



**Issue Date: 15 March 2004**

**BALCA Case No.: 2002-INA-307**  
ETA Case No.: P2002-MA-01317004

*In the Matter of:*

**CORNING SILK SCREEN PRINT, INC.,**  
*Employer,*

*on behalf of*

**ARLETE SOUSA OLIVEIRA,**  
*Alien.*

Appearance: Walter J. Gleason, Jr., Esquire  
Milton, Massachusetts  
For Employer and the Alien

Certifying Officer: Raimundo Lopez  
Boston, Massachusetts

Before: Burke, Chapman and Vittone  
Administrative Law Judges

### **DECISION AND ORDER**

**PER CURIAM.** This case arises from an application for labor certification<sup>1</sup> filed by Corning Silk Screen Print, Inc. (“Employer”) on behalf of Arlete Sousa Oliveira (“the Alien”) for the position of Sales Representative, Graphic Art. (AF 19).<sup>2</sup> The following decision is based on the record upon which the Certifying Officer (“CO”) denied

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<sup>1</sup> Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(5)(A) and 20 C.F.R. Part 656.

<sup>2</sup>“ AF” is an abbreviation for “Appeal File”.

certification and Employer's request for review, as contained in the AF, and any written argument of the parties. 20 C.F.R. § 656.27(c).

## **STATEMENT OF THE CASE**

On April 13, 2001, Employer filed an application for labor certification on behalf of the Alien for the position of Sales Representative. Job duties included selling graphic art, planning and sketching layouts, advising and informing customers, and computing costs. Employer required two years experience in the job offered. (AF 19).

On May 21, 2002, the CO issued a Notice of Findings ("NOF") proposing to deny certification on the basis that the job description was unclear and potentially encompassed restrictive requirements.<sup>3</sup> (AF 14-16). Employer submitted its rebuttal by letter dated June 24, 2002. (AF 10-13). Employer argued that the Alien had the required experience in the position, as documented by letters from former employers. (AF 31-33). Employer also claimed that the job duties reflected the actual requirements of the position, as Employer could not afford to hire more than one employee to perform all these functions. (AF 11-13).

On July 2, 2002, the CO issued a Second Notice of Findings ("SNOF") indicating intent to deny Employer's application for certification because Employer had not documented that the job opportunity, as described, represented Employer's actual minimum requirements for the job opportunity. (AF 7-9). The CO directed Employer to document that its requirements for the position were the minimum necessary for the performance of the duties described, and that he has not hired or cannot hire a worker with less training or experience than the application described. The CO instructed Employer to demonstrate business necessity for the job requirements. The CO directed that Employer amend the ETA 750A and B in order to update the listed job requirements

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<sup>3</sup> The CO also addressed other issues, but as they were not referenced in the FD, Employer successfully rebutted these issues.

to clearly demonstrate the actual minimum requirements for the position and to show that the Alien meets all the requirements as listed on the updated ETA 750A. (AF 8-9).

On July 23, 2002, Employer filed a rebuttal to the SNOF which consisted of a letter asserting, without supporting documentary evidence, that Employer has never hired anyone with less experience than that listed on the ETA 750A. (AF 5-6). Additionally, Employer emphasized the need to have an employee who meets those specific requirements. Employer asserted that the nature of the position requires that the Sales Representative and Graphic Artist duties be listed together and thus it was a business necessity. Employer further asserted that it contacted two competitors and asked them to comment on the necessity of having such requirements. (AF 5-6).

On July 26, 2002, the CO issued a Final Determination (“FD”) denying certification on the grounds that Employer inadequately responded to the CO’s requests for documentation and directions to amend the ETA 750A. (AF 3-4). Specifically, the CO noted that “based on the information provided by Employer, the actual minimum requirements for the position of Sales Representative remain entirely unclear.” (AF 4). Furthermore, Employer was directed to amend both the ETA 750A and B in order to make those requirements clear, but Employer failed to comply with that direction. Additionally, Employer failed to provide any documentation to support his assertions that the requirements questioned by the CO were necessary. Id.

On September 1, 2002, Employer filed a Request for Review and the matter was docketed in this Office on September 25, 2002. In the Request for Review, Employer reiterated his rebuttal argument that the pairing of the Sales Representative and Graphic Artist functions are necessary to his business and other businesses in the field and that the actual minimum requirements were those listed on his application for certification. (AF 1-2).

## DISCUSSION

Despite issuing two NOFs, the CO's directions and reasons for denying certification were not clear. The original NOF raised the issue of actual minimum requirements (specifically that the Alien did not possess the two years experience as a sales representative in the field of graphic arts) and noted that Employer was actually looking for a "silk screen graphic artist," but had tailored the job to meet the Alien's qualifications. (AF 15-16). Although the CO failed to articulately express the nature of the deficiency, the defect essentially involved a combination of duties between the jobs of a sales representative and a graphic designer or artist. This combination of duties was not justified by business necessity.

The NOF must give notice which is adequate to provide the employer an opportunity to rebut or to cure the alleged defects. *Downey Orthopedic Medical Group*, 1987-INA-674 (Mar. 16, 1988) (*en banc*). If the NOF gives sufficient notice of the proposed basis for denial, despite the CO's failure to articulately state the defect, the NOF clearly places the employer on notice of the basis for denial. *Liaison Center of the General Chamber of Commerce of the Republic of China*, 1990-INA-140 (Apr. 29, 1991). If an employer addresses the issue in rebuttal, it indicates that the NOF provided the employer with adequate notice of the deficiency. *Anderson-Mraz Design*, 1990-INA-142 (May 30, 1991); *Family Liquors and Grocery*, 1995-INA-125 (Dec. 23, 1996).

In this case, although the CO did not clearly state that the defect existed with respect to the unduly restrictive job requirements of the combination of duties, Employer addressed this issue in its Rebuttal. Employer stated that small companies require combination and not specialization. (AF 12). This indicated that Employer understood the CO's cited deficiency. The CO, in the SNOF, again hinted that the combination of duties was impermissible unless justified by business necessity, citing 20 C.F.R. § 656(b)(2)(i), and stating that the job description included duties of a sales representative and a silk screen graphic artist. (AF 8). Employer's second rebuttal claimed that it was not feasible to employ two workers. Employer asserted that two letters from competitors

were enclosed and that those letters indicated that this combination of duties was common in the industry. (AF 5-6). However, no such letters were attached or included in the AF. Employer's rebuttals demonstrated the attempts to remedy the deficiency and therefore, the NOF's lack of clarity was harmless error.

The issue is the combination of duties as described on the ETA 750A and Employer's failure to justify this combination through business necessity or otherwise. A combination of duties appears when the job duties do not fit under any single *Dictionary of Occupational Titles* ("DOT") job description. If a combination of duties is required, an employer has the burden of proof to establish that the combination is justified by business necessity, that workers customarily perform that combination of duties in the intended area, or that the employer normally employs workers to perform this combination of duties. 20 C.F.R. § 656.21(b)(2)(ii). To justify a combination of duties by business necessity, an employer must show that it is necessary to have one worker perform the duties, as two workers would be infeasible. *Robert L. Lippert Theatres*, 1988-INA-433 (May 30, 1990) (*en banc*). An employer must demonstrate that reasonable alternatives, such as part-time workers, are impracticable. *Id.* An assertion of convenience or practicality is not sufficient to establish business necessity. An assertion that an employer's size of operation is too small to justify the hiring of the two employees is also insufficient. *Steritech Group, Inc.*, 1989-INA-18 (June 18, 1990).

Employer failed to justify the combination of duties by business necessity. Employer's bare assertions that the need to combine the duties was because Employer is a small company does not establish business necessity. Nor does Employer's claim, without supporting documentation, that other companies employ a similar position establish business necessity. The CO, in the NOF and SNOF, requested documentation regarding the business necessity of the combination of duties. (AF 7-9, 15-16). Employer rebutted with a self-serving assertion that the duties were required based on business necessity, size of the company, and industry standard. Employer's rebuttal consisted of two letters merely stating that Employer did not hire employees without the requisite experience and that Employer essentially could not afford to hire multiple

employees. These assertions fail to satisfy Employer's burden of proof to justify business necessity for the combination of duties. As such, labor certification was properly denied.

## **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 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  
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 ten 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.