

DATE ISSUED: April 24, 1989

CASE NO. 88-INA-55

IN THE MATTER OF THE APPLICATION  
FOR AN ALIEN EMPLOYMENT CERTIFI-  
CATION UNDER THE IMMIGRATION AND  
NATIONALITY ACT

CONSTRUCTION AND INVESTMENT CORP., dba EFFICIENT AIR  
Employer

on behalf of

AHMED JAWISH  
Alien

Edward D. Gillet, Esq.  
For the Employer

BEFORE: Litt, Chief Judge; Brenner, Guill, Tureck, and Williams, Administrative Law  
Judges

NAHUM LITT  
Chief Judge:

DECISION AND ORDER

This matter arose from an application for labor certification submitted by the Employer on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26 (1988).<sup>1</sup>

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that there are not sufficient workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

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<sup>1</sup> All regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

An employer who desires to employ an alien on a permanent basis must apply for labor certification pursuant to §656.21. 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.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in the Appeal File (A1-A41), and any written arguments of the parties. See §656.27(c).

#### Statement of the Case

On September 2, 1986, the Employer filed an application for alien labor certification to enable the Alien to fill the position of marketing and sales director. (A40). The Employer's business is sales and service of commercial and residential heating and air conditioning equipment in Houston, TX and the Middle East. (A40). The listed job duties included responsibility for sales and marketing of commercial heating and A/C systems in Houston and the Middle East, and responsibility for estimates, contract and financial negotiations and technical assistance. (A40). The listed job requirements included four years experience in the job offered, a willingness to travel to the Middle East 20, and fluency in Arabic. (A40).

On May 8, 1987, the Certifying Officer (CO) issued a Notice of Findings. (A19). The CO stated that under §656.21(b)(2), the Employer must document the business necessity of the restrictive requirement of fluency in Arabic. (A19). The CO also stated that under §656.21(b)(1)(D), a U.S. worker was not contacted, and that the Employer must contact the applicant, offer an interview, and document the results. (A19).

On June 11, 1987, the Employer submitted rebuttal evidence stating that the Arabic language requirement arose from business necessity. (A13). According to the Employer, the alien will spend 20 of the time traveling to the Middle East, and will spend the remaining 80 of the time communicating with prospective Middle East clients by telephone and telex. The Employer stated that "[w]ithout the ability to communicate fluently in the Arabic language, whether it is in person, by telephone, tlex [sic], or by letters, the employee we seek to hire would not be able to perform the required duties." (A14). The Employer also submitted a letter from a prospective client in the Middle East, written in English, stating as follows: "Please contact us as soon as possible for arrangements to send your rep. with the prices, catalogues, ect. [sic] to my country (Damascus). For our convenience, he must speak arabic." (A15). With regard to the U.S. applicant named in the Notice of Findings, the Employer stated that the applicant was contacted by telephone, but he did not send the Employer a resume as requested. (A14). The Employer also submitted a letter addressed to the applicant and its envelope indicating that the addressee had moved and had left no forwarding address. (A16-A17).

On September 14, 1987, the CO issued a Final Determination denying labor certification based on the Employer's failure to document the business necessity of the Arabic language requirement. (A10). According to the CO, "[t]he employer did not establish that the essence of the business operation would be undermined without the requirement, nor that the language requirement is overriding or essential for the safety and operation of the business. (A10). The CO also stated that the employer's "unattested statement unsupported by other substantiating documentation does not adequately document. . . business necessity." (emphasis in original). (A10).

On October 5, 1987, the Employer requested appeal, reiterating its argument that the Arabic language requirement arose from business necessity, and submitting further documentation. (A4). The Employer submitted a subscribed and notarized statement from the President of the company stating that without the Arabic language requirement, the employee will be unable to negotiate contracts and financial agreements, and that the company will have to "abandon a significant share of its operations." (A5). The Employer also submitted several letters from prospective clients all requesting that the company's representative be fluent in Arabic. (A6-A8).

The CO treated the request for review as a request for reconsideration, and denied the request on October 15, 1987. The CO stated that the documentation submitted by Employer was written in English and did not support the business necessity for the Arabic language requirement. (A3).

In its brief on appeal, the Employer submitted further documentation that the Arabic language requirement arose from business necessity.

#### Discussion and Conclusion

The Board shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made. §656.26(b)(4); §656.27(c); In Re University of Texas at San Antonio, 88 INA 71 (May 9, 1988); In Re Physician's Inc., 87 INA 716 (Jul. 12, 1988). Therefore, the documents submitted with the Employer's January 6, 1988, Brief on Appeal cannot be considered.

Here, however, the Employer also submitted evidence in a request for review which was treated by the CO as a request for reconsideration. Since the CO's affirmance of the denial of certification was based on a consideration of the evidence submitted with the request for review, such evidence was in the record upon which the denial was made.

This case is distinguishable from our holding in In Re Physician's Inc., 87 INA 716 (Jul. 12, 1988), where the evidence submitted after the Final Determination in a request for review was not considered on appeal. There, the CO treated the employer's request for review as an appeal to the Board; therefore the evidence submitted with the employer's request for review was

not considered by the CO, and was not in the record upon which the denial was based. In the instant case, however, the CO did consider the employer's evidence and affirmed his denial of labor certification on the grounds that the new evidence was insufficient to establish the business necessity of the Arabic language requirement. Therefore, the evidence is considered on appeal.

The CO denied certification on the ground that the Employer failed to establish that the Arabic language requirement arose from business necessity. "To establish business necessity under §656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer." In Re Information Industries, Inc., 88 INA 82 (Feb. 8, 1989) (en banc).

In the instant case, the Employer has established with sufficient documentation that the Arabic language requirement bears a reasonable relationship to the position of sales and marketing director, in the context of the employer's business, since the director must deal with Middle East clients who require an Arabic speaking representative, and such business constitutes a significant share of its operations. The Employer has also established with sufficient documentation that the Arabic language requirement is essential to perform, in a reasonable manner, the job duties as described by the Employer, since the employee must negotiate contracts and financial agreements and must provide technical assistance to Middle East client who require a company representative to speak Arabic.

Contrary to the conclusion of the CO, the written statement of the Employer in its rebuttal to the NOF constitutes documentation, since it is reasonably specific and indicates its sources and bases. In Re Gencorp, 87 INA 659 (Jan. 12, 1988). Also contrary to the conclusion of the CO, the letters of the Employer's clients requesting that a company representative speak Arabic, although written in English, support the business necessity of the Arabic language requirement. The enumerated job duties entail considerably more than writing simple letters, i.e., negotiating contracts and financial agreements, providing technical assistance, etc. That clients can write poorly constructed letters in English does not lessen the necessity of the Arabic language requirement in dealing with Middle East clients.

The Employer has established that the Arabic language requirement arises from business necessity; therefore, the job opportunity has been described without unduly restrictive requirements. The CO improperly denied certification.

ORDER

The Final Determination of the Certifying Officer is hereby REVERSED, and certification is GRANTED.

NAHUM LITT  
Chief Administrative Law Judge

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