



DATE: DEC 11 1997  
CASE NO: 96-INA-113

*In the Matter of*

**RONALD J. O'MARA,**  
*Employer,*

*on behalf of*

**RAMESHBHAI PATEL,**  
*Alien.*

Appearances:

SACKS & KOLKEN by  
Gordon W. Sacks, Esq.  
For the Employer;

Charles D. Raymond, Associate Solicitor,  
U.S. Department of Labor by Patricia Arzuaga, Esq.  
For the Certifying Officer

David Stanton, Esq.  
For the American Immigration  
Lawyers Association, *Amicus Curiae*.

Before: Vittone, Chief Judge; Guill, Deputy Chief Judge and Holmes, Huddleston, Jarvis,  
Neusner and Wood, Administrative Law Judges

DONALD B. JARVIS  
Administrative Law Judge

### **DECISION AND ORDER**

This case arises from Ronald J. O'Mara's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. 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. This decision is based on the record upon which the CO denied Certification and the Employer's request for review, as contained in the appeal file ("AF") and the written arguments and briefs filed herein. §656.27(c).

## STATEMENT OF THE CASE

On December 28, 1993, Employer filed a Form ETA 750, application for Alien Employment Certification, with the New York Department of Labor ("NYDOL") on behalf of the Alien, Rameshbhai Patel. The job opportunity was listed as Senior Mechanical Engineer. The application required four years of college with a bachelors degree in Mechanical Engineering and eight years of experience in the job offered. It had a special requirement that "Applicant must possess experience in the Petro Chemical Industries". AF 68.

The job was advertised. NYDOL forwarded the resumes of eleven applicants to Employer. AF152. Employer submitted Reports of Recruitment which stated that none of the applicants was hired. AF130-44 The file was transmitted to the CO.

On August 9, 1995, the CO issued a Notice of Findings ("NOF") in which she proposed to deny the application. The CO found that: 1. Employer's special and experience requirements may not be based on business necessity. 2. It was not readily evident that the job opportunity, when related to "Petro Chemical" industries, constituted full time employment. 3. The Alien did not have the required job experience prior to his employment by Employer. 4. Employer rejected nine U.S. applicants for non lawful job related reasons. 5. Employer did not engage in good faith recruitment. AF 153-159.

Employer was required to rebut the findings of the NOF. In connection with the finding dealing with the restrictive requirement, the CO stated that:

You may rebut this finding **EITHER** by amending or deleting the restrictive requirement(s) OR documenting business necessity. You may not do both. For example, if you choose to document business necessity you may not offer to delete or amend your requirements(s) in the event that your business necessity rebuttal is not accepted. AFI57.

Employer filed a timely rebuttal which, in part, defended the restrictive requirement and sought to establish business necessity. AF 206-07. In addition, the rebuttal concluded with the following statement:

In the alternative, Ronald J. O'Mara, P.E., P.C. requests an opportunity to readvertise for the position so that it can demonstrate to the Department of Labor that it actually evaluated the candidates who responded to the position in good faith. AF 202.

The CO found the rebuttal to not be persuasive. On September 30, 1995, she issued a Final Determination. ("FD") which denied certification. The FD found that Employer had not recruited in good faith and that U.S. workers had been rejected for non lawful job related reasons. AF 210-12 Employer petitioned for reconsideration and administrative judicial review. AF 222-23. The CO denied reconsideration. AF 224 and the case was transmitted to the Board.

On May 3, 1996, a panel of the Board issued an Order Granting Employer's Motion For Remand on the ground that under the holding of A. Smile, Inc., 89-INA-1 (March 6, 1990), 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. The CO filed a motion for panel reconsideration or en banc review. On August 7, 1996, the Board issued an order granting en banc review. Employer and the CO filed briefs. The American Immigration Lawyers Association filed an amicus curiae brief.

## DISCUSSION

The CO contends that A. Smile was decided incorrectly and should be overruled. She argues that Section 656.25(c)(3) permits an employer to cure the defects or otherwise rebut the findings of an NOF but not do both. The concurring opinion takes the position that under §656.25(c)(3) the CO may not give the employer the option to readvertise. We do not agree with these contentions.

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.

There is nothing in Section 212(a)(5)(A) of the Immigration and Nationality Act or its legislative history which deals with the ability of an employer to rebut or cure defects in a NOR. The Secretary of Labor has promulgated regulations for alien labor certification. As first issued in 1977, Section 656.25(c)(3) provided that an employer was given the opportunity to submit documentary evidence to "rebut the bases of the determination" of the NOF. 42 FR 3440 (January 18, 1977). The present language to "cure the defects or otherwise rebut" the bases of the determination was promulgated in 1980, without any explanation. 45 FR 83933 (December 19, 1980).

The concurring opinion contends that under the regulation the CO cannot give an employer the opportunity to readvertise because readvertising cannot cure or rebut defects noted in the NOF. We do not perceive this to be correct.

The 1980 revision of §656.25(c)(3) was expansive in that it permits an employer to cure defects as well as rebut the findings of a NOF. It appears that since the revision, COs have been issuing NOFs which afford an employer the opportunity of curing or rebutting. This

contemporary construction of the provision supports the conclusion that the CO may offer the opportunity for alternate responses in the rebuttal. Good Samaritan Hosp. v. Shalala, 508 U.S. 402,414 (1993); Aluminum Co. v. Cent Lincoln People's Util. Dist., 467 U.S. 380, 390 (1984).

The CO contends that in the context of §656.25(c)(3) cure or rebut are mutually exclusive alternatives. This is not correct. We find that they are sequential alternatives. In H.C. Lamarche, Ent., Inc., 87-INA-607 (Oct. 27, 1988) (en banc), the Board found a good faith requirement implicit in the regulations. In the case at bench construing cure or rebut to be sequential alternatives is consonant with the propositions that the due process clause encompasses a guarantee of fair procedure (Zinerman v. Burch, 494 U.S. 113,125 (1990)) and administrative convenience or necessity cannot override the requirements of due process (Platex Corp. v. Massinghoff, 771 F.2d 480, 483 (Fed Cir. 1985)).

We hold that the doctrine of A. Smile is still good law but it does not apply to the facts at bench.

In this case the NOF included as proposed reasons for denying the application that: 1. Employer rejected nine U.S. applicants for non lawful job related reasons. 2. Employer did not engage in good faith recruiting. In the Final Determination which denied the application the CO based the denial on these two findings and did not mention the restrictive requirement. AF 201-11.

Employer admits that it did not contact or interview any of the U.S. applicants. Its president personally reviewed each resume and evaluated the applicants qualifications and found that non was qualified. AF 204.

Employer stated that applicant Anatoly Dashevsky "is not qualified... he designed equipment ... has absolutely no petrochemical process experience." However, the CO found that Mr. Dashevsky's resume indicates a Master's Degree in Mechanical Engineering. He states "(m)ore than 20 years of extensive experience in Mechanical Engineering". He lists 25 years with "Telecom Oilfield Services" and "Petrochemical and Gas Institute". Employer stated that applicant Jonathan Gross "does not qualify ... has fourteen years of experience (with) rigid and flexible plastic packages ... absolutely no experience performing any of the responsibilities required..." The CO found that Mr. Gross' resume indicates a B.S. M.E. and 14 years of experience with "Mobil Chemical Company" and specifically states that his responsibilities include conceiving, inventing, designing and developing new products and processes. Based upon these findings, the CO concluded that there was a lack of good faith recruitment because, as stated in the NOF, where an applicant's resume indicates a "broad range of experience, education and/or training that raises a reasonable possibility that the applicant is qualified", the employer bears the burden of further investigating the applicant's credentials. We agree with this conclusion. Gorchev & Gorchev Graphic Design 89-INA-118 (Nov. 29, 1990) (en banc); Wilton Stationers, Inc., 94-INA-232 (April 20, 1995); Nationwide Baby Shops, Inc., 90-INA-286 (Oct. 31, 1991).

In the light of the finding that Employer did not engage in good faith recruiting the holding of *A. Smile* is not applicable to this case.<sup>1</sup> Therefore, the CO's erroneous language in the NOF that Employer could not attempt to justify business necessity and, if unsuccessful, delete the restrictive requirement was harmless error.

No other points require discussion. The denial of Certification should be affirmed.

### ORDER

The Final Determination of the Certifying Officer denying Labor Certification is affirmed.

For the Board

DONALD B. JARVIS  
Administrative Law Judge

San Francisco, California  
DBJ:vr

J. Guill, with whom J. Neusner joins (concurring in the result only):

Initially, we note that the entire discussion regarding *A. Smile* is dicta and, therefore, is not entitled to any precedential value. Assuming arguendo that *A. Smile* is applicable to the facts before us, its holding is not soundly based upon statutory or regulatory law.

Pursuant to § 656.25(c)(3), Employer has 35 days in which to file rebuttal, consisting of "documentary evidence and/or written argument [which] may be submitted to cure the defects or to otherwise rebut the bases of the determination..... 20 C.F.R. § 656.24(C)(3). These provisions plainly provide that whatever documentation or argument is filed on rebuttal within 35 days should be sufficient to conclude the case at the CO's level. Said differently, there is no authority in the plain language of the regulations for the COs to offer the opportunity to readvertise upon elimination of an unduly restrictive job requirement nor was it intended that such offers be made to employers given the short time in which rebuttal must be completed. Readvertisement does not "cure" or "otherwise rebut" deficiencies noted in the NOR Readvertisement cannot be accomplished within 35 days, and new and different problems may be presented after readvertisement. Hence, the provisions at § 656.29 are available to employers who are unsuccessful in obtaining labor certification in the first round as these provisions provide that employers may refile their corrected applications within six months.

Secondly, the majority holds that "due process" requires that employers be given the opportunity to establish business necessity for the challenged job requirement, or delete it and

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<sup>1</sup>We also note that Employer's request to readvertise was equivocal and not covered by the doctrine of *A. Smile*. *Chemtex International, Inc.*, 94-INA-308 (May 31, 1995).

offer to readvertise. The general definitions of the regulatory terms contained in § 656.24(c)(3), as set forth in *The American Heritage Dictionary*, Second Edition, are as follows:

**Cure:** v 4. To get rid of.- remedy.

**Remedy:** tr.v....2. To set right or rectify (an error).

**Otherwise:** adv. 1. In another way, differently; 2. Under other circumstances; 3. In other respects.

**Rebut:** v. 1. To refute, esp. By offering opposing evidence or arguments, as in a legal case.

Thus, an employer's rebuttal must rectify an error made by the certifying officer or, in some other way, refute the defects noted in the certifying officer's *Notice of Findings*. For example, if the certifying officer concludes that the alien is not qualified for the job offered, then an employer may "rebut" or "cure" the defect noted by submitting evidence to the contrary or presenting a probative argument based upon the record already developed. An employer may also rectify errors in the certifying officer's *Notice of Findings*, such as misclassification of the job offered or obtaining Alien's signature on the qualifications statement, by submitting persuasive argument and/or evidence to the contrary.

Another important consideration in this regard is administrative efficiency. In excess of 40,000 applications for labor certification are filed annually. Even if A. Smile is only applied in the context to which it limited itself--business necessity--the practical effect will be to substantially increase the workload at the CO level and, most likely, to greatly slow the certification process. This cannot be the result intended by the drafters of § 656.24(c)(3).

However, we agree with the result set forth by the majority that labor certification should be denied in this case.