, billing statements, fliers, or customer affidavits of any kind to support its statements. See *Raul Garcia, M.D., supra*; *Coker's Pedigreed Seed Co., supra*. The Employer has provided no evidence of any kind in response to the CO's specific requests regarding the total number of clients, the location of those clients, the total number of employees, the number of Farsi-speaking employees, the percentage of time the worker would use the language, how the Employer has dealt with, and is currently dealing with the Farsi-speaking segment of its business, and how it has dealt with other ethnic groups. In this case, the Employer has not established that the foreign language requirement has a direct bearing on the nature of its business of selling electrical supplies. See *Mr. Isak Sakai, supra*; *Raul Garcia, M.D., supra*; *Jung Gil Choi, C.P.A., supra*.

Without some supporting documentation, the statements by the Employer are merely unsupported assertions and conclusions, and cannot carry the Employer's burden of proving business necessity. See *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*); *Our Lady of Guadalupe School*, 88-INA-313 (June 2, 1989); *Inter-World Immigration Service*, 88-INA-490 (Sept. 1, 1989); *Tri-P's Corp.*, 87-INA-686 (Feb. 17, 1989). Failure to address a deficiency in the Notice of Findings by making unsupported assertions, *Sun Valley Co.*, 90-INA-391 and 90-INA-393 (Jan. 6, 1992), or failing to produce any new evidence, *Ted Tokio Tanaka Architect*, 88-INA-334 (June 27, 1989), supports a denial of labor certification.

Although there are some similarities to the Board's decision in *Mr. Isak Sakai, supra*, we are reluctant to extend that precedent to allow employers to establish the business necessity of

the foreign language requirement without credibly documenting that a significant portion of their clients prefer communicating in the foreign language, and showing that the foreign language requirement has a direct bearing on the nature of their businesses.

We find that the Employer has not adequately documented the business necessity of the language requirements of Farsi, and thus, has failed to rebut the CO's finding of a violation pursuant to 20 C.F.R. § 656.21(b)(2)(i). The CO's denial of labor certification is, therefore, proper.

ORDER

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

Entered this the _____ day of August, 2002, for the Panel:

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Richard E. Huddleston
Administrative Law Judge

Judge Pamela L. Wood, dissenting:

Although the majority has attempted to distinguish the Board's decision in *Mr. Isak Sakai*, 90-INA-330 (Oct. 31, 1991), it is directly on point. Accordingly, I respectfully dissent.

The majority has questioned whether the Employer has made a showing of business necessity under the test in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*), because the Employer has failed to submit supporting documentation. Under *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*) and *Greg Kare*, 89-INA-7 (Dec. 18, 1989), written assertions that are reasonably specific and indicate their source or bases constitute documentation that must be considered. However, conclusory statements without further explanation or factual support are insufficient to establish business necessity. *Inter-World Immigration Service*, 88-INA-490 (Sept. 1, 1989). Here, the Employer's assertions are specific and indicate their bases, and the specific statement that more than 50 percent of its customers speak Farsi is supported by a list of Iranian (Farsi-speaking) customers and their telephone numbers. (AF 9-11, 67-68).

Although I share the majority's doubts concerning the sufficiency of this information, we do not write on a clean slate. This case is governed by *Mr. Isak Sakai*, which involved an Export-Import business which sought to hire a business correspondent who was fluent in Farsi. In that case, the Board found that where 20 to 30 percent of the Employer's business is dependent on the Farsi language, and when the job duties required communication with business associates, the need to conduct business in Farsi was a necessity rather than a preference. This finding was based on the Employer's assertions and there is no indication that independent documentation supported them. While the Board in *Mr. Isak Sakai* found that "the essence of the job to be performed, as

described by Employer, is maintaining communications with business associates," on closer scrutiny it does not appear that the nature of the communications required are a basis for distinguishing that case from the instant case, in which the applicant would be expected to communicate with the business owners and staff, as well as the clients, in Farsi. Thus, I would find the Employer has established business necessity under *Mr. Isak Sakai*. See also *Leao & Ferris Inc.*, 94-INA-4 (June 27, 1995); *Raul Garcia, M.D.*, 89-INA-211 (Feb. 4, 1991).

Accordingly, I would reverse the CO's determination and order that certification be granted.

NOTICE OF 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 for such review 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 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.