U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 September 2003

BALCA Case No.: 2002-INA-233
ETA Case No.: P2000-CA-09500050/ML

In the Matter of:

TOMS #1,
Employer,

on behalf of

J. JESUS ARECHIGA,
Alien.

Appearances: John Montano, Jr., Esq.
Santa Anna, California

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "Cook, Mexican Specialty."[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

[1] Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On May 18, 1998, Employer, Toms #1 ("Employer") filed an application for labor certification on behalf of the Alien, J. Jesus Arechiga ("Alien") to fill the position of "Cook, Mexican Specialty." (AF 10). The job required two years of experience in the job offered.

The CO issued a Notice of Findings ("NOF") on March 8, 2002, proposing to deny certification because the requirement of two years of experience in the job offered was considered restrictive. (AF 6). The CO pointed out that the Specific Vocational Preparation ("SVP") time for the occupation of Specialty/Fast-Food Cook was six to twelve months. Employer's menu showed it was a hamburger chain restaurant with a standard menu, and Mexican fast food as a side. To correct the deficiency, Employer was directed to amend the restrictive requirement or justify the requirement based on business necessity.

Employer's rebuttal consisted of a letter dated April 11, 2002, signed by Employer and its counsel. (AF 4). Employer contended that Tom's #1 differed from other fast food restaurants because it did not receive all of its food pre-made, canned or frozen as most fast food restaurants do. By way of example, Employer stated that its cooks must saute and cook the ground meat which is used in various dishes, and they prepare and flavor the beans. Tomatoes are hand-sliced and diced, the cheese is grated and the rice is made fresh, as are quesadillas and salads. Employer further asserted that it offers a variety of Mexican specialty dishes not listed on the menu.

The CO issued a Final Determination ("FD") on May 1, 2002, denying certification. (AF 2). The CO found that Employer had failed to rebut the finding of an unduly restrictive requirement. In particular, the CO found Employer's rebuttal insufficient to establish that a cook would need two years of experience to be able to do the basic preparation activities Employer described in its rebuttal. Furthermore, Employer's rebuttal failed to establish that the position required menu planning or serving food to waiters. Accordingly, the two year experience was found to be excessive and non-

compliant with the regulations.

On May 31, 2002, Employer filed a Request for Review with the Board of Alien Labor Certification Appeals ("Board" or "BALCA"). (AF 1).

DISCUSSION

In its Request for Review, Employer reiterates its arguments, further stating that while it may be a fast food restaurant, it does offer a wide variety of Mexican speciality dishes which are not listed in the menu, and that its cooks are actual cooks as opposed to the other fast food restaurants, where the cooks merely put together ready made food, "performing the duties of assemblers." (AF 1).

Twenty C.F.R. § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. An employer cannot use requirements that are not normal for the occupation or are not included in the Dictionary of Occupational Titles ("DOT") unless it establishes a business necessity for the requirement. The purpose of section 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Rajwinder Kaur Mann*, 1995-INA-328 (Feb. 6, 1997).

Employer can establish a business necessity by showing that (1) the requirement bears a reasonable relationship to the occupation in the context of the Employer's business; and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the Employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*). Employer may not specify any requirements more strict than are listed in the DOT classification for the job. *Approach, Inc.*, 1990-INA-230 (Aug. 29, 1995).

Employer required two years of experience for the position of cook in a fast-food restaurant. It is not a requirement which is normally required for the job of "Specialty/Fast-Food Cook" in the United States. Employer's menu indicates that sandwiches, hamburgers, salads, hot dogs, and several Mexican dishes are served. This position, which fits the descriptions set forth in the DOT at Section

313.361-026 and Section 374-010, has an SVP time of six months to a year. Employer concedes that it is a fast food enterprise, yet contends that its cooks require two years of experience. Employer's arguments in this respect, however, are not compelling. Slicing tomatoes and cooking rice are not so difficult that two years of experience are required to acquire these skills. Employer has failed to establish the business necessity for two years of experience in the job offered. Thus, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.