

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: 21 August 2003

BALCA Case No.: 2003-INA-56
ETA Case No.: P2002-PA-03379335

In the Matter of:

FLEETWASH INC.,
Employer,

on behalf of

ABOUDOU DISKITE,
Alien.

Appearance: Daniel G. Anna, Esquire
Media, Pennsylvania
For Employer and Alien

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Truck Wash Foreman.¹ The CO denied the application and Employer requested review pursuant to 20

¹ Permanent alien labor certification 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 Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

DISCUSSION

On April 30, 2001, Employer filed an application for alien labor certification for the position of truck wash foreman. The only job requirement was two years of experience in the job offered or in car or truck wash operations. (AF 10). In a Notice of Findings dated October 10, 2002, the CO found that according to the Dictionary of Occupational Titles ("DOT"), the normal experience requirement for this occupation is 6 months to one year. The CO instructed Employer to either establish business necessity for the two year experience requirement or reduce the experience requirement to the length stated by the DOT standard. (AF 6-7). Employer submitted rebuttal in the form of a letter written by its attorney. (AF 5). Employer's attorney stated that Employer wanted the foreman to function as manager when the manager was away. The rebuttal contains no offer to reduce the experience requirement and readvertise if the rebuttal argument was not accepted. On November 20, 2002, the CO issued a Final Determination denying labor certification, finding that Employer's rebuttal did not establish business necessity for the two year experience requirement. (AF 2-3). Employer filed a request for Board review by letter dated December 17, 2002. (AF 1). Employer argued that the CO's November 20, 2002 Final Determination denying labor certification was erroneous based on the contention that under the Board decision in *Ronald J. O'Mara*, 1996-INA-113 (Dec. 11, 1997) (*en banc*), Employer should have been given an opportunity to correct the deficiency. Employer wrote: "At this point in time, we have decided to agree with the CO regarding the experience necessary to perform this job and have modified the attached ETA 750 accordingly. We believe that this addresses all issues raised by the CO to date."

In *O'Mara*, the Board reaffirmed the principle stated in *A. Smile, Inc.*, 1989-INA-1 (Mar., 1990), that where an employer attempts to justify the business necessity of a job requirement, and also offers to modify its job requirements and readvertise the job if the justification is not accepted, the employer must be afforded an opportunity to readvertise if the justification is not accepted. However, the Board also stated in *O'Mara*:

The holding in *A. Smile* is a limited one which rests on underpinnings of fairness and due process. It affords an employer the opportunity to attempt to establish the business necessity for a job requirement and, if unsuccessful, readvertise the position if the employer has **unequivocally** agreed to readvertise in accordance with the requirements set forth by the CO in the NOF. *A. Smile* does not apply where: **1. The offer to readvertise is equivocal.** 2. The NOF 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.

O'Mara, supra (emphasis added). In the instant case, Employer made no offer to readvertise in the rebuttal, much less an unequivocal offer to readvertise. Employer's offer to readvertise first came in its appeal to this Board. Nothing in the decision in *O'Mara* suggests that the CO must provide an employer with an additional opportunity to offer to readvertise at the Final Determination stage of the case. We find that Employer's offer to readvertise came too late to require the CO to permit readvertisement.

The Board defined how an employer can show "business necessity" in *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show: (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. The CO's NOF instructions informed Employer of this standard. Employer's rebuttal consisted solely of a statement from its attorney relating that the foreman needed to be able to manage the business while the manager was away, and that in Employer's opinion that person needed to have two years of experience. In *Gencorp*,

1987-INA-659 (Jan. 13, 1988) (*en banc*), the Board held that "written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation. This is not to say that a CO must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve." A bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Carlos Uy III, 1997-INA-304 (Mar. 3, 1999) (*en banc*). Here, we find that the rebuttal letter, lacking both supporting reasoning or evidence, failed to provide credible evidence of the business necessity of the two year experience requirement, and that the CO properly denied labor certification.

ORDER

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

Entered at the direction of the panel by:

A

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 twenty 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for 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 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten 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.