

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
1111 20th Street, N.W.  
Washington, D.C. 20036



DATE: MAY 30, 1990  
CASE NO. 88-INA-561

IN THE MATTER OF

UNIBANCO

Employer

on behalf of

MARCOS AURELIO BARUFFI

Alien

Appearance: Harvey Shapiro, Esquire  
For the Employer

BEFORE: Brenner, Guill, Litt, Marcellino, Marden, Romano,  
Silverman and Williams  
Administrative Law Judges

LAWRENCE BRENNER  
Administrative Law Judge

**DECISION AND ORDER**

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("the Act").

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 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.

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 an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

### Statement of the Case

The Employer, Unibanco, is the New York City branch of a Brazilian-based bank. On November 13, 1985, Unibanco filed for labor certification on behalf of Marcos Aurelio Baruffi, the Alien, to fill the position of Banking Assistant (AF 46). The job duties for the position were given as: Send telexes to the head office regarding proposed transactions; assist in preparing and typing contracts; collect overdue payments; enter data into computer. (AF 46).

On January 13, 1987, the New York State Job Service requested that the Employer clarify the job description and justify the apparent combination of the duties of a Wire Transfer Clerk and a Collection Clerk (AF 31). In response, the Employer offered to strike the job duty of "collect[ing] overdue payments" on February 24, 1987 (AF 32). In making this change however, the duty to "enter data into computer," was amended to read "enter data into computer such as debits and credits for accounts." (AF 40).

The Job Service again requested clarification from the Employer with respect to the specified job duties in a letter dated May 15, 1987 (AF 36). The Employer was informed that the Job Service had found elements from the occupations Accounting Clerk, Wire Transfer Clerk, and Clerk Typist in the position as described. In response, the Employer stated that in a branch office of a bank such as Unibanco the support staff must undertake a multitude of responsibilities and that, for the sake of efficiency, the Alien must perform these various support functions (AF 38).

The Job Service transmitted the application to the Department of Labor on August 6, 1987, with the comment that the Employer had changed the job duties more than once and had failed to justify the apparent combination of duties (AF 47-48). The state authorities expressed their confusion in this transmittal, over whether the position in question was clerical or professional in nature (AF 47). Following a referral of the matter back to the Job Service, a second transmittal indicated that the Job Service then believed the job to be professional, but did still could not assign a title or job code number to the position (AF 52-53).

The Certifying Officer (C.O.) issued her first Notice of Findings on March 31, 1988, proposing to deny certification on the ground that the position involved a combination of duties of a Telex Operator, Data Entry Operator, and Contracts Clerk (AF 55-56). The Employer was directed to document that it normally employs workers in that combination, that workers customarily perform the combination in the area of intended employment, or that the combination is based upon business necessity (AF 56). 20 C.F.R. § 656.21(b)(2)(ii).

A letter of rebuttal was submitted by the Employer on April 12, 1988, in which it further detailed the position's various duties as a "single integrated process" arising out of business necessity (AF 65-66). The Employer explained that the preponderance of the employee's time is spent entering debits and credits, many derived from contracts entered into on behalf of clients, into interdepartmental and client accounts in the bank computer. Within this explanation, the Employer stated that the Alien "set[s] forth the terms and conditions" of various financial contracts and "checks the bank's daily position." (AF 74). Finding that the Employer was adding new duties to the position, the Job Service requested another clarification of the job opportunity from the Employer on May 2, 1988 (AF 80-82).

On May 10, 1988, the Employer submitted the following description of the job opportunity without comment:

[S]end telexes to head office regarding proposed transactions; assist in preparing and typing contracts, (i.e. proofread terms/conditions, confirm negotiations), process contracts (i.e. enter into computer, instruct paying/receiving Department); enter debits/credits into computer; check Bank's daily position. (AF 92).

Thereafter, the Job Service retransmitted the matter to the Department of Labor with the opinion that it believed that the Employer was adding elements to the job, and that it now viewed the position as a combination of duties of Accounting Clerk and Foreign Exchange Clerk (AF 83-84). The C.O. issued her second Notice of Findings on June 3, 1988, echoing the belief that the job description had "experienced continuous change." (AF 97-98). The C.O. instructed the Employer to amend the combination of duties of Accounting Clerk and Foreign Exchange Clerk or justify it as based on business necessity (AF 97).

The Employer's rebuttal to the second Notice of Findings was submitted on July 1, 1988 (AF 103). In it, the Employer reiterated that the duties for the job offered were as set forth in its May 10 correspondence, and that it had documented the business necessity of the combination of duties in its April 12 letter. Furthermore, the Employer denied that it had changed the job, but merely rephrased the duties in response to requests for clarification (AF 103). The numerous inquiries with regard to the processing of contracts were labeled as "puzzling" by the Employer since it had submitted several samples of the contracts showing the work to be performed.

The Final Determination of the C.O. was issued on July 15, 1988, denying labor certification on the ground that the Employer had failed to document that its "uncommon incorporation of so many duties" arises from business necessity (AF 106). A Request for Review by the Board was filed by the Employer on July 25, 1988 (AF 108). A brief in support of its position was subsequently submitted.

On March 2, 1990, the Board decided, sua sponte, to consider this matter en banc, along with other cases, and invited briefs by the parties and amicus curiae. Before consideration began, however, the Alien sent a letter to the Board, dated March 23, 1990, in which he indicated that

his job had changed. By his own description, the position he now holds is Junior Trader in the Money Market Department of the Employer.

### Discussion

The Board notes the numerous attempts back and forth between the Employer, the Job Service, and the C.O. to clarify the job duties that the Alien performs, and the proper classification of the position in question. We empathize with the Employer's understandable frustration over the inability of the parties to resolve this preliminary issue and go forward with the application process, including recruitment of U.S workers which has not yet been done. Throughout, and until the arrival of the Alien's letter, the exchange of correspondence and explanations by the Employer seemed to be genuine attempts at clarification, rather than the C.O.'s pejorative characterization of a "continuous change" of the job duties. With the submission of the Alien's recent letter, though, it appears that the Alien's job duties and title of the position have changed since the initiation of the process.<sup>1</sup>

Therefore, this matter must be returned to the Employer for the submission of a new description of the job duties in light of the Alien's employment in the position of Junior Trader. If the Employer wishes to proceed with this application, it shall submit the necessary description within thirty (30) days of service of this order.

The C.O. shall act promptly to review the reformulation of the job duties and reach an independent judgment of whether the job involves an impermissible combination of duties. The fact that the job does not fit into a pigeonhole in the Dictionary of Occupational Titles does not mean that the Employer does not normally employ the combination or that it is not customarily employed in the financial industry in New York City. 20 C.F.R. § 656.21(b)(2)(ii). If the C.O. finds that the combination does not meet these first two tests under section 656.21(b)(2)(ii), she shall consider whether it satisfies the standard for the business necessity of a combination of duties contained in Robert L. Lippert Theatres, 88-INA-433 (May 30, 1990)(en banc).

Moreover, even if the C.O. believes an impermissible combination of duties is present in the new job description, she shall permit the Employer to advertise the position while the issue is pending, should the Employer wish to exercise that option given the prolonged nature of this dispute thus far.

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<sup>1</sup> Normally, the Board does not consider evidence which was not in the record upon which the denial of certification was made. 20 C.F.R. § 656.27(c). However, in the posture of this matter, the content of the Alien's letter was received, not as evidence of the relative merits of the case, but as further indication of the confusion preexisting in the record and reinforcement of the notion that the job had been misdescribed.

ORDER

The Final Determination of the Certifying Officer is VACATED. The matter is hereby REMANDED to the Certifying Officer for further action consistent with this Decision and Order.

For the Board:

LAWRENCE BRENNER  
Administrative Law Judge

LB/VF/gaf