UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, NW
WASHINGTON, DC 20001-8002

Date: December 4, 1996

Case No. 95-INA-396

In the Matter of:

TRIM AIRE AVIATION INC.
Employer,

on behalf of

GASTONE ROSSATO
Alien.

Before: Guill, Neusner, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial of alien labor certification by a U.S. Department of Labor Certifying Officer ("CO"). The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality 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. We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. 656.27(c).

Statement of the Case

Employer, Trim Aire Aviation, Inc., filed an application for alien labor certification for the position of General Manager on October 5, 1994. (AF 113) The position was classified under the Occupational Code 183.117.014-Production Superintendent. *Id*. Employer's business is aircraft maintenance, refurbishing and sales. *Id*. Included as a special requirement of the position was the ability to speak and communicate in French, Italian and German, and to translate maintenance records, log books, and technical manuals to English. *Id*. The position was advertised in *Trade-A-Plane* (AF 106-107). Only one applicant replied. Employer choose not to interview that applicant because his resume did not show that he had a requisite pilot's license, nor the foreign language capabilities sought by Employer. *See* AF 97. The Texas Employment Commission then forwarded the application and recruitment results to the CO. (AF 92-93)

A Notice of Findings was issued by the CO on December 30, 1994, which raised, *inter alia*, the question of the business necessity of the multiple foreign language requirement, and directed Employer to supply certain documentation in regard to that requirement. *See* AF 17-20. Specifically, Employer was directed to

> ... submit documentation which shows: the total number of clients and persons dealt with and what percentage of these contacts are not able to communicate in English; the percentage of the business which is dependent upon the foreign language and how the business would be affected without the language capability; and the percentage of time the worker would need to utilize the foreign language to conduct business. Additionally, the documentation must be presented to show how the employer has previously and is presently dealing with and handling this segment of the business. In essence, the employer must show the use of the foreign languages is essential to the operation of the business.

(AF 19)

Employer's owner and President, Boyd A. Miller, submitted rebuttal on February 1, 1995. (AF 10-87) Mr. Miller stated that the General Manager position "is not of a traditional pigeon hole position but rather more in the form of an ad hoc position that will be the backup for all other positions." (AF 10). The position, he indicated, is meant to open the door to expansion of the business into the Common Market countries of Europe and to Latin America. (AF 11) Mr. Miller argued that the language requirements were

> ...imposed not by us but by the vagaries of the market. If we wish to deal with the European Common Market, South America and Central American countries we need to be able to communicate in their native languages. In the same manner we need to understand the nuances of the language so that we do not find ourselves in a difficult position.

(AF 11) Mr. Miller also argued that Employer was now doing business in countries where the official language is French, German, Italian, and other languages, and that logs and other documentation are written in the official language of those countries. He stated that Employer had two cases on file where it was unable to "move" two foreign registered airplanes. One airplane could not be moved because, although the person contracted for the job understood the foreign language, he did not understand the foreign bureaucracy. The second airplane could not be moved "due to a language misunderstanding about propeller and engine overhaul." (AF 12)

Mr. Miller also asserted in rebuttal that both its European and Latin American customers prefer to deal in their own language. Mr. Miller asserted that Employer has had a marked increase in the number of customers from Europe placing their aircraft with Employer for sale and repair. He stated that Employer had lost at least $150,000 in commissions in the prior year, and implied that language limitations placed them at a disadvantage in those deals. Mr. Miller noted that increased business from the position would help create skilled jobs.

Finally, Mr. Miller noted that he was attaching copies of official logs and technical

specifications, observing that it is not enough merely to translate the literal words, but to also understand "meanings from between the lines." The rebuttal documentation includes 50 pages of such logs and specifications. Also included in the rebuttal are several pages photocopied from the classified section of the November 1994 issue of *Flight International*. It is not stated why these pages are relevant to rebuttal, but it is noted that several management-training type positions are circled. One of the circled positions contains a job requirement of being bilingual.

In a Final Determination, dated March 22, 1995, certification was denied on the ground that Employer had failed to document the business necessity of its foreign language requirement. (AF 7-9). The CO noted that Employer had provided copies of documents written in Italian, French and German, but found that Employer had not presented documentation "to substantiate whether any of the staff or management who were on the premises on a regular and recurring basis speak French, Italian and German." (AF 9) The CO also found that Employer had not presented documentation addressing any of the specific documentation requests made by the CO in the Notice of Findings.

Employer requested administrative-judicial review on April 23, 1995. (AF 2) On June 14, 1995, Employer submitted at Statement of Position.

Discussion

Section 656.21(b)(2)(I)(C) provides that the job opportunity shall not include a requirement for a language other than English unless that requirement is adequately documented as arising from business necessity. The business necessity standard enunciated in *Information Industries*, 88-INA-82 (Feb. 9, 1989) (*en banc*) is applicable to a foreign language requirement. *See Coker's Pedigreed Seed Co.*, 88-INA-48 (Apr. 19, 1989) (*en banc*). As the business necessity standard has developed in relation to foreign language requirements, the first prong generally involves whether the employer's business includes clients, co-workers or contractors who speak a foreign language, and what percentage of the employer's business involves this foreign language. The second prong generally focuses on whether the employee's job duties require communicating or reading in a foreign language.

Where an employer contends that a foreign language requirement is justified by its plan to expand its business to new foreign markets, the *Information Industries* business necessity test is still applied. *Remington Products, Inc.*, 89-INA-173 (Jan. 9, 1991) (*en banc*). Because of the danger for abuse by employers simply tailoring their job requirements to an alien's foreign language capabilities, the Board has required that documentation presented in cases involving foreign language requirements that are purportedly based on proposed plans for expansion into foreign markets must be thorough. *See, e.g., Cable Car Photo and Electronics*, 90-INA-141 (June 5, 1991); *Advanced Digital Corporation*, 90-INA-137 (May 21, 1991).

Where a labor certification regulation does not require information to be in a specific form, and the CO has not made a request for a reasonably obtainable and relevant document, written assertions that are reasonably specific and indicate their sources or bases are to be considered documentation. *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*). The CO is not

required to accept written statements provided in lieu of independent documentation as credible or true, but must consider them and give them the weight they rationally deserve. *Id*. If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Id*.

In the instant case, the *rebuttal* documentation submitted to the CO did not address many of the specific elements of information requested in the NOF. Employer's rebuttal, which focused on business expansion, did not specifically address the CO's questions about the total number of clients or other persons dealt with who are not able (or even with whom it is impractical) to communicate in English; the percentage of the business that is dependent on the foreign languages requirement; the percentage of time that the General Manager would need to utilize the foreign languages to conduct business; how Employer is currently dealing with the language problem. Although Employer did attempt to explain how the language requirements were relevant to its plans to expand its business into Europe and Latin America (which is relevant to prong one of the business necessity test), that explanation is based largely on sweeping statements, and does little to illuminate how the language requirements were relevant to a position which appeared to be primarily shop production manager (the second prong of the business necessity test).

We note that Employer's explanation of its business and the need for the multi-lingual General Manager is more thoroughly, and compellingly, explained in its statement of position submitted to the Board. For instance, Employer's Statement of Position puts into perspective the relationship between Employer's business of complete overhauls of aircraft, and the resulting need of the production superintendent to understand the logs and specifications of aircraft obtained from other countries. Employer explains why the decreased production of light aircraft in the U.S. combined with increased regulation and taxation of private aircraft in Europe creates a supply and demand situation Employer is in a position to exploit. It documents Employer's efforts in December 1992 to find a qualified superintendent who could understand European languages resulting from specific lost business opportunities, and includes declarations from others in the aviation field attesting to the need for the language requirement. This type of information undoubtedly would have helped the CO understand Employer's business and business needs, and may have been enough to permit the CO to grant certification.[1]

The Board is prohibited by regulation, however, to consider legal argument or evidence that was not within the record upon which the denial of labor certification was based. 20 C.F.R. § 656.26(b)(4). We have carefully compared the information contained in the record before the CO and the information contained in the filing before the Board. Most of the information that explains Employer's business necessity simply was not presented to the CO, or was presented in a way that the CO could not reasonably have been expected to get a clear picture of Employer's need for the foreign languages by a General Manager. In this case

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[1]We merely observe that Employer's presentation of its case was much better in the Statement of Position than in the rebuttal. We do not reach the question of whether the information contained in the Statement of Position would have been sufficient to compel a grant of labor certification.

Employer was seeking an employee whose duties as a shop superintendent are not intuitively related to language skills. Moreover, Employer required fluency in not merely one, but three foreign languages. It was incumbent upon Employer to provide a thorough and lucid explanation of the need for these languages by this employee. We cannot find that the CO erred in denying labor certification based on the record before her.

Employer may find it difficult to understand why the Board cannot consider Employer's new argument and evidence. To do so, however, would be tantamount to permitting Employer to make an untimely rebuttal. Tolling of regulatory deadlines has been permitted only in those rare instances in which failure to do so would result in manifest injustice. *Madeleine S. Bloom*, 88-INA-152 (Oct. 13, 1989) (*en banc*), *recon. den.* (Dec. 20, 1989) (per curiam). The time limit for filing of rebuttal is construed strictly by the Board in order to assure clarity and consistency in the application of the rebuttal requirements of § 656.25. *Park Woodworking, Inc.*, 90-INA-93 (Jan. 29, 1992) (*en banc*). We decline to permit a untimely rebuttal in a case such as this, where an especially egregious factor is not present, and where there is no assurance that certification would have been granted but for the lack of timely rebuttal. *Id*.[2]

ORDER

The denial of labor certification is AFFIRMED.

Entered at the Direction of the panel by:

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Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

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

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[2]We note that an employer may file a new application for the same occupation at any time after the expiration of 6 months from the date of a denial of certification by the CO. *See* 20 C.F.R. § 656.29(a).

Office of Administrative Law Judges
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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 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.