



Issue Date: 11 August 2003

BALCA Case No.: 2002-INA-161
ETA Case No.: P2000-CA-09490667/ML

In the Matter of:

DENNY'S RESTAURANT,
Employer,

on behalf of

ARMANDO SERVA,
Alien.

Certifying Officer: Martin Rios
San Francisco

Appearances: Luis A. Sabroso, Esquire
Anaheim, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by a restaurant for the position of Specialty Cook. (AF 13-14).² The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF").

¹ 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 20 C.F.R. Part 656.

²"AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

On December 15, 1997, Employer, Denny's Restaurant, filed an application for alien employment certification on behalf of the Alien, Armando Serva, to fill the position of Specialty Cook. Minimum requirements for the position were listed as two years experience in the job offered. (AF 13).

Employer received no applicant referrals in response to its recruitment efforts. (AF 17).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on November 2, 2001, proposing to deny labor certification based upon a finding that Employer's stated requirement of two years experience in the job did not appear to be its actual minimum requirement as the Alien did not meet this requirement at the time of hire. (AF 8-11).

In Rebuttal, Employer presented documentation that the Alien had obtained prior experience as a cook with other Denny's Restaurants in different locations before his employment with Employer. (AF 5-7).

A Final Determination denying labor certification was issued by the CO on February 6, 2002, based upon a finding that Employer had failed to adequately document that the Alien met the two years experience requirement at the time of hire. The CO observed that the Alien was hired by the Denny's chain as a cook with no experience at all and that all of his qualifying experience was gained in Denny's restaurants, including Employer's. Finding that Employer had failed to offer the same terms and conditions of employment to U.S. workers, the CO denied labor certification. (AF 3-4).

Employer filed a Request for Administrative Review by letter dated March 12, 2002, and the matter was referred to this Office and docketed on April 26, 2002. (AF 1-2).

DISCUSSION

Pursuant to 20 C.F.R. § 656.21(b)(5), an employer is required to document that its requirements for the job opportunity are the minimum necessary for performance of the job and that it has not hired or that it is not feasible for employer to hire workers with less training and/or experience. Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn*, 1989-INA-105 (Feb. 14, 1990).

In the instant case, Employer set its requirements for the job at two years experience in the petitioned position of specialty cook. The evidence of record reflects that the Alien was hired by Denny's restaurant for the position of cook in 1989, performing the same duties as described in the present position, and that he had no experience as a cook prior to hire. A letter from Denny's headquarters states that the Alien worked for Denny's in the position of cook from March 1989 to June 1998 and March 2000 to March 2001 at Denny's Fullerton and Brea locations. (AF 7). The record further reflects that the Alien worked as a cook for Denny's in Placentia (the petitioning location) from May 1995 to November 2000, and again from March 2001 to present. (AF 6).

In order to prove that an alien gained qualifying experience with a different employer, the employer must demonstrate that its ownership and control are separate and distinct from the company where the alien gained his or her qualifying experience. *Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 1990-INA-200 (May 23, 1991). Even if the companies are not owned or controlled by the same individuals, the employer may have to show a "distinct operational independence" between the two entities. *Obro Ltd.*,

1990-INA-51 (Feb. 21, 1991) (employer may not play “musical employees” to bypass labor certification requirements). In the instant case, the record reflects that the Alien’s experience was gained with Denny’s restaurants, and as is demonstrated by the letter from Denny’s headquarters (Advantica Restaurant Group), ownership and control is one and the same. Thus, it appears that the Alien was trained for the position by Employer and that the Alien did not meet the minimum requirements prior to hire. Accordingly, it is determined that alien employment certification was properly denied.

ORDER

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

Entered at the direction of the panel by:

A

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

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 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 its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

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

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

