BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D.C. 20001-8002

DATE: December 12, 1997

CASE NO.: 94-INA-374

In the Matter of:

PLANT ADOPTION CENTER,
Employer,

On Behalf of:

MIRANDA ROSITA MULOCK,
Alien.

Appearances: Richard Henry Maney, Esq., Tampa, Florida
For the Employer

Charles D. Raymond, Associate Solicitor,
Harry L. Sheinfeld, Counsel for Litigation,
Patricia Arzuaga, Esq., U.S. Department of Labor, Washington, D.C.
For the Certifying Officer

David Stanton, Esq., San Diego, California
For the American Immigration Lawyers Association, ***Amicus Curiae***

Before: Vittone, Chief Judge; Guill, Associate Chief Judge; and Holmes, Huddleston, Jarvis, Neusner and Wood, Administrative Law Judges[1]

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the request for review by Employer Plant Adoption Center ("Employer") pursuant to 20 C.F.R. § 656.26 of denial of a labor certification application by the United States Department of Labor Certifying Officer (“CO”) in Atlanta, Georgia. This application was submitted by the Employer on behalf of Alien Miranda Rosita Mulock ("Alien") pursuant to section 212 (a)(5) of the Immigration and Nationality Act of 1990, 8 U.S.C.

---

[1] Associate Chief Judge Burke did not take part in the consideration of this case.

§ 1182(a)(5) ("Act") and Title 20, Part 656 of the Code of Federal Regulations. Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under section 212 (a)(5) 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.

On August 7, 1996, we issued a Notice of and Order Granting ***En Banc*** Review in which we determined, ***sua sponte***, that ***en banc*** review would be granted for the instant case and the companion case of ***Ronald J. O'Mara,*** 96-INA-113, primarily for the purpose of consideration of ***A. Smile, Inc.,*** 89-INA-1 (Mar. 6, 1990) and its application to the facts and circumstances of each of the cases. Following briefing, we considered both cases ***en banc*** and we have recently issued a ruling in ***O'Mara***. We base our decision in the instant case on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and the written argument of the parties, both before the panel and before the ***en banc*** Board. 20 C.F.R. § 656.27(c).

Statement of the Case

On March 13, 1992, Plant Adoption Center ("Employer") filed an application for labor certification to enable Miranda Rosita Mulock ("Alien") to fill the position of Horticulturist, Tropical Plants (AF 19-19(a)). The job duties for the position are:

> Conducts breeding, production, storage, processing, and transit of flowers, bushes, tropical plants, and trees: Experiments to develop new or improved varieties having higher yield, quality, resistance to disease, or adaptability and harvesting. Specializes in research, and propogation (sic) of ornamental plants, specifically, Bromeliads, Hibiscus, and Orchids.

The only requirement for the position is a B.S. Degree in Botany or Agriculture.

The CO issued a Notice of Findings on November 30, 1992 (AF 13-13(d)), proposing to deny certification on the grounds that the Employer is not in compliance with the regulations at 20 C.F.R. §§ 656.21(b)(7) (now recodified as (b)(6)) and 656.24 (2)(ii) (apparently a reference to 656.24(b)(2)(ii)), because six of the eight U.S. applicants for this position appear to be qualified and the reasons given for their rejection are obscure, do not identify the minimum requirements not met, and are insufficient as job-related reasons for the rejections. The CO found that all six of these U.S. applicants were rejected for "lack of requisite experience" but that there was no experience requirement noted on the application. Additionally, the CO proposed to deny certification because the Employer was not in compliance with the regulation at section 656.21(b)(6) (now recodified as (b)(5)) as the duties of the advertised position are tailored to the education, training, and experience of the Alien. The CO stated that prior to her employment with this Employer, the Alien was employed for seven years as an office manager in a photography store; the Employer cannot require more of U.S. workers than was required of the Alien at the time of her hire. In conclusion, the CO stated that qualified U.S. workers are available, the job is clearly not open to U.S. workers, the Employer is interested only in the Alien, and qualified U.S. workers were rejected for training and experience that the Alien acquired after her hire by the Employer. The Employer was notified that it had until January 4, 1993, to rebut the findings or to cure the defects noted.

In its rebuttal dated December 10, 1992 (AF 11-1(a)), Employer contended that "...as the job position is technically framed, it would require a job candidate to perform the propagation of bromeliads, hibiscus and orchids, notwithstanding the fact that a Bachelor of Science Degree in Botany does not prepare the applicant to perform these services." Additionally, the Employer determined through interviews that none of the U.S. applicants possess the experience, training, practical knowledge, or ability to propagate bromeliads, hibiscus, and orchids. Accordingly, the Employer requested that the application be remanded to add a special requirement to the position to "assure that the applicant can perform the very primary function of the position, that is the propagation of bromeliads, hibiscus, and orchids." The Employer further contended that the Alien is employed as a horticulturist, not a tropical horticulturist, which is the offered position; therefore, the application describes the prospective position rather than the Alien's current position. In conclusion, the Employer requested that the application be remanded or, as an alternative, that it be withdrawn without prejudice.

On February 22, 1993, the CO responded to the Employer's request for remand by stating:

> Since there was a significant response to the employer's recruitment efforts, and the Certifying Officer had determined that several of those U.S. workers applying were qualified for the position; in all fairness to those applicants the employer cannot be allowed to amend the application. Especially since the applicants were rejected for knowledge of a specific requirement that was gained by the alien while working for the employer.

(AF 10). The Employer responded to this correspondence on March 4, 1993 (AF 9-9(a)). The Employer stated that the Alien gained her expertise in the propagation of tropical plants through an educational organization that is completely unrelated to the Employer. Accordingly, the Employer contends that it should not be required to provide training for a U.S. worker. The Employer reiterated that the Alien is currently employed as a horticulturist, not the offered position of a tropical horticulturist.

The CO issued the Final Determination on November 15, 1993 (AF 8-8(a)), denying certification because the Employer had not met the requirements of 20 C.F.R. Part 656, and there were U.S. workers available who were able, willing, and qualified for the job. The CO stated that the Alien was using the experience gained and the training received while working for the Employer to qualify for the offered position, which experience and training was not available to U.S. workers, and put U.S. workers at a disadvantage. Additionally, the CO determined that the Employer rejected U.S. workers for not having the required experience even though their resumes indicated that they were as well or better qualified than the Alien at the time of her hire; thus, the job was not clearly open to U.S. workers. Finally, the CO found that the Employer had failed to state its minimum requirements for the job opportunity.

On December 29, 1993, the Employer requested additional time to respond to the Final Determination as it had only been received on December 28, 1993, due to an oversight by the CO's office (AF 7-7(a)).

On January 20, 1994, the Employer requested review of the denial of labor certification (AF 5-5(e)). The CO, on March 15, 1994, advised the Employer that his decision remained a denial, and advised the employer to notify him in writing whether the Employer wished the file to go to an Administrative Law Judge on appeal (AF 2). On March 30, 1994, the Employer requested that the request for review be forwarded to an Administrative Law Judge (AF 1). On April 13, 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

On May 20, 1994, the Employer filed Appellant's Brief. On May 24, 1994, the Employer filed a Supplemental Affidavit signed by the former vice-president of the Employer, Mary Abbott Athman.

Discussion

The regulations provide in 20 C.F.R. § 656.21(b)(6) that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful, job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. workers. Therefore, an employer must take steps to ensure that it has rejected U.S. applicants only for lawful, job-related reasons. Furthermore, although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is implicit. ***H.C. LaMarche Enterprises, Inc***., 87-INA-607 (Oct. 27, 1988). Actions by the employer which

indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. applicants who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

In this case, the Employer's only requirement was a Bachelor of Science Degree in Botany or Horticulture (AF 19). Six U.S. applicants met the Employer's requirement, but they were rejected by the Employer after a brief telephone interview because they did not have experience in the listed job duty of propagation of ornamental plants such as bromeliads, hibiscus, and orchids (AF 22).

In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. ***United Parcel Service***, 90-INA- 90 (Mar. 28, 1991); ***Mancil-las International Ltd.***, 88-INA-321 (Feb. 7, 1990); ***Microbilt Corp***., 87-INA-635 (Jan. 12, 1988). An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750 A and in the advertisement for the position. ***American Cafe***, 90 INA-26 (Jan. 25, 1991); ***Cal-Tex Management Services***, 88-INA-492 (Sept. 19, 1990); ***Richco Management***, 88-INA-509 (Nov. 21, 1989); ***Dharma Friendship Foundation***, 88-INA-29 (Apr. 7, 1988). An employer, however, may lawfully reject an applicant for the inability to perform the main job duties, even though that applicant meets the minimum specified requirements. ***Quality Inn***, 89-INA-273 (May 23, 1990). The burden is on the employer to demonstrate on rebuttal that the U.S. applicant is unable to perform the stated job duties. ***Impell Corp***., 88-INA-289 (May 31, 1989) (***en banc***).

In its rebuttal, the Employer stated that the job duty of propagation of ornamental plants such as bromeliads, hibiscus, and orchids should have been included on Line 15 of the ETA 750 application, as "other special requirements," and requested that the application be remanded so that it could be amended and the Employer could readvertise (AF 11-12). The CO denied this request because he determined it would be unfair to allow any amendments to the application, because he had determined that a number of U.S. applicants were qualified, and because they were rejected for not having skills that the Alien acquired while working for the Employer (AF 9-10).

It is true that the Board has held that issuance of a Final Determination denying certification may be inappropriate in certain cases where the employer indicates a willingness to cure the defect and readvertise in rebuttal. ***See Mash International Trading Co., Inc.***, 90-INA-70 (June 5, 1991) (rebuttal indicates willingness to clarify and amend requirements); ***Integrated Support Systems, Inc***., 93-INA-211 (Jun. 28, 1994) (rebuttal indicates willingness to readvertise and clarify requirement). This is true even when the Employer conditions its offer to cure on a determination that its rebuttal is not persuasive. ***See A. Smile, Inc.***, 89-INA-1 (Mar. 6, 1990). ***See also Sharon Babb***, 92-INA-068 (Mar. 31, 1993). In such cases, under ***A. Smile, Inc.*** and its progeny, the employer may be given an opportunity to readvertise in order to cure the defect if the Certifying Officer finds the rebuttal to be unpersuasive.

We have recently reaffirmed the validity of ***A. Smile, Inc.,*** 89-INA-1 (Mar. 6, 1990) in the companion case and ***en banc*** decision of ***Ronald J. O'Mara,*** 96-INA-113 (Dec. 11, 1997). However, in ***O'Mara*** we have acknowledged that there are situations in which ***A. Smile, Inc.*** does not apply:

> Situations in which ***A. Smile*** does not apply include: 1. The offer to readvertise is equivocal. 2. The NOF [Notice of Findings] finds that no permanent or full time job exists. 3. The NOF finds that the employer rejected U.S. applicants who met the restrictive requirements. 4. The NOF finds a lack of good faith recruitment, including: a. An unreasonable delay in contacting U.S. applicants. b. Failure to account for all resumes forwarded by the state employment service. c. Job requirements designed to discourage U.S. applicants. d. Unstated job requirements. e. Failure to comply with the posting of notice requirements or failure to advertise in an appropriate newspaper or technical journal as directed by the CO [Certifying Officer]. 5. The offer to readvertise is premised on the addition of new job requirements.

Ronald J. O'Mara, 96-INA-113 (Dec. 11, 1997).

Here, the Employer's offer to readvertise was premised upon the addition of the special requirement of experience in propagation of ornamental plants such as bromeliads, hibiscus, and orchids. Thus, this case does not involve a situation in which the employer should be given the opportunity to readvertise under ***A. Smile*** and ***O'Mara.*** Indeed, we have previously found that the ***A. Smile*** rule is not applicable in a situation where, as here, an employer has sought to add a restrictive requirement after finding U.S. applicants who are qualified. ***See GPF Systems, Inc.***, 94-INA-301 (June 30, 1995); ***33 East Maintenance Corp./Freehold Cartage Corp***., 94-INA-242 (June 27, 1995); ***Metal Cutting Corp.,*** 89-INA-90 (Jan. 8, 1990). ***Compare E. M. Warburg, Pincus & Co., Inc***. 93-INA-343 (Jan. 26, 1994); ***Marcia Beiley***, 91-INA-108 (May 13, 1992). Accordingly, the CO appropriately denied the application.

ORDER

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

For the Board:

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

J. GUILL, concurring in the result only:

To the extent that the majority holds that ***A. Smile, Inc.,*** 89-INA-1 (Mar. 6, 1990) and ***Ronald J. O'Mara,*** 96-INA-113 (Dec. 11, 1997) are ***inapplicable*** to the facts of the instant case and affirms the CO's denial of labor certification, I concur. However, as in ***O'Mara***, the discussion of ***A. Smile*** contained in the majority opinion is dicta. Moreover, as I explained in my concurrence to ***O'Mara***, the holding in ***A. Smile*** is not based on a sound interpretation of the applicable statutory or regulatory law.