UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS

SUMMARIES OF BALCA EN BANC DECISIONS

Last updated February 11, 2004

OVERVIEW: The Board of Alien Labor Certification Appeals ("BALCA") was established in April 1987 in order to provide uniformity and consistency of decisions in regard to permanent alien labor certification applications arising under 20 C.F.R. Part 656. These digest contains summaries of BALCA's en banc decisions.

NOTICE: These BALCA en decision summaries were created solely to assist BALCA staff in researching BALCA caselaw. The summaries are not part of the opinions and in no way constitute the official opinion of BALCA, the Office of Administrative Law Judges or the Department of Labor on any subject. The summaries should, under no circumstances, substitute for a party's own research into the statutory, regulatory, and case law authorities on any subject referred to therein. They are intended simply as a research tool, and are not intended as final legal authority and should not be cited or relied upon as such.

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ACTUAL MINIMUM REQUIREMENTS/ALIEN'S QUALIFICATIONS

Alien gained qualifying experience with the employer, general rule

Actual minimum requirements: alien gained qualifying experience with the employer: "Where, as here, the required experience was gained by the Alien in jobs with the same Employer, the Employer must establish that the Alien gained that experience in jobs which were not similar to the job for which certification is sought. Kurt Salmon Associates, Inc., 87-INA-636 (October 27, 1988); Iwasaki Images of America, 87-INA-656 (May 11, 1988). Cf. Conde, Inc., 87-INA-598 (December 11, 1987). Failing that, the Employer must show that it is infeasible to hire workers with less qualifications than those now being required." [Editors' note: For later authority, see Delitizer Corp. of Newton, 1988-INA-482 (May 9, 1990) (en banc)]. **BRENT-WOOD PRODUCTS, INC., 1988-INA-259 (Feb. 28, 1989) (en banc)**

Alien's prior experience

Actual minimum requirements: alien gained qualifying experience with the employer: employer required one year of experience in interior hotel design: alien's experience was with commercial building, but he had no specific experience with hotels prior to hire by the sponsoring employer. **JAMES NORTHCUTT ASSOCIATES, 1988-INA-311 (Dec. 22, 1988) (en banc)**

Actual minimum requirements: alien did not have qualifying experience when hired: evidence presented to establish alien's prior experience either not credible or not timely submitted. **APARTMENT MANAGEMENT COMPANY/SOUTHERN DIVERSIFIED PROPERTIES, INC., 1988-INA-215 (Feb. 2, 1989) (en banc)**

Actual minimum requirements: alien gained qualifying experience with the employer: employer presented evidence that the alien had the requisite experience prior to being hired. **NATIONAL INSTITUTE FOR PETROLEUM AND ENERGY RESEARCH, 1988-INA-535 (Mar. 17, 1989) (en banc)**

Similar/dissimilar positions

Actual minimum requirements: alien gained qualifying experience with the employer: "[W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for

certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries." (footnotes omitted). **DELITIZER CORP. OF NEWTON, 1988-INA-482 (May 9, 1990) (en banc)**

Actual minimum requirements: alien gained qualifying experience on the job: where alien was hired without experience as an assistant floral designer, employer advertised the job as for a floral designer with one year of experience, but employer failed to establish how the assistant floral designer and floral designer positions were different, the one year experience requirement was found to be an unduly restrictive job requirement. **CREATIVE PLANTINGS, 1987-INA-633 (Nov. 20, 1987) (en banc)**

Actual minimum requirements: alien gained qualifying experience with the employer: assistant cook promoted to cook: certification denied where apparently minor additional duties set forth for the cook position were not shown to constitute a significant dissimilarity in skill level and necessary training and experience between the two positions held by the Alien. **VALLEY RANCH BARBECUE, 1988-INA-239 (July 23, 1990) (en banc)**

Actual minimum requirements: alien gained qualifying experience with the employer: similar/dissimilar positions: employer failed to establish that assistant cook/speciality cook positions were sufficiently dissimilar to avoid the bar of section 656.21(b)(6) where the only distinction made in the record between the two positions is that the Assistant Cook did not actually do the final preparation and cooking of the meals. **HIP WO INC., 1989-INA-24 (July 23, 1990) (en banc)**

Alien's qualifications for the position: whether experience as a bookkeeper is qualifying for a position as an accountant: the Board determined that the position "accountant" does not necessarily carry with it professional designations or educational requirements if an employer does not require the same, observing that employers do not use the term consistently. Thus, since the title given a job by an employer may not be determinative of the scope of duties and level of education and experience required, the Board held that the focus must extend to the underlying job duties for the position. In the instant case, the Board reviewed the Alien's job duties in his past experience and found that they were qualifying for the instant position despite the difference in the job titles. **MAPLE DERBY, INC., 1989-INA-185 (May 15, 1991) (en banc)**

Actual minimum requirements: alien gained qualifying experience with the employer: dissimilarity of the jobs: BALCA panel found that the employer had established that the positions of Machine Operator Trainee and Machine Operator were sufficiently dissimilar to avoid the proscriptions of 20 C.F.R. §656.21(b)(6). The Certifying Officer petitioned for en banc review, which the Board granted on January 2, 1991. The Board declined to disturb the panel decision: "The list of factors for determining whether jobs are sufficiently dissimilar stated in Delitizer Corp. of Newton, 88-INA-482 (May 9, 1990) (en banc), clearly is not an exhaustive list. Further, that the position in which the Alien gained his experience involved training needed for the higher level position is relevant, but not determinative. Compare Duthie Electric

Corp., 89-INA-182 (Nov. 30, 1989); Conde, Inc., 87-INA-598 (Dec. 11, 1987); and Eimco Processing Equipment Co., 88-INA-216 (Aug. 4, 1989). Had the Certifying Officer detailed why the training relationship prevented U.S. workers from applying for the job (such as a practice of Employer of only promoting from within) the panel's Decision might have been found to be incorrect. **E & C PRECISION FABRICATING, INC., 1989-INA-249 (Feb. 15, 1991) (en banc)**

Different employers/locations

Actual minimum requirements: alien gained his experience with a Washington, DC restaurant location, but the application was filed by a Maryland corporation: an employer's showing that two restaurants are separate legal entities may not be sufficient to demonstrate that the they are separate employers for labor certification purposes (by implication, see concurring opinion): because CO did not state full legal standard until Final Determination, remand for new NOF. **YOUNG CHOW RESTAURANT, 1987-INA-697 (Jan. 13, 1989) (en banc)**

Actual minimum requirements: alien gained qualifying experience with the employer: experience cannot have been gained with the parent corporation of an international company: decision leaves open possibility that such experience would not be disqualifying if the employer could show that the two international companies had nothing in common except a corporate entity connection, such as a conglomerate or holding company relationship, but the Board found that this was not the factual background to the case before it. **INMOS CORP., 1988-INA-326 (June 1, 1990) (en banc)**

Actual minimum requirements: similar positions with employer at other facilities: the Board found credible employer's evidence that it position of Hotel Credit Manager required greater experience at the hotel at which the alien would work because it was a more complex job, in number and nature, relative to other hotels (the instant hotel was a very large hotel specializing in conventions). **LOEWS ANATOLE HOTEL, 1989-INA-230 (Apr. 26, 1991) (en banc)**

Infeasibility to train

Actual minimum requirements: Alien gained required experience with the employer; infeasibility of hiring workers with less training or experience than that required by the employer's job offer must be documented: mere statement that it is now not feasible to train workers because of the growth developments and expansion efforts of the Employer in South Florida insufficient to supply required documentation. **MMMATS, INC., 1987-INA-540 (Nov. 24, 1987) (en banc)**

Actual minimum requirements: alien gained experience with employer: infeasibility of training: employer's argument that it now needs three experienced cooks to handle the current volume of business, and that to deprive it of the service of the alien would adversely affect its business was insufficient to establish that its current economic circumstances demonstrate the infeasibility of hiring workers with less training or experience. **ROQUE & ROBELO RESTAURANT & BAR, 1988-INA-148 (Mar. 1, 1989) (en banc)**

Actual minimum requirements: alien gained qualifying experience with the employer: infeasibility of training: mere statement of infeasibility without further explanation or

documentation is insufficient. **INMOS CORP., 1988-INA-326 (June 1, 1990) (en banc)**

Actual minimum requirements: alien gained qualifying experience with the employer: infeasibility of training: "The burden is not on the C.O. to offer evidence, surveys, reports, etc., documenting that the Employer can offer the same training to a U.S. worker, as was offered to the Alien. To the contrary, the burden clearly rests with the Employer to document why it is no longer feasible to do so." Employer failed to establish infeasibility to train where it had only presented two letters from its personnel manager, which did not establish why its greatly expanded production volume combined with its substantially greater number of people performing the set-up and lead man job does not provide it with even greater flexibility now to train a worker with no experience. The Board also noted that the employer would have benefited by showing that in the intervening years since the original hiring of the Alien, during which many persons were hired for the same occupation, none were hired with less than the two years of experience now being required. **AEP INDUSTRIES, 1988-INA-415 (Apr. 4, 1989) (en banc)**

Actual minimum requirements: alien gained qualifying experience with the employer: infeasibility of training: burden is not on the CO to document that the Employer can offer the same training to a U.S. worker, as was offered to the alien. To the contrary, the burden clearly rests with the Employer to document why it is no longer feasible to do so: Employer failed to establish why its greatly expanded business and its extensive growth in manpower has not provided it with greater flexibility in training a new worker. **SUPER SEAL MANUFACTURING CO., 1988-INA-417 (Apr. 12, 1989) (en banc)**

Actual minimum requirements: alien trained by employer: proof of infeasibility for purposes of section 656.21(b)(6) requires more than a showing of loss of efficiency. **ADMIRAL GALLERY RESTAURANT, 1988-INA-65 (May 31, 1989) (en banc)**

Alien's qualifications, generally: sufficiency of documentation

Actual minimum requirements: Alien's qualifications: failure to document alien's prior experience with independent evidence. **JACKSON & TULL ENGINEERS, 1987-INA-547 (Nov. 24, 1987) (en banc)**

Actual minimum requirements: alien not qualified. **KEITHLEY INSTRUMENTS, INC., 1987-INA-717 (Dec. 19, 1988) (en banc)**

Alien's qualifications: physician: where an employer's application involves labor certification of a physician it must establish all of the requirements of 20 C.F.R. §656.20(d). **NEWARK BETH ISRAEL MEDICAL CENTER, 1988-INA-87 (Dec. 23, 1988) (en banc)**

Actual minimum requirements: employer's failure to respond to CO's request for documentation of alien's work experience. **ROSIELLO DENTAL LABORATORY, 1988-INA-104 (Dec. 22, 1988) (en banc)**

Bona fide job opportunity: meaning of “qualified” US worker where job is subject to a CBA giving preference to union members with seniority [note, in Canadian National Railway Co., 1990-INA-66 (Nov. 20, 1992) (en banc den recon), the Board refused

to reconsider CO's argument that this ruling improperly authorized closed union shops because the motion was not timely filed]. **CANADIAN NATIONAL RAILWAY CO., 1990-INA-66 (Sept. 11, 1992) (en banc)**

Tailoring to the Alien's qualifications

Actual minimum requirements: tailoring to alien's qualifications: unconvincing argument that President of a large enterprise would be involved in all aspects of operations. **SNOWBIRD DEVELOPMENT CO., 1987-INA-546 (Dec. 20, 1988) (en banc)**

Tailoring the Alien's qualifications: alternative job requirements

Alien's qualifications for the job: alternative job requirements: the Board held that "where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable." **FRANCIS KELLOGG, 1994-INA-465 and 544, 1995-INA 68 (BALCA Feb. 2, 1998) (en banc)**

State licensure requirements

Alien's qualifications for the job: state licensure requirements: employers sought to fill the positions of physician or physician's assistant in New York, where State law mandated licensure, which, in turn required a three year residency training for the physicians: the Board held that such State licensure requirements do not make an application violative of § 656.20(c)(7), which directs that "the job opportunity's terms, conditions and occupational environment are not contrary to Federal, State, or local law", imposed the New York State licensure requirement upon the aliens: however, under § 656.20(c)(4) an employer must document that it "will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States": the language of § 656.20(c)(4) is properly interpreted to mean that the job opportunity must be "current" in that the employer must place the alien on its payroll for the job offered upon his or her entry into the United States: an alien's lack of a required license to perform the job offered upon entry into the United States is not a per se bar to obtaining labor certification; however, the employer must document that such a license is obtainable within a proximate time of the alien's entry into the United States through the completion of a ministerial process. Under the facts of the cases at bar, the residency program for physicians was neither ministerial in nature nor was a three-year period proximate to the alien's entry into the United States. **PERLA TATE, M.D., 1990-INA-175, et al. (Dec. 4, 1992) (en banc)**

ALIEN OWNERSHIP AND CONTROL

Sufficiency of employer's evidence

Alien ownership and control: failure to establish that employer was not under alien's control. **AMGER CORPORATION., 1987-INA-545 (Oct. 15, 1987) (en banc)**

Self-employment as a per se bar

Alien ownership and control: investor cases: self-employment as a per se bar: Under the regulatory definition of "employment," if the position for which certification is sought constitutes nothing more than self-employment, it does not constitute genuine "employment" under the regulations, and labor certification is barred per se.: " Though many aliens with investment interests in the sponsoring employer will have difficulty overcoming this regulatory proscription, we hold that the sponsoring employer can overcome it if it can establish genuine independence and vitality not dependent on the alien's financial contribution or other contribution indicating self-employment." See also Hall v. McLaughlin, 864 F.2d 868, 870 (D.C. Cir. 1989); Edelweiss Manufacturing Company, Inc., 1987-INA-562 (Mar. 15, 1988) (en banc). **MODULAR CONTAINER SYSTEMS, INC., 1989-INA-228 (July 16, 1991) (en banc)**

Alien ownership and control: investor cases: self-employment as a per se bar: "Malone & Associates is a law firm, founded and wholly owned by the Alien, bearing the name of the Alien, and located until recently in the Alien's own home. The job duties and requirements are specialized and very closely match the qualifications of the Alien. As such, it would be difficult to conceive of a situation in which employment of the Alien would more clearly be tantamount to self-employment. Hence, labor certification is barred per se." (footnote omitted). **MALONE & ASSOCIATES, 1990-INA-360 (July 16, 1991) (en banc)**

Financial interest of alien; inseparability of alien's business interests

Alien ownership and control: company is alter ego of the alien: alien sole stockholder, CEO, and general manager: In matters affecting the public interest such as labor certification, the factfinder is not bound to find fraud or sham in order to look behind the corporation to determine the validity of its actions. **EDELWEISS MANUFACTURING COMPANY, INC., 1987-INA-562 (Mar. 15, 1988) (en banc)**

Alien ownership or control: closely held corporation: alien held important role in formation of company, one of four directors, and owns about 10% of shares. **KEYJOY TRADING COMPANY, 1987-INA-592 (Dec. 15, 1987) (en banc)**

Alien ownership and control: job not established to be bona fide where Alien' spouse owed company and where the Alien had been with the company since the time of its foundation in the US several years earlier. **YOUNG SEAL OF AMERICA, INC., 1988-INA-121 (May 17, 1989) (en banc)**

Bona fide job opportunity: employer-employee relationship: alien ownership interest: "In Hall v. McLaughlin, 864 F.2d 868, 873-874 (D.C. Cir. 1989), the Court identified the standards as (1) whether in light of the alien's part ownership, the corporation is a sham and a scheme for obtaining the Alien's labor certification (sham test), and (2) whether the corporation has come to rely heavily upon the alien's skills and contacts so that, were it not for the alien, the corporation would probably cease to exist (inseparability test).": "At the root of both tests is a consideration of whether, by virtue of a sham or inseparability, the employer would be unlikely to replace the Alien and whether there is a bona fide job opportunity clearly open to any qualified U.S. worker.": inseparability test not meet where alien and his wife owned 49% of the shares of the corporation, were two of the three members of the Board of Directors, were the officers of the corporation, and the alien held the position of President, was one of only five employees of the corporation, and developed the product sought to be marketed by the corporation. [Editor's note: the Lignomat two part sham/inseparability test was replaced by a "totality of the circumstances" test in Modular Container Systems, Inc., 1989-INA-228 (July 16, 1991) (en banc)]. **LIGNOMAT USA, LTD., 1988-INA-276 (Oct. 24, 1989) (en banc)**

Alien ownership and control: application violated the definition of employment section ["permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee."] where the alien had a 65% ownership interest in the employer and had not presented evidence to show that the employment decision was independent of his control. The Board rejected Employer's "displacement theory" -- i.e., that labor certification should be granted where the Alien is not depriving any U.S. worker of the position, or adversely affecting similarly employed U.S. workers, since no qualified U.S. workers were available. **ODESSA EXECUTIVE INN, INC., 1988-INA-410 (Apr. 18, 1989) (en banc)**

Alien ownership and control: investor cases: bona fide job opportunity: " If the employment is established not to be merely self-employment, and thus not barred per se, section 656.20(c)(8) provides the additional requirement that the employer attest that the job opportunity has been and is clearly open to any qualified U.S. worker. This provision infuses the recruitment process with the requirement of a bona fide job opportunity: not merely a test of the job market." (citations and footnote omitted). The Lignomat USA, Ltd., 1988-INA-276 (Oct. 24, 1989) (en banc) two part sham/inseparability test was replaced in Modular by a "totality of the circumstances" test: " The totality of the circumstances standard also includes a consideration of the employer's level of compliance and good faith in the processing of the claim. See, e.g., Malone & Associates, 90-INA-360 (July 15, 1991) (en banc) (companion case to today's decision). Moreover, the business cannot have been established for the sole purpose of obtaining certification for the alien, i.e., a sham. Hall, 864 F.2d at 874." **MODULAR CONTAINER SYSTEMS, INC., 1989-INA-228 (July 16, 1991) (en banc)**

Alien ownership or control: where the alien had only an insubstantial financial interest in the employer, and there was no evidence of an inappropriately high salary or hidden bonuses or perks, the Board found that employment of the Alien was not

tantamount to self-employment, barred per se under section 656.50; however, the Board proceeded to also consider whether the job presented a bona fide job opportunity under section 656.20(c)(8): the Board found under the facts of the case that, despite having a collegial and professional relationship with key members of the sponsoring employer and being a stockholder, a member of the Board of Directors and a Vice President, employer proved that it was presenting a bona fide job opportunity where the Alien's stock ownership was small, he had no familial relationship with the employer, it was clear that others were the prime movers in corporate affairs and that the position was not created merely to obtain labor certification for the alien. **HUMAN PERFORMANCE MEASUREMENT, INC., 1989-INA-269 (Oct. 25, 1991) (en banc)**

Alien ownership and control: investor cases: bona fide job opportunity: employer failed to establish a bona fide job opportunity where the employer, Malone & Associates, was a law firm, founded and apparently wholly owned by the Alien, bearing the name of the Alien, and located until recently in the Alien's own home. In addition, the job duties and requirements were specialized and closely matched the qualifications of the Alien. The Board also took into consideration Employer's actions during the processing of the claim (implausibly reducing the salary to level of an associate; recruitment efforts and interviewing). [Editor's note: This is a companion case to Modular Container Systems, Inc., 1989-INA-228 (July 16, 1991) (en banc). See the casenote for Modular for additional information on the legal standards]. **MALONE & ASSOCIATES, 1990-INA-360 (July 16, 1991) (en banc)**

Familial relationship

Alien ownership or control: familial relationship: alien brother of owner: "We did not hold nor did we mean to imply in Young Seal that a close family relationship between the alien and the person having the hiring authority, standing alone, establishes, that the job opportunity is not bona fide or available to U.S. workers. Such a relationship does require that this aspect of the application be given greater attention. But, in the final analysis, it is only one factor to be considered. Assuming that there is still a genuine need for an employee with the alien's qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the relationship, per se, does not require denial of certification.": record was sufficient to establish that position for French baker was a bona fide job opportunity. **PARIS BAKERY CORPORATION, 1988-INA-337 (Jan. 4, 1990) (en banc)**

DUE PROCESS

Adequacy of NOF and Final Determination

Due process: NOF must state the specific bases on which the decision to issue the NOF of Findings was made. **DR. & MRS. FREDRIC WITKIN, 1987-INA-532 (Feb. 28, 1989) (en banc)**

Due process: failure of CO in both NOF and Final Determination to state the reasons for his findings: remand. **EXXON CHEMICAL COMPANY, 1987-INA-615 (July 18, 1988) (en banc)**

Due process: unclear and confusing nature of the NOF results in remand. **NANCY JOHNSTONE, 1987-INA-541 (May 31, 1989) (en banc)**

Due process: Board rejected employer's argument that NOF was deficient in that it did not provide the option for the employer to re-recruit stating its full job requirements: " Nothing in the regulations or in our previous decisions requires a Certifying Officer to allow an employer to re-recruit under more restrictive requirements after the employer has recruited and received applications from qualified U.S. workers, and we specifically reject any such duty here." **UNIVERSAL ENERGY SYSTEMS, INC., 1988-INA-5 (Jan. 4, 1989) (en banc)**

Due process: "It is the C.O.'s obligation, under the regulations, to state the specific bases upon which the decision to issue the Notice of Findings was made. 20 C.F.R. §656.25(c)(2). If the reasons for the denial are not made clear to the Employer, it cannot rebut with specificity nor can it attempt to cure any deficiency, both of which are crucial to the Employer, as all findings in the Notice of Findings that are not rebutted are deemed admitted under section 656.25(e)(3)." **THE STANDARD OIL COMPANY, 1988-INA-77 (Sept. 14, 1988) (en banc)**

Due process: certification granted where the NOF failed to provide a clear statement of the deficiencies found by the CO in its advertising and recruitment and the Final

Determination ignored the rebuttal argument. **SIZZLER RESTAURANTS INTERNATIONAL, 1988-INA-123 (Jan. 9, 1989) (en banc)**

Due process: NOF must specify errors: Because employers must be afforded a fair and reasonable opportunity to rebut it is incumbent on Certifying Officers "to identify which sections or subsections of the regulations allegedly have been violated and state with specificity how the Employer violated that section or subsection." In re Flemah, Inc., 88-INA-62 (February 21, 1989) (en banc). Specific statements of alleged violations in the NOF enable and encourage employers to file clear responses in rebuttal. The interests of administrative due process are, however, ill served where, as here, a Certifying Officer issues an NOF which is, at best, unclear and confusing then follows with a Final Determination which simply ignores Employer's rebuttal or seeks to add new reasons for denial." **BARBARA HARRIS, 1988-INA-392 (Apr. 5, 1989) (en banc)**

Due process: where the NOF is confusing and prevents an employer from knowing what he is rebutting, the denial of labor certification cannot be affirmed. Remanded. **BEN THOMAS DESIGN, 1988-INA-411 (Mar. 31, 1989) (en banc)**

Due process: "[A] CO's grounds for denial of a labor certification must be set forth in an NOF, giving the Employer an opportunity to rebut or to cure the alleged defects. See, e.g., In re Downey Orthopedic Medical Group, 87-INA-674 (Mar. 14, 1988) (en banc). [In addition] a CO may not cite new evidence in a Final Determination, because the Employer must be afforded the opportunity to rebut the evidence being relied on to deny certification. See, e.g., In re Shaw's Crab House, 87-INA-714 (Sept. 30, 1988) (en banc)." **MARATHON HOSIERY CO., INC., 1988-INA-420 (May 4, 1989) (en banc)**

Due process: NOF must put employer on notice of reason for proposal to deny certification, but is not required to be a detailed guide on how to achieve labor certification: " Twenty C.F.R. § 656.25 requires that the CO issue a Notice of Findings if certification is not granted. The Notice of Findings must give notice which is adequate to provide the employer an opportunity to rebut or cure the alleged defects. . . . Although the NOF must put the employer on notice of why the CO is proposing to deny certification, it is not intended to be a decision and order that makes extensive legal findings and discusses all evidence submitted to the file. The CO is not required to provide a detailed guide to the employer on how to achieve labor certification. The burden is placed on the employer by the statute and regulations to produce enough evidence to support its application. Case law has established that to provide adequate notice, the CO need only identify the section or subsection allegedly violated and the nature of the violation,... inform the employer of the evidence supporting the challenge, ... and provide instructions for rebutting and curing the violation,.... * * * Once the CO provides specific guides, he/she must be careful not to mislead the employer into believing that the specific evidence requested is all that is needed to rebut the NOF and for the application for labor certification to be granted. Often it is necessary for the CO to request specific information that he/she has a particular interest in obtaining in light of the deficiencies of the application. However, when the CO requires more than the specific information requested to find that the deficiency has been remedied, he/she must clearly state this fact in the Notice of Findings to avoid any ambiguity. **MIAOFU CAO, 1994-INA-53 (Mar. 14, 1996) (en banc)**

Issue or evidence raised for the first time in the Final Determination

Due process: "Denial of Alien Labor Certification based on an issued raised for the first time in the Final Determination is improper." **DR. & MRS. FREDRIC WITKIN, 1987-INA-532 (Feb. 28, 1989) (en banc)**

Due process: denial of an application on the basis of information not disclosed to the employer prior to the Final Determination foreclosed the employer's opportunity to rebut the previously undisclosed information: denial reversed and certification granted. **PHOTOTAKE, 1987-INA-667 (July 20, 1988) (en banc)**

Due process: remand where Final Determination was based on ground not raised in the original NOF or a supplemental NOF. **TARMAC ROADSTONE (USA), INC., 1987-INA-701 (Jan. 4, 1989) (en banc)**

Due process: where CO made phone calls to investigate employer's rebuttal evidence regarding the alien's qualifications for the job, but first disclosed this evidence in a Final Determination, the case was remanded to provide the employer an opportunity to respond to the new evidence. **SHAW'S CRAB HOUSE, 1987-INA-714 (Sept. 30, 1988) (en banc)**

Due process: where the employer fully and precisely followed the CO's directions for rebuttal, the CO erred in denying the certification on new grounds. **MR. & MRS. CHARLES SHINN, 1988-INA-16 (Feb. 16, 1989) (en banc)**

Due process: the CO may not rely on a ground first raised in the Final Determination to deny labor certification. **BEL AIR COUNTRY CLUB, 1988-INA-223 (Dec. 23, 1988) (en banc)**

Due process: certification may not be denied based on an issue first raised in the Final Determination **BARBARA HARRIS, 1988-INA-392 (Apr. 5, 1989) (en banc)**

Due process: "[A] CO's grounds for denial of a labor certification must be set forth in an NOF, giving the Employer an opportunity to rebut or to cure the alleged defects. See, e.g., In re Downey Orthopedic Medical Group, 87-INA-674 (Mar. 14, 1988) (en banc). [In addition] a CO may not cite new evidence in a Final Determination, because the Employer must be afforded the opportunity to rebut the evidence being relied on to deny certification. See, e.g., In re Shaw's Crab House, 87-INA-714 (Sept. 30, 1988) (en banc)." **MARATHON HOSIERY CO., INC., 1988-INA-420 (May 4, 1989) (en banc)**

Due process: issue not raised the NOF: “Section 656.25 specifies the path which a C.O. must follow to issue a Final Determination denying labor certification. The proposed bases for denial must first be presented in the Notice of Findings, thereby giving an employer the opportunity to cure or rebut the alleged defects. Denying labor certification in the Final Determination on grounds not first raised in the warning Notice of Findings violates section 656.25 and denies due process.” When a CO wishes to rely on a new or substantially clarified basis for denial subsequent to

the NOF, the CO should issue a second NOF. **NORTH SHORE HEALTH PLAN, 1990-INA-60 (June 30, 1992) (en banc)**

Issue raised in original NOF but not preserved in subsequent NOF

Due process: where the CO raised the issue of an unduly restrictive job requirement in the original NOF but did not raise it in a supplemental NOF where an actual minimum requirements issue was raised instead, the Board declined to affirm a Final Determination relying on a finding of an unduly restrictive job requirement. **DUVAL-BIBB COMPANY, 1988-INA-280 (Apr. 19, 1989) (en banc)**

Final Determination: errors by the CO in the Final Determination do not relieve failures of proof in the rebuttal where the NOF gave adequate notice of the issue

Due process: misstatements by the CO in the Final Determination cannot have affected the Employer's rebuttal submission. [Editor's note: the decision implies that an error in analysis by the CO in a Final Determination will not relieve an inadequate rebuttal on the issue raised in the NOF]. **BELHA CORPORATION, 1988-INA-24 (May 5, 1989) (en banc)**

Due process: where the NOF gave the employer adequate notice of the issue to be rebutted, alleged error in the Final Determination did not excuse Employer's failure of proof in rebuttal. **FISCHER IMAGING CORP., 1988-INA-43 (May 23, 1989) (en banc)**

Due process: sufficiency of Final Determination: if the NOF provided the employer with adequate notice of the violation and instructions for curing or rebutting the deficiencies, a less than fully reasoned Final Determination may not prevent the Board from affirming a denial of labor certification if the employer's documentation was so lacking in persuasiveness that labor certification necessarily would be precluded. **CARLOS UY III, 1997-INA-304 (Mar. 3, 1999) (en banc)**

Rebuttal: "Under the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." **CARLOS UY III, 1997-INA-304 (Mar. 3, 1999) (en banc)**

Due process: where the NOF gave the employer fair notice of the issue, errors in the Final Determination are not a violation of due process. **S & G DONUT CORP. and SIT DONUT CORP., d/b/a DUNKIN DONUTS, 1988-INA-90 and 91 (May 17, 1990) (en banc)**

Due process: adequate notice of issues: where, despite the use of a confusing boiler-plate NOF, there could have been no reasonable doubt in the mind of Employer as to the nature of the CO's complaint, the Board rejected Employer's complaint that the Final Determination amounted to an acceptance of the rebuttal. **CUSTOM CARD d/b/a CUSTOM PLASTIC CARD COMPANY, 1988-INA-212 (Mar. 16, 1989) (en banc)**

Due process: where the CO clearly raised an issue in the NOF and the employer understood the issue to be presented as evidenced by its rebuttal, the fact that the CO did not explicitly cite the relevant section of the regulations did not prevent Board

review of that issue. **NATIONAL INSTITUTE FOR PETROLEUM AND ENERGY RESEARCH, 1988-INA-535 (Mar. 17, 1989) (en banc)**

But see

Due process: case remanded where the CO made factual errors in the Final Determination as to whether employer had established business necessity for a publication requirement. Board reminded COs that "It is not enough merely to list all of the sections of the regulations which may be applicable to the CO's decision. Rather, it is incumbent upon the CO to identify which sections or subsections of the regulations allegedly have been violated and state with specificity how the Employer violated that section or subsection. **FLEMAH INC., 1988-INA-62 (Feb. 21, 1989) (en banc)**

BALCA may remand for consideration of issues not previously adjudicated

Due process: the Board may direct the CO on remand to consider an issue not previously considered in the original NOF or the Final Determination. **DAISY SCHIMOLER, 1997-INA-218 (Mar. 3, 1999) (en banc)**

Due process: failure to address all of employer's rebuttal: in rebuttal to an "alien gained the qualifying experience with the employer" issue, employer argued both that the alien had the qualifying experience and alternatively that it is not now feasible to train workers. The CO failed to address the feasibility to train rebuttal. The Board affirmed the CO on the alien's experience finding, but remanded for consideration of the feasibility issue. Four dissenting Board members would have decided the feasibility issue rather than remanding the case because of the damage further delay would do to the employer. **MELILLO MAINTENANCE, INC., 1989-INA-127 (Sept. 20, 1990) (en banc)**

CO is an impartial adjudicator, not an adversary of the employer

Due process: "The Certifying Officer appears to have acted as though he was Employer's adversary rather than an impartial adjudicator of the certification application. This Board will not stand idly by in such cases." Reversal and grant of certification where CO made numerous factual errors in assessing the application. **LA SALSA, INC., 1987-INA-580 (Aug. 29, 1988) (en banc)**

Impossibility of completion of rebuttal within 45 day period

Due process: impossibility of completing rebuttal during 45 day period: where employer was instructed to show its contact of colleges and universities for recruitment, which the employer did during the rebuttal period, but the CO denied certification because employer's submission did not show the results of the contact, the Board remanded the case because the contacts would not have been responded to during the rebuttal period. **AL-GHAZALI SCHOOL, 1988-INA-347 (May 31, 1989) (en banc)**

Undisclosed evidence

Due process: undisclosed evidence: the Board will not affirm the CO's denial of certification based on granting more credibility to the statement of a US applicant

than employer's statements where the statement was supplied to the employer and not in the record before the Board: however, where there was evidence casting doubt on employer's statements, the case could be remanded. **ANDER TRADING, INC., 1988-INA-356 (Dec. 22, 1988) (en banc)**

Due process: disclosure of outside communications in NOF: If a CO uses evidence obtained from sources other than the applicant, it is necessary for the CO to disclose this information in the NOF so that the employer may have an opportunity to rebut that evidence. **CHAMS, INC, d/b/a DUNKIN' DONUTS, 1997-INA-40, 232 and 541 (Feb. 15, 2000) (en banc)**

BALCA review limited to grounds cited by the CO

Due process: the panel erred when it decided the case on a ground, although within the scope of the relevant regulation, not cited by the CO: the CO had challenged the actual minimum requirements on the suspicion that employer had other hotels with similar positions in which applicants were accepted with qualifications lower than now required, whereas the panel had decided the case on the ground that the alien had gained the qualifying experience for the job with the sponsoring employer – a ground never raised while the case was before the CO. **LOEWS ANATOLE HOTEL, 1989-INA-230 (Apr. 26, 1991) (en banc)**

EMPLOYMENT

Sufficiency of documentation

Employment: permanent full-time job: the CO, suspicious of whether employer was operational, requested documentation, and after several NOFs concluded that certification could not be granted because a single unsigned contract for the alien's services did not establish that employer could offer permanent, full-time employment: the Board agreed, where, inter alia, the contract was not signed by the Employer and the contract's terms did not supply key information such as the value of the contract, the amount of work to be done, the location of the contracted work or the duration of the project. **GERATA SYSTEMS AMERICA, INC., 1988-INA-344 (Dec. 16, 1988) (en banc)**

Individual as employer

Employer: viable business: While an employer, under section 656.50, may be an individual, that individual must still meet the other definitional requirements of an employer, namely that he or she "proposes to employ a full-time worker." There is no requirement that the employer be an "established business." That an Employer does not have a tax number on file with the state is not dispositive; however, a CO is free to inquire a business, under any trade name, has an employer tax number, and if not, to explain. **BEN THOMAS DESIGN, 1988-INA-411 (Mar. 31, 1989) (en banc)**

Subcontractor relationship, transfer of ownership

Employer-employee relationship: subcontractor: majority of the Board reinstates and affirms panel decision in American Chick Sexing Association, 1989-INA-320 et al. Mar. 12, 1991), which permitted the employer to be transferred in rebuttal to remove the contractor relationship objected to by the CO (although the same individual owed both companies): dissenters found that the job had changed so significantly that the employer should be required to file new labor certification applications. **AMERICAN CHICK SEXING ASSOCIATION, 1989-INA-320 et al. (May 12, 1992) (en banc)**

Full-time - sufficient duties to keep worker occupied during the day

Employment: Full-time job: whether full-time nature of job duties can be raised under section 656.3 alone: the Board held that the definition of employment in section 656.3 cannot be used to attack the employer's need for the position by

questioning the hours in which a worker will actually be engaged in work-related duties, i.e., the business necessity for the position. Where the employer is offering a work week with hours customary for a full-time employee in the industry, section 656.3 is not the proper ground for denying labor certification. The Board observed, however, that the lack of sufficient duties to keep a worker gainfully employed for a substantial part of a work week may be relevant to the issue of whether the employer is offering a bona fide job opportunity. Moreover, if the true nature of the CO's concern is that the job has been mischaracterized or that the job was created for the purpose of assisting the alien's immigration, the citation of error should be to section 656.20(c)(8), to provide adequate notice of what is really being contested. The Board indicated that Schimoler does not prevent a CO from rejecting under section 656.3 an application that does not offer a full-time work week, or a permanent position. Nor does it prevent a denial of certification under section 656.3 where the employer cannot demonstrate the ability to provide permanent, full-time work. [Note: this is a companion case to Carlos Uy III, 1997-INA-304 (Mar. 3, 1999) (en banc)] **DAISY SCHIMOLER, 1997-INA-218 (Mar. 3, 1999) (en banc)**

Full-time v. seasonal and temporary work - sufficient work to keep work occupied for full calendar year

Employment: Permanent full-time work v. seasonal and temporary work: landscapers: "[W]e hold that although these landscaping jobs may be considered “full time” during ten months of the year, and the need for these jobs occurs year after year, they cannot be considered permanent employment, as they are temporary jobs that are exclusively performed during the warmer growing seasons of the year, and from their nature, may not be continuous or carried on throughout the year.": [Editor's note: the Board declined to revisit Vito Volpe in Crawford & Sons, 2001-INA-121 (Jan, 9, 2004) (en banc), citing the principle of stare decisis]. **VITO VOLPE LANDSCAPING, 1991-INA-300, et al (Sept. 29, 1993) (en banc)**

Employment: permanent full-time work v. seasonal and temporary work: Board declines to overrule or modify Vito Volpe Landscaping, 1991-INA-300, at 5 (Sept. 29, 1993) (en banc). **CRAWFORD & SONS, 2001-INA-121 (Jan, 9, 2004) (en banc)**

EVIDENCE

Burden of proof

Evidence: Burden of proof: Pursuant to 8 U.S.C. §1182(a)(14) [recodified at §1182(a)(5)(A)] "it is the burden of the alien, or more accurately the employer on behalf of the alien, to establish to the Secretary's satisfaction that U.S. workers are not available to perform the job, and that the employer of the alien will not adversely affect the wages and working conditions of U.S. workers." **INFORMATION INDUSTRIES, INC., 1988-INA-82 (Feb. 9, 1989) (en banc)**

Evidence: Burden of proof: where the employer contended that it was better able to evaluate the qualifications of a mechanic and that the CO could not justifiably find the applicant qualified to perform the job duties based solely on his resume, the Board found that the employer's contention, in effect, improperly shifted the burden of proof to the CO to show that the U.S. worker was qualified and placed the employer as the judge of its own case. **FRITZ GARAGE, 1988-INA-98 (Aug. 17, 1988) (en banc)**

Definition of documentation

Evidence: definition of documentation: "[W]here a provision of the regulations requires information to be furnished in a specified form, *e.g.*, documentation of experience ''in the form of statements from past or present employers,''' §656.21(a)(3)(J), the regulation controls. In the absence of such a specific provision, where a document has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the document, if requested by the Certifying Officer, must be adduced. In all other cases, *e.g.*, where an employer is required to prove the existence of an employment practice or the performance of an act and its results, written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation. This is not to say that a certifying officer 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." **GENCORP, 1987-INA-659 (Jan. 13, 1988) (en banc)**

Evidence: an employer's statement that prior familiarity with operations is a normal requirement for managers of fast-food restaurants was found not to be specific and

not to indicate sources or bases, such that it did not meet the documentation definition from *Gencorp*. **TRI-P'S CORP., dba JACK-IN-THE-BOX, 1987-INA-686 (Feb. 17, 1989) (en banc)**

Evidence: cryptic notes do not rise to level of documentation: "The fact that someone representing Employer wrote "too far" on Lukas' resume, among other notes regarding actual or scheduled dates of 8/14 and 8/16 for attempted or actual contacts with Lukas does not rise to the level of argument and evidence presented to the CO simply because it was in the file.... Cryptic notes on a resume should not have to be deciphered by the CO in an attempt to discover Employer's theory for rejection." **YARON DEVELOPMENT CO., INC., 1989-INA-178 (Apr. 19, 1991) (en banc)**

Evidence: undocumented statements: Employer argued that since the NOF did not require a specific type of documentation, an undocumented statement from the employer is sufficient evidence to satisfy the request. The Board rejected this contention, noting that "Gencorp does not suggest that where a CO does not request a specific type of document, an employer's undocumented assertion must be accepted and certification granted. To the contrary, the holdings of many BALCA panels state that a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. See, e.g., A.V. Restaurant, 1988-INA-330 (Nov. 22, 1988); Our Lady of Guadalupe School, 1988-INA-313 (June 2, 1989). We concur with these holdings." **CARLOS UY III, 1997-INA-304 (Mar. 3, 1999) (en banc)**

Hearsay

Evidence: Hearsay: must have probative value and bear indicia of reliability: questionnaires returned by US applicants **CATHAY CARPET MILLS, INC., 1987-INA-161 (Dec. 7, 1988) (en banc)**

Weighing of evidence: party status is not, in itself valid basis for evaluation of evidence

Evidence: CO's attribution of more weight to statement of US applicant solely because he was not a party to the proceeding, and therefore presumably had no reason to state anything but the truth, was clear error. Party status is not, in itself, a valid basis for evaluating evidence. **CATHAY CARPET MILLS, INC., 1987-INA-161 (Dec. 7, 1988) (en banc)**

Evidence: credibility: CO's generalization that "when an employer's response differs from an applicant's response, the weight of evidence is generally afforded the applicant" was erroneous: " The probative value of evidence is judged on the basis of its own strengths and weaknesses in each case, as we have done here, without general preconceptions based on its source. *Screen Actors Guild, Inc.*, [19]87-INA-626 (Mar. 9, 1988)." **DOVE HOMES, INC., 1987-INA-680 (May 25, 1988) (en banc)**

Evidence: where a CO intends to find that evidence submitted by an employer is not genuine, a finding is to be expressly made and adequately supported by probative evidence. **YEDICO INTERNATIONAL, INC., 1987-INA-740 (Sept. 30, 1988) (en banc)**

Translation: ease of seeking

Evidence: rather than denying claim outright because single page letter supporting rebuttal was written in Spanish, CO should have issued supplemental NOF seeking a translation if CO could not obtain one easily (case arose in Texas): Board disfavors technical denials. **J. MICHAEL & PATRICIA SOLAR, 1988-INA-56 (Apr. 6, 1989) (en banc)**

Technical Assistance Guide (TAG)

Technical Assistance Guide: although not binding on BALCA, policies may be adopted by BALCA when the reasoning is sound. **ROGER AND DENNY PHELPS, 1988-INA-214 (May 31, 1989) (en banc)**

Statements of counsel as evidence

Evidence: "The factual theory presented by counsel in a brief cannot serve as evidence of material facts." **YARON DEVELOPMENT CO., INC., 1989-INA-178 (Apr. 19, 1991) (en banc)**

Evidence: statements of counsel as evidence: statements of counsel in a brief or otherwise presented, unsupported by underlying party or non-party witness documented assertions do not constitute evidence, and are not entitled to evidentiary value, except that an attorney may be competent to testify about matters of which he or she has first-hand knowledge: an attorney, however, may be required to withdraw as counsel if he or she becomes a witness in the case. **MODULAR CONTAINER SYSTEMS, INC., 1989-INA-228 (July 16, 1991) (en banc)**

Authority of CO to go outside record supplied by the employer

Evidence: CO's introduction of outside communications: the Board held that it was proper for the CO to go outside the record provided by an employer in order to verify the information provided by an employer in a labor certification application. Such evidence must be disclosed in an NOF. **CHAMS, INC, d/b/a DUNKIN' DONUTS, 1997-INA-40, 232 and 541 (Feb. 15, 2000) (en banc)**

Statements made under penalty of perjury

Evidence: the mere fact that an employer makes statements under penalty of perjury does not compel the CO or the Board to accept the statements as credible. **CARLOS UY III, 1997-INA-304 (Mar. 3, 1999) (en banc)**

Scope of CO's authority to request information

Evidence: scope of CO's authority to request information: the Board affirmed the denial of labor certification where the employer relied on two pre-BALCA decisions in refusing to supply requested information on the full-time nature of the job: the Board observed that such questions were not reasonable where they were in reality, a requirement that the employer establish the "business necessity" for the position, but that a CO may reasonably ask for the same type of information in an analysis of a bona fide job opportunity, under the totality of the circumstances test, pursuant to 20 C.F.R. § 656.20(c)(8), or make inquires about the employer's ability to offer

permanent, full-time work, or the sufficiency of funds to pay the alien's salary. [Note: this is a companion case to Carlos Uy III, 1997-INA-304 (Mar. 3, 1999) (en banc)]. **ELAIN BUNZEL, 1997-INA-481 (Mar. 3, 1999) (en banc)**

JOB TITLE

Determining the correct job title

Job title: CO's challenge of job title: in each of these cases, the employers had listed the occupation as "Baker" under the DOT. The CO challenged these classifications and changed the job title to that of "Doughnut Maker" under the DOT. The Board held that it is well-established that a CO may challenge the job title provided by the employer. As with any other finding in a NOF, it is then the employer's burden to rebut this finding by providing sufficient evidence. **CHAMS, INC, d/b/a DUNKIN' DONUTS, 1997-INA-40, 232 and 541 (Feb. 15, 2000) (en banc)**

Job title: determining the correct job title: comparison of DOT with duties stated by employer: computer programmer v systems programmer. **LDS HOSPITAL, 1987-INA-558 (Apr. 11, 1989) (en banc)**

Job title: remand where CO's job title ("Medical Technologist") was erroneous for the job offered, but there may have been some validity to CO's observation in the Final Determination that employer appeared to want to hire someone to perform a physician's duties ("Medical Diagnostician") without paying a physician's salary. **DOWNEY ORTHOPEDIC MEDICAL GROUP, 1987-INA-674 (Mar. 16, 1988) (en banc)**

CO's suspicion that the job was misclassified and is not a bona fide job opportunity

Bona fide job opportunity: CO suspects job misclassified: domestic cook: the Board held that a CO may properly invoke the bona fide job opportunity analysis authorized by 20 C.F.R. § 656.20(c)(8) if the CO suspects that the application misrepresents the position offered as skilled rather than unskilled labor in order to avoid the numerical limitation on visas for unskilled labor. A totality of the circumstances is applied. Factors such as the inherent implausibility of a household using a very percentage of its disposable income to hire a cook may be considered. **CARLOS UY III, 1997-INA-304 (Mar. 3, 1999) (en banc)**

GOOD FAITH EFFORTS TO RECRUIT

General principles

Evidence

Particular actions and issues

Additional recruitment

Sufficiency of efforts: documentation must be of reasonable efforts to contact U.S. applicants rather than of actual contact: bare assertion without supporting reasoning or evidence is generally insufficient

Good faith efforts to recruit: sufficiency of efforts: standard is reasonable efforts to contact U.S. applicants rather than proof of actual contact; certified mail, return receipt requested cannot be required by the CO, but may be beneficial for employers to document their reasonable efforts: An employer must be given an opportunity to prove that its overall recruitment efforts were in good faith, even if it cannot produce

certified mail return receipts to document its contacts with U.S. applicants. Moreover, a CO may not summarily discard an employer's assertions about what efforts were made to contact applicants, although a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Although a CO may not require use of certified mail, an employer who fails to do so runs the risk of not being able to prove its good faith efforts at contact and recruitment of U.S. workers. **M.N. AUTO ELECTRIC CORP., 2000-INA-165 (Aug. 8, 2001) (en banc)**

Sufficiency of evidence: telephone billing records

Good faith efforts to recruit: sufficiency of evidence: availability of local phone records: if an employer asserts that local phone records are not available, it should at the minimum be prepared to document that it asked the phone company for such records in a timely fashion. **M.N. AUTO ELECTRIC CORP., 2000-INA-165 (Aug. 8, 2001) (en banc)**

Good faith efforts to recruit: sufficiency of evidence: where the NOF had required Employer to submit "convincing documentation" of its reasons for rejecting U.S. applicants but had not specifically mentioned telephone bills, the CO should have issued a second NOF if he wished to require submission of the telephone bills rather than accept Employer's written initial reports of contacts, together with written notes of telephone calls. **DICEON ELECTRONICS, INC., 1988-INA-253 (Apr. 18, 1989) (en banc)**

Sufficiency of evidence: documentation found sufficient

Good faith efforts to recruit: itemized telephone bills, "Interview Sheets" summarizing the telephone calls with applicants, and follow-up letters, supported a finding of good faith recruitment efforts. **YEDICO INTERNATIONAL, INC., 1987-INA-740 (Sept. 30, 1988) (en banc)**

Good faith efforts to recruit: sufficiency of documentation: CO erred in denying certification based on fact that certified mail receipt was not stamped where Employer's rebuttal included the signed declarations of Employer's executive chef and general manager and the CO ignored these declarations in the Final Determination. **BEL AIR COUNTRY CLUB, 1988-INA-223 (Dec. 23, 1988) (en banc)**

Rejection of U.S. workers: sufficiency of documentation: lawful rejection established where during a telephone conversation with the Employer, the applicant declined to come in for an interview and indicated a lack of interest in the job, and employer substantiated its position, with notes of the telephone call and a copy of a letter to the applicant confirming that he was not interested in the job. The CO presented no evidence to the contrary. **KOMFORT INDUSTRIES, INC., 1988-INA-402 (May 4, 1989) (en banc)**

Sufficiency of evidence: documentation found insufficient

Rejection of U.S. workers: CO's denial of labor certification affirmed where rebuttal consisted solely of a one page affidavit from employer's President stating that several applicants declined by telephone to be interviewed and that the remaining applicants were contacted but never responded and did not appear for an interview. This information was already in the record and Employer made no attempt to recontact several applicants as directed by the NOF until after the Final Determination. **MEDICAL DESIGNS, INC., 1988-INA-159 (Dec. 19, 1988) (en banc)**

Rejection of U.S. workers: failure of employer to substantiate its efforts to contact applicants where US workers submitted questionnaires indicating that they were never contacted. **CARRIAGE HOUSE REALTORS, 1987-INA-739 (Apr. 5, 1989) (en banc)**

Good faith efforts to recruit: sufficiency of efforts: Employer's recruitment report was inadequate where it failed to indicate when or how many times Employer attempted to contact an applicant by telephone and failed to indicate whether the attempted contact or contacts were to his place of business or his home, or with whom the message was left, or what the substance of the message was. It also failed to show that Employer attempted alternative means of communication, such as a letter. **YARON DEVELOPMENT CO., INC., 1989-INA-178 (Apr. 19, 1991) (en banc)**

Evidence: contemporaneous evidence, probative value of

Good faith efforts to recruit: evidence: contemporaneous evidence of contact of US workers is more probative than narrative evidence prepared months later. **YEDICO INTERNATIONAL, INC., 1987-INA-740 (Sept. 30, 1988) (en banc)**

Evidence: responses to recruitment, probative value of

Good faith efforts to recruit: the fact that there were some responses to the application and advertisement does not indicate that problems in recruitment, if any, were insubstantial. O'Malley Glass & Millwork Co., 1988-INA-49 (March 13, 1989). **MAPLE DERBY, INC., 1989-INA-185 (May 15, 1991) (en banc)**

Relevancy of pre-application recruitment

Good faith efforts to recruit: whether CO's finding that US applicants were unlawfully rejected in a pre-application recruitment can support a denial of labor certification: because the record was unclear, the Board remanded for further proceedings. **UNIVERSITY OF OKLAHOMA - HEALTH SCIENCES CENTER, 1988-INA-158 (Dec. 29, 1988) (en banc)**

Alien involvement in interview

Good faith efforts to recruit: alien involvement in interview of US applicants is fatal defect in application: Employer violated section 656.20(b)(3) by involving the alien in the interviewing or consideration of U.S. applicants for the position offered the alien. " an alien's participation in the interviewing and consideration of U.S. workers

per se taints the labor certification process. See Eastern Trading Co., Inc., 88-INA-144 (August 4, 1988) .... In cases where the alien has been involved in the interviewing or consideration of U.S. applicants, as he has here, we will not determine whether, despite this taint, no qualified and available U.S. worker applied." **MASTER VIDEO PRODUCTIONS, INC., 1988-INA-419 (Apr. 18, 1989) (en banc)**

Calling only one of several telephone numbers

Good faith efforts to recruit: telephone contact: employer made several attempts to contact the applicant at his home telephone, and not until after the NOF did it contact the applicant at his work number: Employer argued that it did not call the work number due to sensitivity: the Board rejected this argument noting that since the applicant was presently employed it was likely that he would be at work when telephoned and that employer could have written the applicant. **BRUCE A. FJELD, 1988-INA-333 (May 26, 1989) (en banc)**

Discouraging U.S. applicants

Good faith efforts to recruit/Rejection of U.S. workers: an Employer who by its actions had made it sufficiently difficult for the applicants to obtain an interview so as to discourage them from pursuing the job opportunity has not shown a good faith effort to recruit U.S. workers, and has not established lawful, job-related reasons for rejecting U.S. workers. **BUDGET IRON WORK, 1988-INA-393 (Mar. 21, 1989) (en banc)**

Diversion of U.S. applicant

Good faith efforts to recruit: diversion of U.S. applicant: "fact that a position was created after a qualified U.S. worker applied for the job for which certification is sought suggests that it was created in a way to keep the original position open to the alien and to circumvent 20 C.F.R. 656.20." **AMGER CORPORATION., 1987-INA-545 (Oct. 15, 1987) (en banc)**

Misunderstanding about location or date of interview

Good faith efforts to recruit: interview at the wrong location based on employer's poor coordination. **SUNILAND MUSIC SHOPPES, 1988-INA-93 (Mar. 20, 1989) (en banc)**

Good faith efforts to recruit: misunderstanding about interview date: where the Board concluded that there was no evidence that the employer purposely rescheduled an interview for Saturday (a day when the facility was closed) but that there was a misunderstanding about the time for the interview, the matter was remanded for an interview of the applicant, or, if the applicant was no longer available, for readvertising. **BOLTON ELECTRIC, INC., 1988-INA-192 (Dec. 22, 1988) (en banc)**

Placing burden on applicants to contact employer

Good faith efforts to recruit: unreasonable delay in contact of applicants: improperly placing burden on applicants instead of actively recruiting. **VIVA OF CALIFORNIA, 1987-INA-583 (Nov. 20, 1987) (en banc)**

Post-NOF contact of applicants: whether lack of interest at that time cures initial bad faith recruitment

Good faith efforts to recruit: fortuitous cure: "an applicant's expression of disinterest or lack of availability upon recontact does not cure an initial improper rejection. Arcadia Enterprises, Inc., 87-INA-692 (Feb. 29, 1988)." The Board declined, under the facts of the case, to decide whether a "fortuitious cure" (i.e., whether an employer's failure to contact an apparently qualified applicant timely can be fortuitously cured by later establishing that the applicant would not have taken the job even if it had been timely offered) would be recognized by the Board. **YARON DEVELOPMENT CO., INC., 1989-INA-178 (Apr. 19, 1991) (en banc)**

Good faith efforts to recruit: fortuitous cure: even though the applicant was no longer interested in the job offered when employer contacted him post-NOF, this does not cure the Employer's failure to take reasonable steps to contact him during the original recruitment period. See e.g., Dove Homes, 87-INA-680 (May 25, 1988) (en banc); Arcadia Enterprises, Inc., 87-INA-692 (Feb. 29, 1988). **BRUCE A. FJELD, 1988-INA-333 (May 26, 1989) (en banc)**

Speaking or leaving a message with an applicant's family member

Good faith efforts to recruit: CO stated in recruitment report that he left a message with the applicant's wife: applicant later asserted in questionnaire that he was never contacted: rebuttal that post-NOF letter to applicant was not answered and therefore applicant was no longer interested was not responsive to the NOF: moreover, leaving message with a spouse does not itself relieve employer's burden to attempt to contact applicant directly: moreover, the post-NOF letter to the applicant could not cure the initial rejection on the basis that the applicant is no longer interested. **DOVE HOMES, INC., 1987-INA-680 (May 25, 1988) (en banc)**

Good faith efforts to recruit: "[A]n employer who wants to consider an applicant seriously must go further than merely speaking to the applicant's spouse by telephone. In re Dove Homes, Inc., 87-INA-680 (May 25, 1988) (en banc). **SWITCH, U.S.A., INC., 1988-INA-164 (Apr. 19, 1989) (en banc)**

Good faith efforts to recruit: telephone contact: "As in Dove Homes, Inc., 87-INA-680, May 25, 1988 (en banc), it is unacceptable for an Employer to assume a U.S. applicant is not interested based on a phone conversation with another family member. The vice in such a procedure, the strong possibility of a misunderstanding or miscommunication, is evidenced by the instant case." **DICEON ELECTRONICS, INC., 1988-INA-253 (Apr. 18, 1989) (en banc)**

Good faith efforts to recruit: sufficiency of efforts: where the employer only attempted to contact a US applicant at one of three possible telephone numbers and no attempt was made to contact her by mail, the employer's two messages did not constitute reasonable efforts to contact a qualified U.S. worker. In re Bruce A. Fjeld, 1988 INA 333 (May 26, 1989) **BAY AREA WOMEN'S RESOURCE CENTER, 1988-INA-379 (May 26, 1989) (en banc)**

Timeliness of contact

Good faith efforts to recruit: untimely contact of US applicants: employer left country for a month and failed to delegate recruitment responsibilities in the interim. **LEONARDO'S, 1987-INA-581 (Nov. 20, 1987) (en banc)**

Good faith efforts to recruit: delay in contact of applicants: the Board declined to adopt the CO's finding of unacceptable delay where the delay had been occasioned in large part because of the CO's direction to readvertise in a national journal, and the delay had been for inevitable, a period of 16-20 days between receipt of the applicants' resumes and Employer's response to these resumes. **LEE & CHIU DESIGN GROUP, 1988-INA-328 (Dec. 20, 1988) (en banc)**

Good faith efforts to recruit: "In legal parlance, an employer who makes timely contact is acting in good faith. However, it is important not to become lost in "good faith" jargon, which easily disintegrates into an analysis of the intent underlying an employer's delay. The proper focus is not on the employer's intent, but on the probable effect on U.S. applicants of the passage of time." Note strong dissents that intent does have a role in assessing whether to invoke equitable remedies. **LOMA LINDA FOODS, INC., 1989-INA-289 (Nov. 26, 1991) (en banc)**

Good faith efforts to recruit: timeliness: this decision contains an extended discussion of the principles underlying the requirement that an employer must contact potentially qualified U.S. applicants as soon as possible after it receives resumes or applications, so that the applicants will know that the job is clearly open to them. **LOMA LINDA FOODS, INC., 1989-INA-289 (Nov. 26, 1991) (en banc)**

Good faith efforts to recruit: timeliness: equitable relief for innocent employers who fail to recruit timely: the Board permits two equitable remedies: "First, an employer who provides a reasonable justification for its delay is given a second chance to recruit; the case is remanded. Second, an employer who provides a legitimate excuse, showing that it did not contribute to the delay, is granted certification; the C.O.'s denial is reversed." **LOMA LINDA FOODS, INC., 1989-INA-289 (Nov. 26, 1991) (en banc)**

Good faith efforts to recruit: delay: "an employer remains under the affirmative duty to commence review and make all reasonable attempts to contact applicants as soon as possible": the Board rejected Employer's argument that all that was necessary was that the contacts be completed within the 45 days allotted to complete review and evaluation of the candidates and report the results to the local job service: "A delay is likely to result in workers becoming disinterested in the opportunity. A delay without cause is also an indication of an employer's lack of a good faith effort to evaluate U.S. applicants. It is irrelevant that the record in this case does not show that the delay actually caused or contributed to an apparently qualified applicant's disinterest or unavailability. An employer's intent in creating an unjustified delay is equally irrelevant." **CREATIVE CABINET & STORE FIXTURE, CO., 1989-INA-181 (Jan. 24, 1990) (en banc)**

Travel expenses

Good faith efforts to recruit: although not going so far as to hold that an employer must pay for travel expenses of applicants to attend a personal interview, the Board

affirmed the denial of labor certification where " employer made no effort to try to reduce the impact of this requirement on the pool of job applicants": for example, employer could have weeded out unqualified applicants and invited the best applicants for interviews. **LIN & ASSOCIATES, INC., 1988-INA-7 (Apr. 14, 1989) (en banc)**

Good faith efforts to recruit: travel expenses of applicants: "Where an employer is recruiting for a professional position, not limited to the local area, and flatly refuses to pay expenses or interview over the phone, rejection of U.S. workers for failure to agree to an interview at the job site is unlawful; an employer has the affirmative obligation to mitigate the financial hardship involved in some way." **AMERICAN EXPORT TRADING CO., 1988-INA-220 (June 15, 1990) (en banc)**

Good faith efforts to recruit: travel expenses: "That an applicant refuses to pay his or her own expenses for the purpose of being interviewed cannot be the bases for rejecting an apparently qualified applicant. * * * Accordingly, where more than local recruitment efforts are required, yielding referrals of apparently qualified U.S. applicants, the employer must make efforts, either through telephone interviews of through personal interviews at the employer's expense, to determine the qualifications of the U.S. applicants, and to specify lawful, job-related reasons for rejecting each U.S. applicant." **HIPOINT DEVELOPMENT, INC., 1988-INA-340 (May 31, 1989) (en banc)**

Good faith efforts to recruit/Rejection of U.S. workers: travel expenses: where Employer rejected five applicants solely on the basis of failing to appear for an interview at their own expense, but the employer made no effort to determine the qualifications of the applicants, either through telephone interviews or by paying the applicants' traveling expenses, denial of labor certification was affirmed. **WARMTEX ENTERPRISES, 1988-INA-403 (June 28, 1989) (panel)** [see Warmtex Enterprises, 1988-INA-403 (Oct. 31, 1989) (en banc) (Order Denying Petition for En Banc Review),affirmed, Warmtex Enterprises v. Martin, 953 F.2d 1133 (9th Cir. 1992)]

Further recruitment: authority of CO to require: CO's obligation to explain why alternative publication is required

Good faith efforts to recruit: CO is authorized to require further recruitment if he or she finds that such recruitment could produce additional qualified job applicants; however, that authority is not unbridled. If CO directs advertising the job in a different publication, he or she should explain why the publication used by Employer failed to provide an adequate test of the market, and why advertising in the other publication would significantly add to that test...Employer used Electronic News for software engineer positions; CO directed Computerworld. **INTEL CORPORATION, 1987-INA-570 and 571 (Dec. 11, 1987) (en banc)**

Good faith efforts to recruit: "Where the CO requires advertising different from or in addition to that which the Employer has run, the CO must provide a reasonable explanation of why the employer's advertising and recruitment efforts were inadequate and show how the additional recruitment efforts would add to the test of

the labor market. See Intel Corp., 87-INA-570, 571 (December 11, 1987) (en banc); Pater Noster High School, 88-INA-131 (Oct. 17, 1988)." **ALPINE ELECTRONICS OF AMERICA, INC., 1988-INA-107 (Mar. 14, 1989) (en banc)**

Other efforts to locate and employ U.S. workers: the CO has the ultimate responsibility for determining the adequacy of the Employer's recruitment efforts and whether additional potential sources of U.S. workers may be available to fill the job. Section 656.21(b)(4) expressly authorizes the CO to require additional recruitment through colleges and universities. **ESSEX COUNTY COLLEGE, 1988-INA-147 (Feb. 1, 1989) (en banc)**

Good faith efforts to recruit: appropriate publication for advertisement: the employer advertised the position of chef in a national journal following the recommendation of the local job service but the CO ordered readvertisement in a local newspaper, but employer refused arguing that it was entitled to rely on the local job service's recommendation: the Board affirmed the CO's denial of labor certification: "'[T]he Certifying Officer is authorized to require further recruitment if he or she finds that such recruitment could produce additional qualified job applicants.' In re Intel Corp., 87 INA 570 (Dec. 11, 1987). However, 'the Certifying Officer should not require additional advertising or recruiting without offering a reasonable explanation of why the employer's advertisements and/or recruitment were inadequate and how the additional recruitment recommended by the Certifying Officer would be appropriate.' Id." In the instant case, the CO had explained that local recruitment would be more likely to produce applicants. **PEKING GOURMET, 1988-INA-323 (May 11, 1989) (en banc)**

Good faith efforts to recruit: additional recruitment: "[A] CO, under Section 656.24(b)(2)(i), may require an employer to conduct additional recruitment if he offers a reasonable explanation of why employer's recruitment was inadequate and how the additional recruitment efforts he is requiring would add to the test of the job market." Where, however, the CO, without any explanation required the employer to conduct a specific individual that the employer had never heard of, the Board held that the employer was justified in not carrying out such recruitment. **NATIONAL INSTITUTE FOR PETROLEUM AND ENERGY RESEARCH, 1988-INA-535 (Mar. 17, 1989) (en banc)**

Further recruitment: authority of CO to require union recruitment

Good faith efforts to recruit: CO's authority to require additional recruitment: union referrals to non-union employer: Where the CO did not allege that unions were customarily used as a recruitment source in the area or industry, such that the employer was required to contact unions for referrals pursuant to 20 C.F.R. § 656.21(b)(5), it is nonetheless reasonable for the CO to require recruitment through the union pursuant to the provisions of 20 C.F.R. § 656.24(b)(2)(i). In David Howard, the CO had documented that the ILGWU was a source of U.S. workers in the Employer's industry which had requested to refer workers to the non-union Employer for non-union jobs. **DAVID HOWARD OF CALIFORNIA, 1990-INA-241 (May 12, 1992) (en banc) [see also DAVID HOWARD OF CALIFORNIA, 1990-INA-241 (Sept. 21, 1992) (en banc, amendment) (correction to foonote 4)]**

MISCELLANEOUS

Exceptional ability in the performing arts: relevant population for comparison

Exceptional ability in the performing arts: comparison is with others in the field not with general population: "[I]n order to prove that an alien has exceptional ability in a performing art, an employer must prove that the alien has uncommon, extraordinary ability as compared with the other artists in the same field." Background of singing engagements in churches, high schools and a single Hotel ballroom was insufficient to establish exceptional ability: evidence of single engagement in Carnegie Hall was insufficient where no information about the performance was presented. **ALLIED CONCERT SERVICES, INC., 1988-INA-14 (Nov. 3, 1988) (en banc)**

Special handing cases: College or university teacher: alien only prospective candidate for degree

College or university teacher, special handling: requirement of showing of competitive recruitment and selection process and that alien was more qualified than US applicants: certification denied where alien was hired without a PhD and only later received that degree, but all US applicants either already had a PhD or would receive one prior to hire. **UTAH STATE UNIVERSITY, 1988-INA-115 (Apr. 5, 1989) (en banc)**

Special handing cases: College or university teacher: DOL regulations do not include elementary or secondary school teachers

Alien's qualifications: teachers: the special handling and "equally qualified" regulations at 20 C.F.R. 656.21a and 656.24 are limited in application to college or university teachers: despite apparent conflict between DOL's regulations and the plain language of the statute (see Mastroyanis v. U.S. Department of Labor, No. A 88-089 (D. AK 1989) (unpublished)), the Board held that it was not empowered to invalidate a DOL regulation: the Board also reviewed the regulatory history and found that the exclusion of teachers in elementary or secondary schools from the regulatory was not mere oversight. **DEARBORN PUBLIC SCHOOLS, 1991-INA-222 (Dec. 7, 1993) (en banc)**

Prior recruitment efforts: sufficiency of documentation

Prior recruitment efforts: sections 656.21(b) and 656.21(b)(1) explicitly require an employer to document its prior recruitment efforts: DOL is not required to accept employer's general statement merely because it comes from a "reputable employer": employer's statement that its corporate policy was to destroy records after a year and that the CO could obtain the required information from the recruiter improperly attempted to place the responsibility of on the CO to perform evidence-gathering tasks. **CITBANK SOUTH DAKOTA, 1988-INA-211 (Mar. 24, 1989) (en banc)**

Schedule B Waivers

Schedule B waiver: an employer's must establish at least one year of paid employment by the alien to remove the application for a household domestic service worker from Schedule B: Board adopts rule found in TAG, to wit: " Documentation of experience working in one's own home, for a parent, close relative, or someone in a similar familial-type relationship cannot be regarded as a bona fide employer-employee relationship and is not acceptable." [Editor's note: this ruling was reaffirmed in Marvin and Ilene Gleicher, 1993-INA-3 (Oct. 29, 1993) (en banc)]. **ROGER AND DENNY PHELPS, 1988-INA-214 (May 31, 1989) (en banc)**

Schedule B waiver: an employer's must establish at least one year of equivalent, full-time, paid employment by the alien through an employer other than the petitioning employer to remove the application for a household domestic service worker from Schedule B: " It is not knowledge of the job, but assurance an alien really seeks permanent status to remain in such a job, which the one-year experience requirement, necessary to justify an exception to Schedule B, seeks to foster." **MARVIN AND ILENE GLEICHER, 1993-INA-3 (Oct. 29, 1993) (en banc)**

Professional responsibility: maintaining willful ignorance about details of application

Professional responsibility: lay representative suspended for six months where he was found to have been recklessly negligent in maintaining a willful ignorance about of the details of the application: lay representative, relying on the representations of a third party intermediary, had submitted documents to the DOL and the Board purportedly on behalf of the employer when in reality the employer had been dead for several years: although no evidence that the representative had an intent to defraud the government, circumstances existed that should have alerted the representative to the likelihood that the application for labor certification was not being pursued in good faith. **TADEUSZ KUCHARSKI, in re Judicial Inquiry regarding MIROSLAW KUSMIREK, 2000-INA-116 (Sept. 18, 2002) (29 CFR 18.36 proceeding)**

PREVAILING WAGE

Employer's burden of proof

Prevailing wage: burden of proof: the general rule that is "[a]n employer seeking to challenge a prevailing wage determination . . . bears the burden of establishing both that the CO's determination is in error and that the employer's wage offer is at or above the correct prevailing wage.": [Editor's note: see El Rio Grande, 1998-INA-133 (Feb. 4, 2000)(en banc) at n.6 regarding the impact of GAL 2-98 on the PPX ruling.]. **PPX ENTERPRISES, INC., 1988-INA-25 (May 31, 1989) (en banc)**

CO's responsibility to explain determinations and to provide notice of burden of proof

Prevailing wage: remand for further proceedings where CO did not explain why Employer's survey was insufficient to rebut EDD prevailing wage determination: Board quoted *Shuk Yee Chan v. Regional Manpower Administrator, U.S. DOL*, 521 F.2d 592, 595 (7th Cir. 1975), to wit: "The ''perfunctory exercise of acquiescence in the statistical compilations of the state employment service . . . ' cannot be the basis for the denial of certification." **LAS CAZUELAS NUEVAS, 1987-INA-646 (Dec. 29, 1988) (en banc)**

Prevailing wage: inadequate notice of employer's burden of proof: "[B]y only instructing the Employer to submit countervailing evidence that the prevailing wage determination was in error, and by not instructing that the Employer's countervailing evidence must establish that its wage offer is within the prevailing wage, the CO

provided inadequate notice of the Employer's burden of proof on rebuttal." Case remanded. **PPX ENTERPRISES, INC., 1988-INA-25 (May 31, 1989) (en banc)**

Equitable considerations

Prevailing wage: no exception based on equities of the case: elderly man wanted to hire his grand nephew for the position of live-in companion, but could not afford prevailing wage. **EMIL SZTYKIEL, 1988-INA-67 (Mar. 1, 1989) (en banc)**

Fringe Benefits

Prevailing wage: fringe benefits: the Board concludes that "the Act mandates that the Certifying Officer permit an employer to submit evidence of fringe benefits if it wishes to show that its offer of a basic hourly rate of pay is significantly enhanced by fringe benefits available to its workers at the time of hire. . . . [W]hen an Employer relies on fringe benefits in its wage offer, it bears a heavy burden to demonstrate to the Certifying Officer the fairness and bona fides of its proposal. As was stated by a panel of this Board in Peddinghaus Corp., 88-INA-79 (July 6, 1988): . . . at a minimum the Employer must establish the value of its fringe benefits and show that its fringe benefits are not common to the comparable jobs upon which the prevailing wage rate is based. Moreover, if the Employer is relying on unique fringe benefits, then these fringe benefits must be disclosed in its advertisements and posted notices." **KIDS "R" US, 1989-INA-311, et al (Jan. 28, 1991) (en banc)**

Sufficiency of CO's survey: true arithmetic mean

Prevailing wage: rebuttal: a CO's wage survey is not improperly skewed because one of the employers surveyed had a large percentage of employees paid at the highest rate in the survey: "We agree with the CO that the prevailing wage is the average rate paid to workers similarly employed in the area of intended employment. Section 656.40(a)(2)(I). We also agree that employers are looked at as a whole, and that to throw out wages that are high or low would not arrive at a true arithmetic mean." **HUNTER HOLMES McGUIRE VETERANS AFFAIRS MEDICAL CENTER, 1994-INA-210 (Oct. 7, 1996) (en banc)**

Posture of case if challenge fails

Prevailing wage: posture of case if challenge fails: "Section 656.21(e) requires a local job service office to advise an employer that refusal to raise the wage offered to the prevailing level is ground for denying the application, and that if the denial becomes final, the application will have to be refiled at the local office as a new application. The regulation contemplates that if an employer contests a prevailing wage determination but does not prevail, he will have to go back to the beginning of the process. See, also, § 656.29(a)." **RICHARD CLARKE ASSOCIATES, 1990-INA-80 (May 13, 1992) (en banc)**

Similarly employed: nature of employer's business: charitable organizations

Prevailing wage: meaning of the term "similarly employed": "the term 'similarly employed' does not refer to the nature of the Employer's business as such; on the contrary, it must be determined on the basis of similarity of the skills and knowledge required for the performance of the job offered." The Board also held that the lack of financial ability of a charitable non-profit institution to pay the prevailing wage was not a ground to permit an employer to pay substandard wages. [Editor's Note: *Hathaway* was modified by 63 Fed. Reg. 13755 (Mar. 20, 1998) and 61 Fed. Reg. 17610 (Apr. 22, 1996). In Hunter Holmes McGuire VA Medical Center, 94-INA-210 (BALCA Oct. 7, 1996)(en banc), the Board observed that the ETA's "use of notice and comment rule making to carve out an exception to the ruling of *Hathaway Children's Services* based on policy considerations is the appropriate method for an agency to change the language, scope, or application of a regulation."]. **HATHAWAY CHILDRENS SERVICES, 1991-INA-388 (Feb. 4, 1994) (en banc)**

Similarly employed: Federal pay schedule

Prevailing wage: meaning of the term "similarly employed": under the Federal pay system, a VA hospital was limited to offering a salary that is approximately 20 percent lower than the prevailing wage for anesthesiologists: the Board held that "the labor certification regulations do not provide an exception, either express or implied, for a Federal wage schedule and therefore, the logic of Hathaway Children's Services, is also applicable. . ." In the Board had held that the term "similarly employed" does not refer to the nature of the Employer's business but is based on the basis of similarity of the skills and knowledge required for the performance of the job offered. The Board also held in Hathaway that the lack of financial ability of a charitable non-profit institution to pay the prevailing wage was not a ground to permit an employer to pay substandard wages. **HUNTER HOLMES McGUIRE VETERANS AFFAIRS MEDICAL CENTER, 1994-INA-210 (Oct. 7, 1996) (en banc)**

Similarly employed: nature of employers being compared: historically black colleges

Prevailing wage: historically black college: "It is clear that it is not only the job titles, but the nature of the business or institution where the jobs are located -- for example, public or private, secular or religious, profit or non-profit, multi-national corporation or individual proprietor-ship -- which must be evaluated in determining whether the jobs are "substantially comparable." [Editor's note: Tuskegee was overruled in *Hathaway Childrens Services*, 1991-INA-388 (Feb. 4, 1994) (en banc). *Hathaway* in turn was modified by 63 Fed. Reg. 13755 (Mar. 20, 1998)]. **TUSKEGEE UNIVERSITY, 1987-INA-561 (Feb. 23, 1988) (en banc)**

Similarly employed: sufficiency of employer's survey: area of intended employment

Prevailing wage: because the regulation requires, at least in the first instance, that the prevailing wage must be based on the wages of similarly employed workers in the area of intended employment, the CO correctly rejected a survey presented by the employer that spanned several states. **WIRTZ MANUFACTURING COMPANY, 1988-INA-63 (Jan. 13, 1989) (en banc)**

Similarly employed: sufficiency of employer's survey: limitation to like employers

Prevailing wage: rebuttal: survey limited to other VA hospitals: "[T]he Employer's wage survey is simply the statutory rate paid to Anesthesiologists at 12 VA hospitals. We agree with the CO that this survey is inadequate because these are not 12 separate employers, but are the same employer paying the same wage." **HUNTER HOLMES McGUIRE VETERANS AFFAIRS MEDICAL CENTER, 1994-INA-210 (Oct. 7, 1996) (en banc)**

DBA wage determinations

Prevailing wage: SCA and DBA: Board rejected employer's argument that it was not subject to the DBA and therefore was not required to offer the DBA wage rate: " The issue is not whether the employer is subject to the provisions of the Davis-Bacon Act, but whether the occupation is subject to a wage determination under the Davis-Bacon Act." **STANDARD DRY WALL, 1988-INA-99 (May 24, 1988) (en banc)**

Prevailing wage: DBA wages: Employer argues that its job offer wa exempt from a Davis-Bacon wage determination because the Employer's business is landscaping, not construction: The Board reject the argument, finding that landscaping is within the ambit of the DBA regulations, and that "'[t]he issue is not whether the employer is subject to the provisions of the Davis-Bacon Act, but whether the occupation is subject to a wage determination under the Davis-Bacon Act.' Standard Dry Wall, 88-INA-99, slip op. at 3, (May 24, 1988) (en banc) (emphasis in original)": Board held that the "focus is not on the nature of the Employer's business, but rather whether the job offered, that of a mason, is an occupation subject to a Davis-Bacon wage determination. **BRAD BARTHOLOMAY JR. LANDSCAPE DESIGN & CONSULTATION, 1988-INA-332 (May 31, 1989)**

Prevailing wage: DBA occupation: evidentiary burdens on employer and CO: "The burden of persuasion rests with the Employer seeking to challenge the CO's prevailing wage determination. However, placement of this burden on the Employer presumes that the Employer knows the source and basis for the CO's determination. . . . It is unreasonable to require that an employer rebut a wage rate of ambiguous or unknown origin, or one which is not easily accessible. . . . Consequently, in those cases where the wage rate is in dispute, it is incumbent upon the CO to provide a copy of the relevant portions of his or her source for the prevailing wage determination with the NOF. * * * In addition, if an employer challenges the CO's Davis-Bacon wage determination in rebuttal, then the CO must provide a reasonable explanation of how the prevailing wage was determined from the Davis-Bacon schedule, and why it was appropriate under the circumstances." **JOHN LEHNE & SONS, 1989-INA-267 and 313 (May 1, 1992) (en banc)**

Prevailing wage: DBA occupation: employer's burden of proof: "An employer seeking to challenge a prevailing wage determination generally bears the burden of establishing both that the CO's determination is in error and that the employer's wage offer is at or above the correct prevailing wage. PPX Enterprises, Inc., 88-INA-25 (May 31, 1989) (en banc). Because the occupation of painter is covered by

the Davis-Bacon schedule, the prevailing wage rate must be derived from that schedule and cannot be assessed from an independent wage survey conducted by the Employer. * * * However, the Employer is not precluded from conducting a survey which may indicate an error in the classification used by the CO in the Davis-Bacon wage assessment." **JOHN LEHNE & SONS, 1989-INA-267 and 313 (May 1, 1992) (en banc)**

SCA wage determinations

Prevailing wage: SCA wage determinations: standard of review: BALCA looks to thee ARB and its predecessors (the WAB, BSCA and Secretarial review decisions), and well as the federal courts for guidance on the legal principles involved in SCA wage review: those entities afford great deference to the Wage and Hour Administrator's specific methodology in making wage determinations under the SCA. **EL RIO GRANDE, 1998-INA-133 (Feb. 4, 2000) (en banc)**

Prevailing wage: SCA wage determinations: burdens of proof: BALCA finds that John Lehne & Sons, 1989-INA-267 and 313 (May 1, 1992)(en banc) is applicable SCA as well as DBA wage determination disputes, to wit: "[t]he burden of persuasion rests with the Employer seeking to challenge the CO's prevailing wage determination. However, placement of this burden on the Employer presumes that the Employer knows the source and basis for the CO's determination." In addition, the Board held that, where a wage determination is in dispute, a CO must "provide a copy of the relevant portions of his or her source for the prevailing wage determination with the NOF" because "[i]t is unreasonable to require that an employer rebut a wage rate of ambiguous or unknown origin, or one which is not easily accessible." In Lehne, the Board also held that "if an employer challenges the CO's Davis-Bacon wage determination in rebuttal, then the CO must provide a reasonable explanation of how the prevailing wage was determined from the Davis-Bacon schedule, and why it was appropriate under the circumstances." In regard to the employer's burden, the Board noted the general rule that "[a]n employer seeking to challenge a prevailing wage determination . . . bears the burden of establishing both that the CO's determination is in error and that the employer's wage offer is at or above the correct prevailing wage. PPX Enterprises, Inc., [19]88-INA-25 (May 31, 1989)(en banc)." The Board held that where the occupation "is covered by the Davis-Bacon schedule, the prevailing wage rate must be derived from that schedule and cannot be assessed from an independent wage survey conducted by the Employer." Nonetheless, the Board held that an employer "is not precluded from conducting a survey which may indicate an error in the classification used by the CO in the Davis-Bacon wage assessment." Finally, the Board held that, in addition to demonstrating that the CO's wage determination is in error, the Employer is required to establish that its wage offer is at or above the correct prevailing wage. **EL RIO GRANDE, 1998-INA-133 (Feb. 4, 2000) (en banc)**

Prevailing wage: SCA wage determinations: classification of job: BALCA is only requiring a ". . .reasonably good fit -- not necessarily a perfect fit." In the instant case, it was reasonable for the CO to have classified a cook specializing in foreign foods to the SCA Cook II definition. **EL RIO GRANDE, 1998-INA-133 (Feb. 4, 2000) (en banc)**

Prevailing wage: SCA wage determinations: slotting: " Slotting is provided for in 29 CFR § 4.51(c) as a means of arriving at a salary when there is insufficient data to make an accurate wage determination for those workers. The process of slotting

involves examining data from related occupations with a comparable skill level to arrive at a wage for the occupation for which the data is insufficient." "[W]here slotting is used for a SCA wage determination, and Employer challenges the SCA wage determination, the CO must provide information on why slotting was used, which positions were compared, and why the comparison was reasonable. Once the CO does so, however, the ultimate burden of proof remains on an employer challenging a SCA prevailing wage determination to establish that the CO's wage determination is in error, and that it its wage offer is at or above the correct prevailing wage." **EL RIO GRANDE, 1998-INA-133 (Feb. 4, 2000) (en banc)**

Prevailing wage: SCA wage determinations: use of slotting: Board holds that it does not find the "slotting procedure to be inconsistent with the statutory purpose of protecting the wages and working conditions of U.S. workers similarly employed. By its own terms, section 4.51 (c) requires "a comparison of equivalent or similar job duty and skill characteristics between the classifications studied ...." **EL RIO GRANDE, 1998-INA-133 (July 28, 2000) (recon en banc)**

Scope of BALCA review: BALCA has jurisdiction to review SCA wage determinations made in the context of applications for alien labor certification under 20 C.F.R. Part 656. **EL RIO GRANDE, 1998-INA-133 (Feb. 4, 2000) (en banc)**

PROCEDURE

Precedent: Pre-BALCA Decisions

Procedure: Pre-BALCA decisions are not binding. **MMMATS, INC., 1987-INA-540 (Nov. 24, 1987) (en banc)**

Procedure: Pre-BALCA decisions are not binding. **VETERANS ADMINISTRATION MEDICAL CENTER, 1988-INA-70 (Dec. 21, 1988) (en banc)**

Stare decisis: Board declines to overturn established Board ruling in the absence of a compelling justification: case had been on the books for over 10 years and neither Congress nor DOL had made any effort by law or regulation to alter the decision. [Editor's note: see also Marvin and Ilene Gleicher, 1993-INA-3 (Oct. 29, 1993) (en banc) (Board declined to overrule holding relating to Schedule B waivers in part because the decision had been on the books for four years and there had been no change in the applicable regulations). **CRAWFORD & SONS, 2001-INA-121 (Jan, 9, 2004) (en banc)**

Request for BALCA review, failure to state grounds

Procedure: failure to state grounds for appeal: Where an employer failed to set out any grounds for the request for review, the appeal will be dismissed. **NORTH AMERICAN PRINTING INK CO., 1988-INA-42 (Mar. 31, 1988) (en banc)**

Procedure: failure to state grounds for appeal: Employer's mere assertions in its request for review that "the Employer has substantiated the necessity of the requirements set forth to fill the position in question and has met all the requirements established by the Department of Labor for Alien Labor Certification," does not constitute "particular grounds," pursuant to § 656.26. **BROOKS ROOFING CO., INC., 1988-INA-116 (May 19, 1989) (en banc)**

Request for Board review: failure to state grounds for review: " The timely filing of the brief cures any error arising from the failure to state grounds for the appeal in [an employer's] request for review." **MALONE & ASSOCIATES, 1990-INA-360 (July 16, 1991) (en banc)**

Request for Board review: failure to specify grounds: "The request for review in the instant case merely states that "[t]he grounds, arguments and considerations advanced in the August 18th rebuttal are hereby adopted and incorporated by

reference." Such statements are tantamount to a failure to set forth specific grounds for review." **MIRIAM R. WITLIN, 1994-INA-23 and 52 (Apr. 7, 1994) (en banc)**

Request for Board review: failure to specify grounds: where the request for review merely stated that "[t]he grounds, arguments and considerations advanced in the August 18th Rebuttal are hereby adopted and incorporated by reference" the Board found that such was tantamount to a failure to set forth specific grounds for review as required by regulation at 20 C.F.R. § 656.26(b)(1). "[A] general incorporation by reference of a document issued prior to the final determination is not sufficient to set forth specific grounds for review of the final determination itself. 20 C.F.R. Part 656.26(b)(1)." **MIRIAM R. WITLIN, 1994-INA-23 and 52 (Nov. 29, 1994) (recon en banc)**

Request for BALCA review, timeliness

Request for BALCA review: OALJ rule of practice at 29 CFR § 18.4(c)(3) does not apply to add five mailing days because the applicable regulation at 20 CFR § 656.21(b)(1) provides a rule of special application that sets the time for appealing at " within 35 calendar days of the date of the determination, that is, by the date specified on the Final Determination form," see 29 CFR § 18.1(a) (rule of special application controls). **DELMAR FAMILY DENTAL CENTER, 1988-INA-132 (Sept. 26, 1988) (en banc)**

Request for BALCA review, standing of the alien

Request for en banc review: en banc review will not be granted when it is only the alien who is requesting review: "[A]n appeal cannot be maintained when Employer has not joined in the petition." **HUB TRUCK RENTAL, 1991-INA-262 (Jan. 6, 1992) (en banc)**

Request for BALCA review, request for extension of time

Request for Board review: standard for request for extension of time: good cause (previously, the Board used an extraordinary circumstances standard). **MALONE & ASSOCIATES, 1990-INA-360 (July 16, 1991) (en banc)**

Request for BALCA review, motion for reconsideration is not a request for Board review

Procedure: motion for reconsideration is not a request for BALCA review: the CO was forwarding all cases with motions for reconsideration to BALCA on the theory that only BALCA could review a Final Determination: the Board rejected this theory noting that the Board had held that COs may reconsider their Final Determinations and that under the facts of the instant cases it was clear that neither employer actually was seeking Board review. **SEQUEL CONCEPTS, INC., 1992-INA-421 (Oct. 29, 1993) (en banc)**

En Banc Procedure

Procedure: Order Granting Motion for Extension of Time in en banc proceeding issued where at least 4 members voted in favor of granting. **WARMTEX ENTERPRISES, 1988-INA-403 (Aug. 17, 1989) (en banc)**

Procedure: denial of petition for en banc review. **WAILUA ASSOCIATES, 1988-INA-533 (Aug. 25, 1989) (en banc)**

Procedure: failure to submit statement of intent to proceed: where the employer failed to response to the Board's notice of en banc review requiring a statement of intent to proceed the en banc proceeding was dismissed. **MANZUR KHALID, M.D., 1991-INA-7 (Apr. 9, 1992) (en banc)**

Procedure: failure to submit statement of intent to proceed: in one case consolidated for en banc review, one employer failed to response to the Board's notice of en banc review requiring a statement of intent to proceed: accordingly, this case was dismissed from the en banc proceeding. **VITO VOLPE LANDSCAPING, 1991-INA-300, 1991-INA-349 (Oct. 28, 1993) (en banc)**

Procedure: voting: where the Board was equally divided as to the resolution of the matter, the CO's denial of labor certification was affirmed: Board had six members at the time. **WALTER LANDOR ASSOCIATES, 1988-ina-111 (May 31, 1989) (en banc)**

REBUTTAL

Employer must perfect record sufficient to grant certification at rebuttal stage

Rebuttal: "Under the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." **CARLOS UY III, 1997-INA-304 (Mar. 3, 1999) (en banc)**

Timeliness - discretion of CO to refuse to consider untimely rebuttal

Rebuttal: timeliness: CO did not abuse his discretion in refusing to consider an untimely rebuttal. **AUGUSTA BAKERY, 1988-INA-297 (Jan. 12, 1989) (en banc)**

Timeliness - sufficiency of notice of due date

Rebuttal: timeliness: CO cannot find rebuttal untimely when he failed to provide employer notice of due date as required by the regulations. **J. MICHAEL & PATRICIA SOLAR, 1988-INA-56 (Apr. 6, 1989) (en banc)**

Rebuttal: timeliness: where it appeared that the CO's staff may have stated or implied to the Employer that the results of its recent recruitment could be filed subsequent to the original rebuttal deadline, the Board remanded the case "to the CO to determine whether the Employer, directly or by implication, was given an extension of time in which to file further rebuttal evidence or otherwise was misled into believing that it could report the results of its post-NOF recruitment when completed." **MODGRAPH, INC., 1988-INA-287 (Dec. 29, 1988) (en banc)**

Timeliness - equitable tolling

Rebuttal: timeliness: deadline is non-jurisdictional and may be waived in appropriate circumstances: ends of justice will not be served by allowing Employer to suffer the consequences of its attorney's negligence: " Notwithstanding the outcome of this case, we note that it is not the intent of this Board to ignore or disregard the filing deadlines contained throughout Part 656 of the regulations. Rather, the holding in this case will be limited to those rare instances in which failing to toll regulatory deadlines would result in manifest injustice. Editor's note: Bloom was strictly construed in *Park Woodworking, Inc.*, 1990-INA-93 (Jan. 29, 1992) (en banc)]. **MADELINE S. BLOOM, 1988-INA-152 (Oct. 13, 1989) (en banc)**

Rebuttal: timeliness: Board rejects assertion that Bloom decision is inconsistent with Augusta Bakery, 1988 INA 297 (January 12, 1989) (en banc): Board clarifies that abuse of discretion standard is not inconsistent with manifest injustice standard: "[A] CO's refusal to waive or extend a nonjurisdictional regulatory deadline generally will not constitute an abuse of discretion. ...When, however, as in *Bloom*, it is apparent that the CO's refusal to waive or extend a nonjurisdictional regulatory deadline will result in manifest injustice, a determination that the CO has abused his or her discretion is appropriate." **MADELINE S. BLOOM, 1988-INA-152 (Dec. 20, 1989) (en banc den recon)** [see also **MADELINE S. BLOOM, 1988-INA-152 (Jan. 3, 1990)(en banc den recon erratum)**

Rebuttal: timeliness: equitable relief due to manifest injustice: Madeleine S. Bloom, 88-INA-152 (Oct. 13, 1989) (en banc), recon. den. (Dec. 20, 1990) (per curiam). standard strictly construed: equitable relief not mandated where there is no specially egregious factor in the case, such as the deceptive, defaulting attorney in Bloom. An apparent misconstruction of the NOF is not sufficient. Also, the Board observed that in Bloom if the rebuttal had been timely filed a grant of certification was virtually inevitable. **PARK WOODWORKING, INC., 1990-INA-93 (Jan. 29, 1992) (en banc)**

Due process: impossibility of completing rebuttal during 45 day period: where employer was instructed to show its contact of colleges and universities for recruitment, which the employer did during the rebuttal period, but the CO denied certification because employer's submission did not show the results of the contact, the Board remanded the case because the contacts would not have been responded to during the rebuttal period. **AL-GHAZALI SCHOOL, 1988-INA-347 (May 31, 1989) (en banc)**

Rebuttal: failure to rebut: manifest injustice standard for equitable relief: the Board found the employer's failure to rebut a supplementary NOF was excusable where the employer had timely filed rebuttal to the first NOF, the supplementary NOF was obscure as to the nature to the error, the error was de minimis (miscalculation of the overtime rate by approximately three cents), the high probability that certification would have been granted had the overtime rate been properly calculated, the employer's evident good faith in recruitment shown by offering a wage significantly higher than the prevailing wage, and the fact that there were no U.S. applicants for the job despite the high wage offer. The Board found inconsequential the CO's argument that this case was distinguishable from Madeleine Bloom insofar as Bloom involved untimely rebuttal whereas the instant case involved failure to rebut. **BUENA VISTA LANDSCAPE, 1990-INA-392 (July 9, 1991) (en banc)**

Offer to readvertise if rebuttal not accepted

Rebuttal: offer to readvertise if rebuttal is not accepted: : "The holding in A. Smile[, 1989-INA-1 (Mar. 6, 1990)], 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." [Editor's note: *See also the companion case in* ***Plant Adoption Center***, 1994-INA-374 (Dec. 12, 1997)(*A. Smile* did not apply because employer sought to add a restrictive requirement after finding U.S. applicants who were qualified)]. **RONALD J. O'MARA, 1996-INA-113 (Dec. 11, 1997) (en banc)**

RECONSIDERATION BY BALCA

Authority to reconsider

Reconsideration by BALCA: BALCA has the inherent authority to reconsider its decisions. **EDELWEISS MANUFACTURING COMPANY, INC., 1987-INA-562 (Nov. 10, 1988)** (en banc den recon)

Standard for determination of whether to reconsider

Reconsideration by BALCA: en banc decision: "Whether to reconsider in a particular case is left to the Board's discretion. Edelweiss Manufacturing Co., Inc., 1987-INA-562 (Nov. 10, 1988) (en banc)." **EL RIO GRANDE, 1998-INA-133 (July 28, 2000) (recon en banc)**

Reconsideration by BALCA: the decision of BALCA whether to reconsider a decision is a matter of discretion: BALCA declined to reconsider where Employer pointed out no flaw in the judicial process by which the Board reached its decision and did not allege that the Board overlooked some important fact. **EDELWEISS MANUFACTURING COMPANY, INC., 1987-INA-562 (Nov. 10, 1988)** (en banc den recon)

Denial where motion merely reargues issues

Reconsideration by BALCA: En Banc decision: where a motion for reconsideration only reargues an issue which has already been fully considered, the motion will be denied. **THE STANDARD OIL COMPANY, 1988-INA-77 (Dec. 20, 1989) (en banc den. recon)**

Reconsideration by BALCA: en banc decision: summary denial where Board already considered and rejected employer's arguments. **MASTER VIDEO PRODUCTIONS, INC.,1988-INA-419 (May 31, 1989) (en banc den recon)**

Evidence or argument not previously presented

Reconsideration by BALCA: en banc decision: Board declines to reconsider where motion based on facts and evidence which were not part of the record upon which the denial of certification was made. **ATLANTIC SALES, INCORPORATED, 1988-INA-349 (Aug. 22, 1989) (en banc den recon)**

Reconsideration by BALCA: en banc decision: issues not raised earlier: where the CO raised an issue that had not preserved in the Final Determination or briefed before the Board, the Board held that it would not entertain a motion for reconsideration on

that issue. A dissent argued that the majority opinion had introduced the issue, and therefore the motion for reconsideration should have been entertained. **CANADIAN NATIONAL RAILWAY CO., 1990-INA-66 (Nov. 20, 1992) (en banc den recon)**

Time period for filing

Reconsideration of en banc decision: applying FRCP 59(e) as made applicable by 29 CFR § 18.1(a) the Board held that "any motion to reconsider a decision and order, as opposed to a petition for en banc review, must be served within 10 days of issuance of the decision and order". **LIGNOMAT USA, LTD., 1988-INA-276 (Jan. 24, 1990) (en banc den recon)**

Reconsideration by BALCA: en banc decision: timeliness: where the CO filed a motion for reconsideration one day outside the time period for filing such a motion (adding five days under section 18.4(a) because the decision was served by mail), the Board found that the motion was not timely filed. **CANADIAN NATIONAL RAILWAY CO., 1990-INA-66 (Nov. 20, 1992) (en banc den recon)**

Standing of alien

Reconsideration by BALCA: en banc decision: standing of alien: the Board will not entertain an motion for reconsideration of an en banc decision filed only by the Alien. See 20 C.F.R. §656.26(a)(2) (1988). **K SUPER KQ-1540 A.M., 1988-INA-397 (May 31, 1989) (en banc den recon)**

RECONSIDERATION BY THE CO

Requirement that CO rule on motions to reconsider

Reconsideration by the CO: where an employer timely files a motion for reconsideration the CO must formally rule on the motion: a hand written memo to the file documenting a telephone call by a member of the Certifying Officer's staff is insufficient. **CHARLES SEROUYA & SON, INC., 1988-INA-261 (Mar. 14, 1989) (en banc)**

Reconsideration by the CO: CO's have the inherent authority to reconsider a Final Determination prior to it becoming final (35 days after issuance): " This does not mean that the CO must reconsider a denial of certification whenever such a motion is filed. Nor must the CO accept the validity of evidence submitted on reconsideration and change the outcome of the case. But at least where, as here, the motion is grounded in allegations of oversight, omission or inadvertence by the CO which, if credible, would cast doubt upon the correctness of the Final Determination, and the Employer had no previous opportunity to argue its position or present evidence in support of its position, the CO should reconsider his or her decision." (footnote omitted). In the instant case, evidence that a rebuttal was timely filed obviously could not have been presented prior to the time that the employer was informed that the CO considered the rebuttal to have been untimely. Remand. **HARRY TANCREDI, 1988-INA-441 (Dec. 1, 1988) (en banc)**

Reconsideration by the CO: "[T]he CO is required to state clearly whether he has denied an employer's request for reconsideration, Harry Tancredi, 88-INA-441 (Dec. 1, 1988) (en banc), or has granted the request and, upon reconsideration, affirmed his denial of certification. But we find no requirement of a statement of reasons for the denial of a motion for reconsideration which merely lets a prior denial stand." **RICHARD CLARKE ASSOCIATES, 1990-INA-80 (May 13, 1992) (en banc)**

Reconsideration by the CO: remand where the CO did not explain the grounds for denying the motion for reconsideration: [Editor's note: this decision was limited to its facts and is probably implicitly overruled by Richard Clarke Associates, 1990-INA-80 (May 13, 1992) (en banc)]. **LINEN STAR, 1990-INA-438 (Dec. 7, 1990) (en banc)**

Reconsideration by the CO: remand to CO to consider motion for reconsideration that contained new evidence: [Editor's note: more recent BALCA authority on motions to reconsider is found in *Richard Clarke Associates*, 90-INA-80 (May 13, 1992)(en banc)] **KINGS COUNTY HOSPITAL CENTER, 1987-INA-715 (May 13, 1988) (en banc)**

Circumstances justifying denial

Reconsideration by the CO: CO did not abuse his discretion in denying a second extension to file rebuttal where it the request was received only the day before the extended rebuttal deadline. **POLYTEX FIBERS CORPORATION, 1987-INA-597 (Feb. 7, 1989) (en banc**)

REJECTION OF U.S. WORKERS

General principles

Particular grounds

General principles

Rejection of U.S. workers: general principles: "This Board has held that where the job requirements stated on the application are not found to be unduly restrictive, an applicant who does not meet the requirements is not qualified for the job. In the Matter of Concurrent Computer Corp., 88-INA-76 (August 19, 1988); In the Matter of Hong Kong Royale Restaurant, 88-INA-60 (Oct. 17, 1988). The converse is also true. An applicant who meets those requirements is qualified for the job in terms of his or her education, training and experience. In the Matter of Fritz Garage, 88-INA-98 (August 17, 1988); In the Matter of Vanguard Jewelry Corp. 88-INA-273 (Sept. 20, 1988) In particular, a job applicant may not be rejected for failure to satisfy job requirements which were not listed on the application form. In the Matter of D.N.A., Inc., 88-INA-18 (May 9, 1988). Cases may arise where certain job requirements may be implied, and treated as if they had been stated in terms, on the theory that the requirements were not stated precisely because they are obvious and likely to be met by any one who would apply for the job. Proficiency in English language

furnishes an example." **VETERANS ADMINISTRATION MEDICAL CENTER, 1988-INA-70 (Dec. 21, 1988) (en banc)**

Burden of proof

Rejection of U.S. workers: "the burden of proof, in the two-fold sense of burdens of production and persuasion, is on the employer...." **CATHAY CARPET MILLS, INC., 1987-INA-161 (Dec. 7, 1988) (en banc)**

Sufficiency of evidence

Rejection of U.S. workers: An employer's bare assertion, in the absence of supporting reasons or evidence, that a U.S. applicant was not interested in the position is insufficient to prove rejection for a lawful job-related reason. **CUSTOM CARD d/b/a CUSTOM PLASTIC CARD COMPANY, 1988-INA-212 (Mar. 16, 1989) (en banc)**

Rejection of U.S. workers: vague and indefinite rationale for rejection: employer stated that it rejected an applicant for poor communication skills, but did not offer an explanation for that conclusion until the request for BALCA review: the explanation was untimely and, reviewing the information before the CO, the Board found that employer had failed to explain to the CO what it meant by "poor communication skills," or what relation poor communication skills bears to the performance of the job duties. **HUGHES AIRCRAFT COMPANY, 1988-INA-325 (Mar. 21, 1989) (en banc)**

Rejection of U.S. workers: specificity requirement: the employer's proffered "explanation" for the rejection of the two U.S. applicants "No import/export experience, only clerical." and "Documentation clerk exp." were found to be cursory notations that do not meet the "specificity" requirement of section 656.21(j)(1)(iv). **U.S.A. MANUFACTURING, INC., 1988-INA-373 (May 1, 1989) (en banc)**

"As qualified" standard

Rejection of U.S. workers: US worker need not be as qualified as the alien, but only needs to meet the minimum requirements specified in the labor certification application. **EXXON CHEMICAL COMPANY, 1987-INA-615 (July 18, 1988) (en banc)**

Rejection of U.S. workers: although an employer understandably may want to employ a better qualified alien, US immigration law requires that jobs go to US workers who meet an employer's minimum qualifications. **VETERANS ADMINISTRATION MEDICAL CENTER, 1988-INA-70 (Dec. 21, 1988) (en banc)**

Rejection of U.S. workers: An employer may not reject a U.S. worker because the alien is more qualified. **PAPERLERA DEL PLATA, INC., 1990-INA-53 (Jan. 31, 1992) (en banc)**

CO's obligation to state why employer's rejection of a U.S. worker was unlawful and to raise the issue timely

Rejection of U.S. workers: reversal where CO stated no ground and presented no documentation supporting summary rejections Employer's rebuttal that one applicant was not qualified and another applicant was not interested. **NEW CONSUMER PRODUCTS, 1987-INA-706 (Oct. 18, 1988) (en banc)**

Rejection of U.S. workers: Where employer listed special course work in its statement of job requirements and the CO did not contest those requirements as unduly restrictive until the Final Determination, the CO's raising of the issue was untimely (especially since the employer consistently stated these requirements throughout the application process). Thus, the employer lawfully rejected US workers who did not have the required coursework. The Board also rejected the CO's finding that the applicants could perform the job with a reasonable period of training because the CO provided no explanation for that conclusion. **CONCURRENT COMPUTER CORP., 1988-INA-76 (Aug. 19, 1988) (en banc)**

Rejection of U.S. workers: the Board overruled the CO's finding that US workers were qualified where the CO failed to address the reasons given by the employer in both the recruitment report and the rebuttal, and had failed to take into consideration Employer's unchallenged educational and experience requirements. **LEE & CHIU DESIGN GROUP, 1988-INA-328 (Dec. 20, 1988) (en banc)**

U.S. applicant who fails to meet the employer's unchallenged job requirement may be rejected

Rejection of U.S. workers: applicant not qualified: "Where an employer's job requirements are not found to be unduly restrictive, a U.S. applicant who does not meet all of the stated job requirements is not qualified for the position, and may be lawfully rejected. In Re Adry-Mart, Inc., 88 INA 243 (Feb. 1, 1989). **EUCLID CHEMICAL, CO., 1988-INA-398 (May 4, 1989) (en banc)**

Rejection of U.S. workers: "Since the U.S. applicant does not meet the Employer's stated and unchallenged job requirements, the Employer did not reject the U.S. applicant for other than lawful, job-related reasons...." Employer's rebuttal successfully established the difference between a field service engineer and a bench technician, the later of which the U.S. worker had. **DATAGATE, INC., 1987-INA-582 (Feb. 17, 1989) (en banc)**

Rejection of U.S. workers: where the CO never questioned the validity of the minimum requirements for the job, the employer was entitled to rely on those minimum requirements as a yard stick to measure the qualifications of any applicant for the position: an employer is under no obligation to interview workers whose response to the advertisement fails to show that he or she meets those minimum requirements " in the absence of additional relevant information from other sources or a reasonable request by the Certifying Officer that the applicant be interviewed." [Editor's note: This ruling appears to have been limited by later Board authority to instances in which it is clear that the applicant is not qualified. *Compare Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (en banc) (where U.S. applicants appear to meet job qualifications, employer must investigate further).] **ANONYMOUS MANAGEMENT, 1987-INA-672 (Sept. 8, 1988) (en banc)**

Rejection of U.S. workers: where employer's job requirement of three years of experience as a head chef preparing Italian cuisine was unchallenged, the CO erred in finding that employer unlawfully rejected applicants who had more than three years of chef experience, but that experience was not directly related to Italian cuisine. Board took into consideration that the position was well-paid, and that employer offered specialized, gourmet food at relatively high prices, in finding that not just any chef experience would do. **GENNARO'S RISTORANTE, 1987-INA-742 (Nov. 23, 1988) (en banc)**

Rejection of U.S. workers: "If [a US applicant's] resume shows that she does not meet the minimum requirements for the job, Employer's rejection was lawful unless the resume is contradicted by additional relevant information from other sources or the C.O. reasonably requested that she be interviewed.": in the instant case, an unchallenged job requirement was experience teaching grades 4 through 6, but the US applicant's experience was teaching mentally retarded, disabled, or disadvantaged youths: although the CO maintained that a person with the applicant's background should at least have been interviewed, but the Board found that since the CO did not instruct employer in the NOF to interview the applicant the CO could not now rely on the lack of an interview as a ground for denial. [Editor's note: this ruling is probably inconsistent with the later ruling in *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (en banc) (where U.S. applicants appear to meet job qualifications, employer must investigate further).] **PROSPECT SCHOOL, 1988-INA-184 (Dec. 22, 1988) (en banc)**

Rejection of U.S. workers: Where the employer's "minimum job requirements were not alleged to be unduly restrictive, and since the only available applicants do not have the retail warehouse experience listed as a special requirement by Employer, these applicants were properly rejected for this position." **ADRY-MART, INC., 1988-INA-243 (Feb. 1, 1989) (en banc)**

Rejection of U.S. workers: CO reversed for reasons stated in *Adry-Mart, Inc.*, 1988 INA 243 (Feb. 1, 1989). **ADRY-MART, INC., 1988-INA-186 (Apr. 28, 1989) (en banc)**

Rejection of U.S. workers: where the job requirements stated in the application have not been found to be unduly restrictive, an applicant who does not meet the requirements is not qualified for the job. Concurrent Computer Corp., 88-INA-76 (August 19, 1988). **HARRIS CORPORATION, 1988-INA-293 (Jan. 5, 1989) (en banc)**

Rejection of U.S. workers: where employer was a research and development organization for digital telecommunications and stated the requirement of comprehensive knowledge of digital telecommunication switching design, in line 15 of Form ETA 750A, it lawfully rejected US applicants whose experience was limited to analog systems. **BELL NORTHERN RESEARCH, 1988-INA-296 (Apr. 5, 1989) (en banc)**

Rejection of US worker: worker not qualified: employer lawfully rejected a US applicant where the applicant admitted that he did not have field experience as a cement finisher and verification of his references indicated that the applicant's experience was as a general laborer rather than a cement finisher. **QUALITY CONCRETE COMPANY, 1988-INA-314 (Apr. 21, 1989) (en banc)**

Rejection of U.S. workers: US workers who do not meet the employer's stated job requirements: authority of the CO to find the applicants' nonetheless qualified: in the instant case, the Employer's job requirements for its comptroller position were a MBA and 5 years of experience in the job offered or as an accountant: the CO did not challenge the requirements as unduly restrictive, but found that two applicants possessed education, training and/or experience "equivalent to the employer's requirements and/or to the DOT standard" therefore were considered qualified for the job. See § 656.24(b)(2)(ii). In a plurality decision, the Board "reaffirm[ed] what we stated in Concurrent Computer Corp., 88-INA-76 (Aug. 19, 1988) (en banc) and Adry-Mart, Inc., 88-INA-243 (Feb. 1, 1989) (en banc). We hold that, so long as an employer's job requirements are within the limits prescribed by section 656.21(b), the rejection of a U.S. worker who does not meet all those requirements is a rejection for a lawful, job-related reason, within the meaning of section 656.21(b)(7)." The plurality decision left for another day the scope of the CO's authority under section 656.24(b)(2)(ii). Several concurring and a dissenting opinion took different views of the case. **BRONX MEDICAL AND DENTAL CLINIC, 1990-INA-479 (Oct. 30, 1992) (en banc)**

U.S. applicant who meets the employer's job requirements may not be rejected as unqualified

Rejection of U.S. workers: job requirement of two years of experience as the manager of an import/export company met by applicant who had 14 years of experience " in all aspects of export operations, including extensive experience in marketing, sales, engineering, production, accounting and forecasting." **QUALITY PRODUCTS OF AMERICA, INC., 1987-INA-703 (Jan. 31, 1989) (en banc)**

U.S. applicant whose resume indicates a reasonable prospect that he or she is qualified: employer must investigate further

Rejection of U.S. workers: the Board affirms the principle stated in in Nancy, Ltd., 88-INA-358 (April 27, 1989) (en banc), rev. Nancy, Ltd. v. Dole, Case No. 89-2257-CIV-Scott 58 (April 27, 1989) (en banc), rev. on other grounds Nancy, Ltd. v. Dole, Case No. 89-2257-CIV-Scott (S.D. Fla. August 8, 1990), the effect that where a U.S. applicant's resume indicates that he meets the broad range of experience, education, and training required for the job, thus raising the reasonable prospect that he meets all of the Employer's stated actual requirements, the Employer has a duty to make a further inquiry, by interview or other means, into whether the applicant meets all of the actual requirements. The Board stated that "[w]hen an applicant's resume is silent on whether he or she meets a 'major' requirement such as a college degree, an employer might reasonably assume that the applicant does not and, therefore, rejection without follow up may be proper. In the case of a subsidiary requirement with detailed specifications -- something a candidate might not indicate explicitly on his resume though he possesses it -- an employer carries the obligation under Nancy to inquire further whether the applicant meets all the detailed specifications." The Board overruled Anonymous Management, 87-INA-672 (Sept. 8, 1988) (en banc), to the extent that it would shift the burden from the employer to the U.S. applicant or the C.O., and would be contrary to application of the guideline set forth in Gorchev & Gorchev. **GORCHEV & GORCHEV GRAPHIC DESIGN, 1989-INA-118 (Nov. 29, 1990) (en banc)**

Rejection of U.S. workers: applicant who may meet the job qualifications: where a resume does not expressly state qualifications for all of an employer's job

requirements, but lists such a broad range of experience that there is a reasonable possibility the applicant may meet the job requirements, it is incumbent on the Employer to further investigate Wheeler's qualifications, either through an interview or by other means. See GORCHEV & GORCHEV GRAPHIC DESIGN, 1989-INA-118 (Nov. 29, 1990) (en banc), affirming this aspect of Nancy, Ltd, noting that although the BALCA decision was revised in Nancy, Ltd. v. Dole, Case No. 89-2257-CIV-Scott (S.D. Fla. August 8, 1990), "the Court did not address the validity of the policy guideline stated by the Board in Nancy. Rather, the Court concluded that certain material findings of fact were internally inconsistent in the Nancy decision and, accordingly, that denial of certification should be reversed." **NANCY, LTD., 1988-INA-358 (Apr. 27, 1989) (en banc)**

Rejection of U.S. workers: applying Gorchev & Gorchev, the Board held that where an applicant's resume is ambiguous as to whether it establishes qualifications for all of employer's job requirements, it is the Employer's duty to further investigate an applicant's credentials, by interview or other contact. **CREATIVE CABINET & STORE FIXTURE, CO., 1989-INA-181 (Jan. 24, 1990) (en banc)**

Rejection of U.S. workers: duty of employer to further consider an applicant with apparent qualifications: the employer sought a Choral Director and the minimum stated requirements listed for the position were a Master's Degree for Teachers in Music Education, three years experience in the job offered and a Michigan State Teaching Certificate: one rejected applicant had a PhD in Music Education and a wide variety of experience spanning nearly twenty years: the Board held that the panel properly applied Gorchev & Gorchev Graphic Design, 89-INA-118 (Nov. 29, 1990) (en banc) to find that the employer should have further investigated the applicant's credentials. The employer had rejected the applicant without an interview because her resume did not show three years of experience as a Choral Director. The Board wrote: "A resume is just that: a summary; an introductory overview highlighting an applicant's background of qualifications. It is not a temple to be worshiped as the fount of all knowledge about an applicant's qualifications. Under the Gorchev & Gorchev standard, an employer truly seeking a qualified U.S. applicant would have contacted [an applicant such the one rejected here] and her references to inquire further about her qualifications." **DEARBORN PUBLIC SCHOOLS, 1991-INA-222 (Dec. 7, 1993) (en banc)**

Rejection of U.S. workers: interest in job: the employer determined that because the applicants stated career objectives on their resumes outside of the semiconductor field (employer's business), it followed that they did not possess interest in or the ability to perform the job duties: the Board found that employer's unilateral finding that the applicants where not interested was not sufficient grounds for rejecting the applicants: Employer never inquired of the applicants as to their interest in the job: the applicants indicated an interest in the job by applying for it and seeking an interview. Additionally, one applicant specifically expressed an interest in the instant job opportunity in his cover letter. **NATIONAL SEMICONDUCTOR, 1988-INA-301 (Mar. 3, 1989) (en banc)**

Availability of U.S. worker

Rejection of U.S. workers: availability of worker assessed as of time of recruitment: CO erred in assuming that a US worker who was scheduled for back surgery and therefore was unavailable at the time of recruitment would now be recovered and available: " this Board has repeatedly held that it is the status of job applicants at the time of recruitment that is controlling. *See, e.g., ENY Textiles, Inc.*, 87-INA-641 (Jan. 22, 1988)" **ADRY-MART, INC., 1988-INA-243 (Feb. 1, 1989) (en banc)**

Currency of U.S. applicant's knowledge

Rejection of U.S. workers: current knowledge: the Board found that the employer had presented convincing evidenced that its requirement of "knowledge of semiconductor devices" encompassed the requirement of pertinent, reasonably current knowledge, such that an applicant whose experience with seminconductors was eight years in the past was lawfully rejected. The Board found that the employer had established that the applicant would require a lengthy period of retraining not required of applicants with reasonably recent semiconductor knowledge. **TEXAS INSTRUMENTS, INC., 1988-INA-413 (May 23, 1989) (en banc)**

"Fortuitous cure" cases

Rejection of U.S. workers: fortuitous cure: An employer cannot, after reviewing the NOF, contact an applicant for the purpose of curing a defect in the recruitment of that applicant by showing that the applicant is no longer available for the job. *Custom Card d/b/a/ Custom Plastic Card Co.*, 1988-INA-212 (March 17, 1989) (en banc). **CARRIAGE HOUSE REALTORS, 1987-INA-739 (Apr. 5, 1989) (en banc)**

Rejection of U.S. workers: fortuitous cure: "[A]n employer's initial unlawful rejection of a U.S. worker as "unavailable" at the time of recruitment, is not cured a lack of response by that applicant to a post-NOF letter from the employer. The question of whether able, willing and qualified U.S. applicants are available for a particular job opportunity must, perforce, be determined as of the time of recruitment for it would be meaningless to show that such workers existed either before the job was open or after it had been filled." **CUSTOM CARD d/b/a CUSTOM PLASTIC CARD COMPANY, 1988-INA-212 (Mar. 16, 1989) (en banc)**

Rejection of U.S. workers: fortuitous cure: "We hold that where, as here, the Employer initially rejects a U.S. worker for an unlawful reason, upon the subsequent revival of interest in the position, and the Employer's later rejection on lawful grounds, the Employer must establish, in addition to the lawfulness of its second rejection, that the initial unlawful rejection as well as the delay generated by the initial rejection, did not contribute to the basis underlying such lawful rejection. In other words, the Employer must establish that neither the initial unlawful rejection, nor the delay in recontact, contributed in any way to the subsequent lawful rejection." (footnote omitted). Remand. **KENNEDY RESEARCH, INC., 1988-INA-350 (Dec. 21, 1989) (en banc)**

Rejection of US worker: fortuitous cure: "If Wheeler was qualified for the job, and the Employer fails to show that he was either uninterested in the job or was unavailable at the time of recruitment, that he may no longer be interested in it cannot cure the Employer's rejection of Wheeler at the time of recruitment. See,

e.g., In re Done-Rite, Inc., 88-INA-341 (Mar. 2, 1989) (en banc); In re ENY Textiles, Inc., 87-INA-641 (Jan. 22, 1988). * * * However, if Wheeler was not qualified for the job in the first place, then it is irrelevant if Employer cannot establish his unavailability. It is Employer's burden to establish that Wheeler was unqualified, and thus lawfully rejected. See §656.21(b)(7)." **NANCY, LTD., 1988-INA-358 (Apr. 27, 1989) (en banc)** [But see Nancy, Ltd. v. Dole, Case No. 89-2257-CIV-Scott (S.D. Fla. August 8, 1990) (reversal based on the Board's factual findings, not the legal principles applied)].

Rejection of U.S. workers: belated efforts to contact US applicants: later lack of interest in the job does not cure earlier poor effort at contacting. **SUNILAND MUSIC SHOPPES, 1988-INA-93 (Mar. 20, 1989) (en banc)**

Rejection of U.S. workers: employer concedes in rebuttal that the applicants were qualified but raises issue of whether they are now available for the position: the Board quoted with approval the CO's find that "the key question is not whether the applicants are still available for the position five months after it was offered, but rather whether the applicants were initially lawfully rejected in the first place." **DONE-RITE, INC., 1988-INA-341 (Mar. 2, 1989) (en banc)**

Lack of commitment of U.S. applicant to stay in the job

Rejection of U.S. workers: that a US worker would not commit beyond 6 months not ground, in itself, for rejection based on the conclusion that he was not interested in a permanent position: although the Board recognized that certain jobs may require lengthy periods of on-the-job training, or involve other factors peculiar to that business or industry such that a commitment of a minimum period of employment is not inherently unlawful, no such factors were present in this case. **WORLD BAZAAR, 1988-INA-54 (June 14, 1989) (en banc)**

Rejection of U.S. workers: an employer's "unfounded speculation that the applicant would have used the job as a stepping-stone while continuing his studies to pursue a business career is insufficient to establish the applicant's lack of availability." **SWITCH, U.S.A., INC., 1988-INA-164 (Apr. 19, 1989) (en banc)**

Lack of experience in job duty

Rejection of U.S. workers: experience in certain duties: "Although an employer may contemplate that certain duties specified in the job description may require certain education and/or experience, those requirements must be specified by the employer; they will not be implied." **UNIVERSAL ENERGY SYSTEMS, INC., 1988-INA-5 (Jan. 4, 1989) (en banc)**

Rejection of U.S. workers: job duty: employer could not rely on lack of experience in particular job duty to reject US workers where such duty was not listed in ETA Form 750A item 14 or 15. **CHROMATOCHEM INC., 1988-INA-8 (Jan. 12, 1989) (en banc)**

Rejection of US workers/unduly restrictive job requirements: job duty: employer could not rely on lack of experience in particular job duty to reject US workers where such duty was not listed in ETA Form 750A item 14 or 15: one of the purposes of Items 14 and 15 "is to notify the C.O. of Employer's minimum requirements so that the C.O. may, if necessary, challenge the stated requirements as unduly restrictive

or as not the actual minimum. See 20 C.F.R. §§656.21(b)(2) and 656.21(b)(6)." **BELL COMMUNICATIONS RESEARCH, INC., 1988-INA-26 (Dec. 22, 1988) (en banc)**

Rejection of US workers/unduly restrictive job requirements: job duty: case arising in 5th Circuit remanded for reconsideration under *Ashbrook-Simon-Hartley v. McLaughlin*, 863 F.2d 410 (5th Cir. 1989).(job duties listed in block 13 of the ETA 750A must be considered by the CO as job requirements): [Editor's note: the Board has not extended *Ashbrook* outside the 5th Circuit]. **OMEGA CONTRACTOR, INC., 1988-INA-37 (Apr. 25, 1989) (en banc)**

Rejection of US workers/unduly restrictive job requirements: job duty: case arising in 5th Circuit remanded for reconsideration under *Ashbrook-Simon-Hartley v. McLaughlin*, 863 F.2d 410 (5th Cir. 1989) (Whether the U.S. worker is capable of performing the job duties listed on the application must be addressed as a separate issue). **MOTOROLA, INC., 1988-INA-47 and 160 (Apr. 18, 1989) (en banc)**

Rejection of US workers/unduly restrictive job requirements: job duty: "On appeal, the Alien's counsel insists that the job duties must be considered part of the minimum requirements of a job, so that if an employer documents that an applicant could not perform the requisite duties, the rejection of the applicant is based on a lawful, job-related ground. . . . We need only point out that the form used to apply for a labor certification clearly distinguishes between job duties and the requirements necessary to perform satisfactorily those duties." **VETERANS ADMINISTRATION MEDICAL CENTER, 1988-INA-70 (Dec. 21, 1988) (en banc)**

Rejection of US worker: job duties: Ashbrook-Simon-Hartley v. McLaughlin, 863 F.2d 410 (5th Cir. 1989) remand: whether applicant with four years of experience was able to perform the job duties listed by employer: the Board observed that the CO could inquire into whether the Alien was able to perform the duties when hired. **RON HARTGROVE, INC., 1988-INA-302 (May 31, 1989) (en banc)**

Overqualified U.S. applicant

Rejection of U.S. workers: overqualified applicant: accountant who applied for a bookkeeper position: "The Employer also argues on appeal that as a matter of business judgment, it was justified in taking into consideration the likelihood of an accountant being unwilling to hold the job of a bookkeeper on a permanent basis. In *In Re Southpoint Seafood Market*, 87-INA-614 (Jan. 20, 1988), the Board rejected, as a lawful, job related reason, an employer's subjective assertion that an overqualified applicant would become quickly bored in an unchallenging job." **METROPLEX DISTRIBUTORS, 1988-INA-249 (May 22, 1989) (en banc)**

Relationship to competitor

Rejection of U.S. workers: applicant has a familial relationship to a competitor: the Board finds that a familial relationship with a competitor, standing alone, affords an insufficient basis to reject a U.S. worker: “Employer has not documented, through affidavits from prior employers or otherwise, that the security of its business would be at risk if the applicant is hired.” **PAPERLERA DEL PLATA, INC., 1990-INA-53 (Jan. 31, 1992) (en banc)**

Salary offer: job must actually be offered

Rejection of U.S. workers: low salary: an applicant's expression of concern about a low salary is not sufficient grounds for rejection of the applicant: rather, for the employer to lawfully reject a US applicant on this basis the position must be offered to the applicant and the applicant then decline the position based on the low salary offered. Martinez and Wright Engineering, 1988 INA 127 (Oct. 28, 1988). **IMPELL CORPORATION, 1988-INA-298 (May 31, 1989) (en banc)**

Subjective grounds for rejection

Rejection of U.S. workers: subjective reasons: "an Employer's subjective opinions concerning a U.S. applicant are not valid job-related reasons for rejection of the U.S. worker. See R. L. Fender, D.D.S., 87-INA-657 (Feb. 3, 1988); Southpoint Seafood Market, 87-INA-614 (Jan. 20, 1988). Here, the Employer relied on subjective considerations, such as its belief that [the US applicant] was a "paper man," (even though it admitted that [the US applicant's] resume "seemed perfect"), as well as feeling uncomfortable and not confident in him. Such reasons do not constitute lawful job-related reasons for rejection." **EMPIRE MARBLE CORP., 1988-INA-360 (Feb. 28, 1989) (en banc)**

Rejection of U.S. workers: subjective grounds: in recruitment for a radio announcer the Employer stated that comparing the voices of the Alien and the U.S. workers, the Alien was better qualified based on tone and loudness. The Board found that this was not a lawful grounds for rejection of US workers, stating that "Employer did not allege, let alone establish, that the U.S. workers were unable to perform the job duties, based on voice tone and loudness." **K SUPER KQ-1540 A.M., 1988-INA-397 (Apr. 3, 1989) (en banc)**

Rejection of U.S. workers: position of secretary who could take dictation: inability to understand employer's heavily accented English not sufficient ground to rejection US applicants: " The ability to understand the accented speech of a co-worker speaking english is, in our opinion, more in the nature of job orientation than a specific skill." **CARRIAGE HOUSE REALTORS, 1987-INA-739 (Apr. 5, 1989) (en banc)**

Rejection of U.S. workers: poor communication skills: where the CO talked with the US applicant and found no deficiency in his use of English, together with the circumstances of the applicant's education, employment history, time spent in the United States, the Board declined to disturb the CO's ruling that the employer had unlawfully rejected the applicant for lack of fluency in English. **IMPELL CORPORATION, 1988-INA-298 (May 31, 1989) (en banc)**

Tests and questionnaires

Rejection of U.S. workers: use of questionnaire to determine qualifications was not unlawful, even though alien was not required to file out a questionnaire, where employer was already familiar with the alien's qualifications: questionnaire was used to determine applicant's knowledge and was not a term or condition of employment and merely asked the same types of questions as would be asked in an interview. **ALLIED TOWING SERVICE, 1988-INA-46 (Jan. 9, 1989) (en banc)**

Unstated requirement

Rejection of U.S. workers: unstated requirement: Employer stated uncontested job requirement that employees "have the ability work within a team approach. . . and be skilled in group counseling skills and assessment." On this basis, rejected some applicants for lack of ability to confront addictive behavior. The Board found that this requirement was not subsumed in the counseling skills requirement -- that "if the ability to apply a specific counseling 'approach' or method is considered to be imperative for the job it must be listed as a special requirement in Item 15. Similarly, the employer wrongfully rejected applicants who did not have the right "personality" to market Employer's services and deliver public educational programs -- such not being a listed job requirement. **PRESBYTERIAN HOSPITAL, 1988-INA-38 (Feb. 21, 1989) (en banc)**

Rejection of U.S. workers: unstated requirement: employer sought an general manager: the Board found unconvincing employer's argument that it could reject applicants who only managed one store on the theory that a general manager in its organization manages at least three retail stores: if that was a requirement it should have been specified in the application. **JUST CLOTHES, INC., 1988-INA-252 (Mar. 21, 1989) (en banc)**

Rejection of U.S. workers: undisclosed requirements: non-smoking: "[W]here a U.S. applicant engages in personal practices which, if performed on the job would expose the employee, or the employee's charge, or co-workers, or the employer or the employer's family or property to a risk that would not otherwise exist, the employer has an inherent right to prohibit such practice, provided that the job requirements do not unlawfully or unreasonably discriminate." "If an employer, as in this case, introduces a previously unstated requirement as a ground for rejection of a U.S. applicant, such is properly considered a job requirement that must be considered under the provisions of §656.21(b)(2)." Job requirements relating to education, skills, training or experience are so fundamental that they must be stated from the outset of the application process. In the instant case, the Board found that the employer did not unlawfully reject a US applicant who smoked where the job entailed a live-in housekeeper with child care responsibilities. Decision limited to its precise facts and is not a blanket endorsement of non-smoking requirements. **JEFFREY SANDLER, M.D., 1989-INA-316 (Feb. 11, 1991) (en banc)**

Rejection of U.S. workers: undisclosed requirement: job requirement was four years experience as a foreign car mechanic, with duties of overhauling and repairing German cars: applicant who had experience in working on Mercedes, BMWs, Volkswagens and Volvos could not be lawfully rejected for lack of adequate experience on VWs: majority rejects dissent's argument that such a requirement was implicit. **FRITZ GARAGE, 1988-INA-98 (Aug. 17, 1988) (en banc)**

Verification of employment

Rejection of U.S. workers: verification of employment: "An Employer may lawfully reject U.S. workers who do not respond to reasonable requests for verification of employment history and educational credentials. In re Sunee Kim's Enterprises, 87 INA 713 (Jul. 22, 1988)." **AL-GHAZALI SCHOOL, 1988-INA-347 (May 31, 1989) (en banc)**

SCOPE OF BALCA REVIEW

General review authority

Scope of BALCA review: ". . .a reviewing body should not find implicit limits on its review authority based on indeterminate evidence of Congressional - or in this case - the regulatory drafter's - intent about the scope of the review authority authorized." ". . . the source of the Board's authority is the Part 656 regulations which vest a general review authority in BALCA to review denials of labor certification and do not include any express limits on the subjects the Board can consider . . . ." **EL RIO GRANDE, 1998-INA-133 (July 28, 2000) (recon en banc)**

Limitation to evidence and argument presented before the CO

Scope of BALCA review: evidence, policy: The regulation at 20 C.F.R. § 656.24(b)(4) which requires the development of evidence before certifying officers. "is an expression of the importance for labor certification matters to be timely developed before certifying officers who have the resources to best determine the facts surrounding the application." **CATHAY CARPET MILLS, INC., 1987-INA-161 (Dec. 7, 1988) (en banc)**

Scope of BALCA review: the regulations preclude consideration of evidence which was not "within the record upon which the denial of labor certification was based." 20 C.F.R. §656.26(b)(4). **FRIED RICE KING CHINESE RESTAURANT, 1987-INA-518 (Feb. 7, 1989) (en banc)**

Scope of BALCA review: evidence first submitted in motion to remand cannot be considered by the Board. **UNIVERSAL ENERGY SYSTEMS, INC., 1988-INA-5 (Jan. 4, 1989) (en banc)**

Scope of BALCA review: The Board's review of the denial of labor certification is based solely on the record upon which the denial was based, the request for review, and legal briefs. The Board does not consider additional evidence submitted in conjunction with a request for review. The University of Texas at San Antonio, 88-INA-71 (May 9, 1988). **IMPORT S.H.K. ENTERPRISES, INC., 1988-INA-52 (Feb. 21, 1989) (en banc)**

Evidence submitted with a motion for reconsideration

Scope of BALCA review: where the CO's affirmance of the denial of certification was based on a consideration of the evidence submitted with the request for review,

treated by the CO as a motion for reconsideration, such evidence was in the record upon which the denial was made and could be considered by the Board. **CONSTRUCTION AND INVESTMENT CORP., dba EFFICIENT AIR, 1988-INA-55 (Apr. 24, 1989) (en banc)**

Issues raised and preserved by the CO

Scope of BALCA review: "Unless, the CO raises an issue in the Notice of Findings and in the Final Determination, we will not consider the issue on appeal." **DATAGATE, INC., 1987-INA-582 (Feb. 17, 1989) (en banc)**

Due process: BALCA will not review issues not preserved by the Final Determination or presented in the NOF. **INTERNATIONAL STUDENT EXCHANGE OF IOWA, INC., 1989-INA-261 (Apr. 21, 1992) (en banc)**

Procedure: "An assertion made in the NOF, responded to in Rebuttal, and not repeated in the Final Determination, is deemed to be successfully rebutted and thus not an issue before us. 20 C.F.R. §656.25(g)(2)(ii) (1988)." **BARBARA HARRIS, 1988-INA-392 (Apr. 5, 1989) (en banc)**

[Editor's note: but see cases cited in "Due Process" section to the effect that BALCA can remand for consideration of issues not previously litigated below]

Deference to credibility findings of panel

Scope of BALCA review: where the original panel in the case reasonably chose to credit the statements of the two applicants over those of the Employer, the Board en banc declined to disturb that credibility finding. **S & G DONUT CORP. and SIT DONUT CORP., d/b/a DUNKIN DONUTS, 1988-INA-90 and 91 (May 17, 1990) (en banc)**

Lack of authority to rule on validity of the regulations

Scope of BALCA review: BALCA, as a non-Article III court, lacks inherent authority to rule on the validity of a regulation; moreover, we hold that it also lacks express authority to invalidate the regulations as written. See Gibas v. Saginaw Mining Co., 748 F.2d 1112, 1117 (6th Cir.1984). **DEARBORN PUBLIC SCHOOLS, 1991-INA-222 (Dec. 7, 1993) (en banc)**

Review of SCA wage determinations

Scope of BALCA review: BALCA has jurisdiction to review SCA wage determinations made in the context of applications for alien labor certification under 20 C.F.R. Part 656. **EL RIO GRANDE, 1998-INA-133 (Feb. 4, 2000) (en banc)**

UNDULY RESTRICTIVE JOB REQUIREMENTS

Unduly restrictive job requirements:

Business necessity

Rebuttal

Regulation's requirements are conjunctive

Unduly restrictive job requirements: the requirements of subsections A, B and C § 656.21(b)(2)(i) must be read as conjunctive. Thus, job requirements which do not comply with all three subsections A, B and C (normal for the job in the US, defined in the DOT, and not language other than English) are unduly restrictive unless adequately documented as arising from business necessity. **LUCKY HORSE FASHION, INC., 1997-INA-182 (Aug. 22, 2000) (en banc)**

When CO may raise issue of unduly restrictive job requirements

Unduly restrictive job requirements: insufficient for the CO merely to conclude that he does not understand the job opportunity, and therefore the requirements are unduly restrictive: position was for a Research Chemist with highly technical and complex position requirements. **THE STANDARD OIL COMPANY, 1988-INA-77 (Sept. 14, 1988) (en banc)**

Unduly restrictive job requirements: the Board found that CO misconstrued a statement in the job advertisement referencing British primary teaching methods" as a job requirement: neither the ad nor the ETA 750A asserted experience in British

methods as a job requirement and no US workers were rejected on that basis. **PROSPECT SCHOOL, 1988-INA-184 (Dec. 22, 1988) (en banc)**

Unduly restrictive job requirements: CO may require adjustment of experience requirement where the experience plus an implied educational requirement exceeds the DOT. **FISCHER IMAGING CORP., 1988-INA-43 (May 23, 1989) (en banc)**

Job duties as requirements

Unduly restrictive job requirements: job duty: case arising in 5th Circuit remanded for reconsideration under *Ashbrook-Simon-Hartley v. McLaughlin*, 863 F.2d 410 (5th Cir. 1989).(job duties listed in block 13 of the ETA 750A must be considered by the CO as job requirements): [Editor's note: the Board has not extended *Ashbrook* outside the 5th Circuit]. **OMEGA CONTRACTOR, INC., 1988-INA-37 (Apr. 25, 1989) (en banc)**

Unduly restrictive job requirements: job duty: Ashbrook-Simon-Hartley remand. **TEH-TUNG STEAMSHIP (HOUSTON), INC., 1989-INA-9 (Apr. 17, 1990) (en banc)**

Unduly restrictive job requirements: difference between job duties and job requirements: job requirements must be set out in ETA 750A, items 14 and 15: however, an employer who lists experience in the job offered engrafts the job duties: whether requiring experience in the duties is unduly restrictive then become grist for a NOF: in the instant application CO erred by finding that job duties were unduly restrictive where employer had not made them a job requirement. **BEL AIR COUNTRY CLUB, 1988-INA-223 (Dec. 23, 1988) (en banc)**

Business necessity: general standard: Information Industries test

Unduly restrictive job requirements: business necessity: "[T]o 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." **INFORMATION INDUSTRIES, INC., 1988-INA-82 (Feb. 9, 1989) (en banc)**

Business necessity: cooking specializations

Unduly restrictive job requirements: business necessity; cooking specialization requirements for domestic cook position: Board reviewed three applications involving domestic cooks with job requirements for experience in specific styles or types of cuisine (Kosher, Vegetarian, Polish). The Board held that cooking specialization requirements for domestic cooks are unduly restrictive within the meaning of the regulation at 20 C.F.R. § 656.21(b)(2), and therefore must be justified by business necessity pursuant to the test found in Information Industries, 1988-INA-82 (Feb. 9, 1989) (en banc). The Board also held that cooking specialization requirements for domestic cooks normally should be analyzed under the business necessity standard of 20 C.F.R. § 656.21(b)(2) prior to their consideration as a factor under the bona

fide job opportunity analysis of 20 C.F.R. § 656.20(c)(8). See Carlos Uy III , 1997-INA-304 (Mar. 3, 1999)(en banc). **MARTIN KAPLAN, 2000-INA-23 (July 2, 2001) (en banc)**

Business necessity: combination of duties

Unduly restrictive job requirements: business necessity: combination of duties: where Employer's assertions that it would be economically infeasible to hire two workers were unexplained and unsupported, the CO properly denied certification. **WANG WESTLAND INDUSTRIAL CORPORATION, 1988-INA-27 (Mar. 3, 1989) (en banc)**

Unduly restrictive job requirement: business necessity: combination of duties: section 656.21(b)(2)(ii) requires that if a job opportunity contains a combination of duties, the employer must document that 1) it has normally employed persons for that combination of duties, and/or 2) that workers customarily perform the combination of duties in the area of intended employment, and/or 3) that the combination job opportunity is based upon business necessity. "The first two prongs of this provision, the "normally employed" and "industry norm" tests, are fairly straightforward and easily applied. For example, the Board has previously held that, where a combination of duties is consistent with the description of the job in the Dictionary of Occupational Titles (DOT), the combination is normal and business necessity need not be shown. Alan Bergman Photography, 88-INA-404 (Sept. 28, 1989). Similarly, in Van Boerum & Frank Associates, 88-INA-156 (Dec. 5, 1989), a small engineering firm justified a combination of managerial and training duties by documenting that, although it had never used the combination, it was customarily used by firms in the area of intended employment." The business necessity prong is only reached if the employer cannot establish one of the first two prongs. "Accordingly, for a combination of duties to be based on business necessity under § 656.21(b)(2)(ii), an employer must document that it is necessary to have one worker to perform the combination of duties, in the context of the employer's business, including a showing of such a level of impractibility as to make the employment of two workers infeasible. The intent of this formula is to focus the parties on addressing the fundamental issue of why it is necessary to have one worker perform the duties instead of two or more. Implicit in this standard is a showing by the employer that reasonable alternatives such as part-time workers, the purchase of new equipment, and a reordering of responsibilities within the organization are infeasible. In addition, though not necessary to satisfy the test, a showing that the duties are essential to perform each other would weigh heavily in favor of business necessity." (footnote omitted). " The level and burden of proof under this standard must necessarily be high because, to rely on this provision, an employer is already proposing a combination which has not been normal to its business or the particular industry in general. A mere showing that the combination produces financial savings, or adds to the efficiency or quality of the employer would not, therefore, satisfy the above standard." (footnote omitted). If the employer can establish the business necessity of the combination of duties, it must still establish the business necessity under the Information Industries standard of the job requirements for each set of duties. **ROBERT L. LIPPERT THEATRES, 1988-INA-433 (May 30, 1990) (en banc)**

Unduly restrictive job requirements: business necessity: combination of duties: The fact that a 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 relevant industry. 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). **UNIBANCO, 1988-INA-561 (May 30, 1990) (en banc)**

Business necessity: experience and educational requirements

Unduly restrictive job requirements: business necessity: experience requirement: general statement of the employer, standing alone, insufficient to establish business necessity for one year experience requirement for press operator. **AQUARIUS ENTERPRISES, 1987-INA-579 (Mar. 24, 1988) (en banc)**

Unduly restrictive job requirements: business necessity: experience with protocol relating to VIPs and foreign investors: Employer established that such experience was necessary but failed to establish that three years of such experience was necessary. **VENTURE INTERNATIONAL ASSOCIATES, LTD. 1987-INA-569 (Jan. 13, 1989) (en banc)**

Unduly restrictive job requirements: where DOT states a SVP of 3 to 6 months experience, employer's 6 month experience requirement is not unduly restrictive. **LEBANESE ARAK CORP., 1987-INA-683 (Apr. 24, 1989) (en banc)**

Unduly restrictive job requirements: business necessity: educational requirement: employer required one year of secretarial college: CO properly found that this was unduly restrictive: "One year of college would not guarantee a successful employee, especially when no degree or diploma is required. Requiring one year of college without a certificate of completion would only serve to exclude qualified U.S. workers who may have demonstrated experience as successful secretaries who have not attended college for one year." **BUSINESS MEN'S INSURANCE, 1988-INA-78 (May 31, 1989) (en banc)**

Unduly restrictive job requirements: business necessity: educational and experience requirements: where CO summarily, and without explanation, rejected Employer's rebuttal argument, the Board reversed and granted labor certification. **QUINCY SCHOOL COMMUNITY COUNCIL, 1988-INA-81 (Feb. 21, 1989) (en banc)**

Unduly restrictive job requirements: business necessity: lawyer with experience in international trades issues: statement from employer explaining duties and litigious nature of its business adequate to meet *Information Industries* criteria. **AMERICAN EXPORT TRADING CO., 1988-INA-220 (June 15, 1990) (en banc)**

Unduly restrictive job requirements: business necessity: education requirement as alternative to experience requirement: the Board found that letters from a school administrator and a child psychotherapist adequately documented the reasonableness of the one year of college requirement where the letters were uncontradicted and the CO did not proffer any reason for rejecting those letters as not credible. **KENNETH R. GOLDMAN, 1988-INA-288 (May 31, 1990) (en banc)**

Unduly restrictive job requirements: business necessity: educational degree: employer's evidence failed to establish second prong of Information Industries test: evidence only showed that employer's products were diverse and technical, and did not provide sufficient information to determine whether the educational degree

disputed by the CO was essential to perform, in a reasonable manner, the job duties as described by the employer. **ATLANTIC SALES, INCORPORATED, 1988-INA-349 (May 24, 1989) (en banc)**

Unduly restrictive job requirements: business necessity: experience: prong one of Information Industries test (he job requirements bear a reasonable relationship to the occupation in the context of the employer's business) is obviously met where the requirement is experience in the job offered. **NATIONAL INSTITUTE FOR PETROLEUM AND ENERGY RESEARCH, 1988-INA-535 (Mar. 17, 1989) (en banc)**

Unduly restrictive job requirements: business necessity: experience: prong two of Information Industries test was established for the employer's five year experience requirement where the employer presented evidence that the position offered was an upper level, supervisory position in the complex and sophisticated industry of thermodynamics research. **NATIONAL INSTITUTE FOR PETROLEUM AND ENERGY RESEARCH, 1988-INA-535 (Mar. 17, 1989) (en banc)**

Business necessity: foreign language requirements

Unduly restrictive job requirements: business necessity: foreign language requirement: statement that 14% of students speak foreign language did not establish business necessity for a position employee whose job it is to process applications. **FELICIAN COLLEGE, 1987-INA-553 (May 12, 1989) (en banc)**

Unduly restrictive job requirements: business necessity: foreign language requirement: whether German or German-Swiss is sufficient for employer's business needs. **SPUHL ANDERSON MACHINE CO., 1987-INA-564 (May 18, 1989) (en banc)**

Unduly restrictive job requirements: business necessity: foreign language requirement: written assertions, although documentation that must be considered, need not be credited by a CO where they lack underlying support: statistics showing that 20% of employer's business is conducted in Spanish found not, standing alone, to establish business necessity where there was no evidence about the language capabilities of remaining employees. **WASHINGTON INTERNATIONAL CONSULTING GROUP, 1987-INA-625 (June 3, 1988) (en banc)**

Unduly restrictive job requirements: business necessity: foreign language requirement: inadequate evidence of the need for three Indian dialects. **BELHA CORPORATION, 1988-INA-24 (May 5, 1989) (en banc)**

Unduly restrictive job requirements: business necessity: foreign language requirement: Employer met Information Industries test were it established that a significant part of the job must be performed in Brazil and Argentina, and required the employee to communicate in the native languages of those countries. **COKER'S PEDIGREED SEED COMPANY, 1988-INA-48 (Apr. 19, 1989) (en banc)**

Unduly restrictive job requirements: business necessity: foreign language requirement: Employer established that its Arabic language requirement bore 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. Employer also established 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. Fact that some letters written by Employer's clients were written in poorly construed English did not show lack of need for Arabic. **CONSTRUCTION AND INVESTMENT CORP., dba EFFICIENT AIR, 1988-INA-55 (Apr. 24, 1989) (en banc)**

Unduly restrictive job requirements: business necessity: foreign language: where job was retail clerk for a health food store in California, evidence that Alien may have used his knowledge of Indonesian language to write letters to potential customers in Indonesia was not relevant evidence: dicta that some customer loss is not sufficient, in itself to support business necessity as there is a large potential customer base. **WEIDNER'S CORPORATION, 1988-INA-97 (Nov. 2, 1988) (en banc)**

Unduly restrictive job requirements: business necessity: foreign language requirement: financial controller for roofing company: "The job description for the financial controller's position fails even to suggest interaction with any individuals other than Best Roofing's own employees, and thus does not support Employer's statement that the successful candidate must interact with businessmen, contractors and customers lacking fluency in English.": cites with approval dicta in Weidner's Corp., 1988-INA-97 (Nov. 3, 1988) (en banc): that some customer loss is not sufficient, in itself to support business necessity where there are other potential customers. **BEST ROOFING COMPANY, INC., 1988-INA-125 (Dec. 20, 1988) (en banc)**

Unduly restrictive job requirements: business necessity: foreign language requirement: certification granted where unrebutted evidence was that virtually all of the restaurant operators it conducts business with speak Chinese as their principal language and many do not speak English at all, and that given the complexity of the transactions, and the necessity of precision in communication concerning the various food products, the employee must have the ability to communicate in Cantonese and Mandarin: employer also that the employee's contact with suppliers of oriental food products requires the ability to communicate in Chinese. **SYSCO INTERMOUNTAIN FOOD SERVICES, 1988-INA-138 (May 31, 1989) (en banc)**

Unduly restrictive job requirements: business necessity: foreign language requirement: "When applied to a foreign language requirement, the Information Industries business necessity test involves two basic issues. To satisfy the first prong of Information Industries, an employer must show that a significant portion of its business is performed in a foreign language or with foreign-speaking clients or employees. ...If a small portion of the employer's business involves persons speaking a foreign language, this may be insufficient to establish business necessity. ... To satisfy the second prong of Information Industries, an employer must show that the employee's duties require communication or reading in a foreign language." (citations omitted). Employer established business necessity where the job principally involved communication with Korean-speaking suppliers (1st prong) and where the person holding the job would be speaking Korean with the suppliers about 95% of the time on the job (2d prong: " When the job duties include or demand interaction with clients who only speak a foreign language, the second prong of business necessity"). **TEL-KO ELECTRONICS, INC., 1988-INA-416 (July 30, 1990) (en banc)**

Unduly restrictive job requirements: business necessity: foreign language requirements: the Board rejected the CO's apparent position restricting the concept of business necessity to only those cases where the employer would suffer loss to its existing business if the specific qualification were not required, and not to a situation in which its goal is to expand its business in foreign markets. The Board held that this interpretation was not supported by the statute or regulations, and found that the employer had presented sufficient proof to establish the business necessity of foreign language requirements for an export manager. The Board did not find it significant that much of the documentation submitted by the employer to show business necessity was written in English, since it was logically apparent that consumer products could only be advertised and sold to and through distributors in the Philippines and in South America using the language of the customers' countries. **REMINGTON PRODUCTS, INC., 1989-INA-173 (Jan. 9, 1991) (en banc)**

Unduly restrictive job requirements: business necessity: foreign language requirement: Board declines to reach issue of whether an employer's clients' preference alone can justify a foreign language ability requirement, finding that the case did not present that scenario. **INTERNATIONAL STUDENT EXCHANGE OF IOWA, INC., 1989-INA-261 (Apr. 21, 1992) (en banc)**

Unduly restrictive job requirements: business necessity: foreign language requirement: justification based on poor English-language proficiency of workforce: the Board held that such evidence, standing alone, does not establish that a foreign language requirement bears a reasonable relationship to the occupation within the context of Employer's business. Thus, an employer relying on such evidence alone has not satisfied the first prong of the Information Industries business necessity test. **LUCKY HORSE FASHION, INC., 1997-INA-182 (Aug. 22, 2000) (en banc)**

Business necessity: grade point average

Unduly restrictive job requirements: business necessity: high grade point average: mere fact that US applicant was not rejected for this reason is irrelevant as unduly restrictive job requirement may have discouraged other workers from applying. **COLORGRAPHICS CORPORATION, 1987-INA-600 (Nov. 20, 1987) (en banc)**

Business necessity: live-in and spilt-shift requirements

Unduly restrictive job requirements: business necessity: live-in requirement: inadequate documentation of why worker would need to live on the premises. **ROLAND AND BLANCA LAURENZO, 1987-INA-603 (Feb. 24, 1987) (en banc)**

Unduly restrictive job requirements: business necessity: live-in, spilt-shift requirement: Employer presented evidence that live-in, spilt-shift requirement was based on fact that he is an 83-year old widower: reversal where CO did not explain why this fact was not sufficient to establish business necessity. **SIEGFRED SANDER, 1987-INA-721 (May 31, 1989) (en banc)**

Unduly restrictive job requirements: business necessity: domestic live-in requirement: in domestic live-in cases "the relevant "business" is the "business" of running a household or managing one's personal affairs": "To establish the business necessity for a live-on-the-premises requirement for a domestic worker, the

employer must demonstrate that the requirement is essential to perform, in a reasonable manner, the job duties as described by the employer. In the context of a domestic live-in worker, pertinent factors in determining whether the live-on-the-premises requirement is essential for the performance of the job duties include the Employer's occupation or commercial activities outside the home, the circumstances of the household itself, and any other extenuating circumstances.": mere personal preference to have an employee live on the premises does not establish business necessity. **MARION GRAHAM, 1988-INA-102 (Feb. 2, 1990) (en banc)**

Business necessity: nonstandard work hours

Unduly restrictive job requirements: business necessity: nonstandard work hours: the Board questioned whether a 2:30 p.m. to 9:00 p.m. work schedule was justified where the child to be tutored by the employee was still an infant. The Board, however, also questioned the CO's conclusion that a 9 to 5 schedule was normal for a child tutor and remanded the case for consideration under the current circumstances (the child no longer being an infant). **KENNETH R. GOLDMAN, 1988-INA-288 (May 31, 1990) (en banc)**

Business necessity: proficiency/familiarity with employer's equipment, systems, software, etc.

Unduly restrictive job requirements: business necessity: failure to establish that the equipment with which Employer requires proficiency is different from other systems used in the industry: therefore second prong of Information Industries business necessity test not met. **AMERICAN COPPER AND NICKEL CO., INC.**, 1987-INA-556 (May 16, 1989) (en banc)

Unduly restrictive job requirements: business necessity: employer failed to establish business necessity under the second prong of *Information Industries* for the requirement of prior familiarity with its fast food operations where it did not explain or document "why Jack-In-The-Box operations are so different that an applicant who has general fast-food managerial experience cannot perform the duties of Jack-In-The-Box manager after a reasonable amount of training." **TRI-P'S CORP., dba JACK-IN-THE-BOX, 1987-INA-686 (Feb. 17, 1989) (en banc)**

Unduly restrictive job requirements: business necessity: specialized requirements for a Research Associate: CO erred in refusing to consider a rebuttal letter prepared by one of employer's professors explaining why the specialized requirements were integral to the research; however, the CO reasonably requested documentation from a disinterested person confirming the necessity of the requirements given their highly technical nature: employer provided this documentation in a motion for reconsideration, which the CO found still inadequate: the Board, however, found that the original rebuttal and the new information on reconsideration were sufficient to establish business necessity. **TEXAS A & M UNIVERSITY, 1988-INA-162 (Mar. 1, 1989) (en banc)**

Unduly restrictive job requirements: business necessity: general statement that the requirements, such as familiarity with Employer's IBM 34 computer systems, allowed Employer to make a reasonable and practical testing of the job market was insufficient to establish business necessity. **DANBY-PALICIO, 1987-INA-530 (Mar. 21, 1989) (en banc)**

Business necessity: union membership

Unduly restrictive job requirements: business necessity: union membership: although not technically an unduly restrictive job requirements case, the Board ruled that union membership was justified by business necessity under facts of the case. **CANADIAN NATIONAL RAILWAY CO., 1990-INA-66 (Sept. 11, 1992) (en banc)**

Rebuttal: offer to reduce restrictive requirements and readvertise

Unduly restrictive job requirements: offer to reduce restrictive job requirements insufficient rebuttal where the reduced requirements are still too restrictive for the job and appear to be tailored to the qualifications of the alien. **MULTI-PROCESS INTERNATIONAL CORP., 1987-INA-529 (Nov. 13, 1987) (en banc)**

Unduly restrictive job requirements: business necessity: unequivocal offer to readvertise if rebuttal is not accepted: *A. Smile*, 1989-INA-1 (Mar. 6, 1990), does not apply where employer sought to add a restrictive requirement after finding U.S. applicants who were qualified: [Note: this is a companion case to Ronald J. O'Mara, 1996-INA-113 (Dec. 11, 1997) (en banc)]. **PLANT ADOPTION CENTER, 1994-INA-374 (Dec. 12, 1997) (en banc)**

Unduly restrictive job requirements: business necessity: unequivocal offer to readvertise if rebuttal is not accepted: Board affirms holding in *A. Smile*, 1989-INA-1 (Mar. 6, 1990) affording 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. **RONALD J. O'MARA, 1996-INA-113 (Dec. 11, 1997) (en banc)**

See also REBUTTAL: Offer to readvertise if rebuttal not accepted