

**U.S. Department of Labor**

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



DATE: DEC 23, 1988

CASE NO. 88-INA-223

IN THE MATTER:

BEL AIR COUNTRY CLUB,  
Employer,

on behalf of,

DANIEL ENZLER,  
Alien.

Before: Litt, Chief Judge; Vittone, Deputy Chief Judge; and  
Brenner, DeGregorio, Guill, Tureck and Schoenfeld  
Administrative Law Judges

MICHAEL H. SCHOENFELD  
Administrative Law Judge

**DECISION AND ORDER**

Bel Air Country Club ("Employer") has requested review, pursuant to 20 C.F.R. §656.26, of the determination of a Certifying Office of the U.S. Department of Labor ("CO") denying an application for labor certification which Employer submitted on behalf of the above named Alien, pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182 (a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work (1) there are not sufficient workers in the United States who are able, willing, qualified, and available for employment; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

### Statement of the Case

We are asked to review the decision of the Certifying Officer denying Employer's application for labor certification. The Certifying Officer denied Employer's application on the grounds that the job's requirements were unduly restrictive in violation of 20 C.F.R. §656.21(2)(i) and that Employer had failed to establish a good-faith effort while recruiting a U.S. worker, in violation of 20 C.F.R. §656.21(b)(1). (AF4).

We reverse the decision of the Certifying Officer and grant Employer's application for labor certification. While the job description contained references to specific duties, the job requirements were not unduly restrictive and thus did not necessitate proof of a business necessity. In addition, the evidence establishes Employer's good-faith effort to recruit U.S. workers.

### FACTS

The Employer, Bel Air Country Club, filed the application on behalf of the Alien, Daniel Enzler, for the position of Chef (Continental/Swiss/Scandinavian cuisine) (AF 22-23). The job duties, described "fully" as requested by item 13 in the application and as listed in the newspaper advertisement, included, inter alia, preparing and cooking "dishes such as gravlax, beef a la rydberg, rabbit dishes, snails, venison, etc." (AF34) In response to item 14 of the application, Employer listed as its minimum requirements two years of training as a cook and two years experience as a chef or as an assistant chef or cook (AF22).

In the July 9, 1987 Notice of Findings (AF 18-20) the Certifying Officer found that the Employer had not met the requirements of section 656.21 because Employer was in violation of sections 656.21(b)(2)(i) and 656.21(b)(1) and (g)(1-9). The CO found a violation of §656.21(b)(2)(i) because

the Swiss and Scandinavian cuisine experience requirement appears unduly restrictive, not a normal requirement for the occupation and precludes the referral and consideration of qualified U.S. applicants.

AF19. The C.O. also found a violation of §656.21 (b)(1) and (g)(1-9) (lack of good faith effort to recruit) because Employer did not contact a U.S. applicant until March 16, 1987 (AF28), although the Employment Development Department (EDD) sent the applicant's resume to Employer on February 23, 1987 (AF3). Furthermore, the CO did not accept as proof of

Employer's good-faith effort to recruit qualified U.S. workers the money receipt for certified mail sent to the applicant, as it was not stamped by the Post Office (AF19).

Employer submitted a Rebuttal on August 11, 1987 (AF 5-17). It contended that the job opportunity did not contain a restrictive "Swiss and Scandinavian" cuisine requirement. Employer asserted that though preparing Swiss, Scandinavian and continental cuisine was part of the job duties, there was no special requirement of experience in cooking those cuisines. The ETA 750 required two years experience as a chef or two years experience as an assistant chef or cook, and two years of training.

In its Rebuttal, Employer conceded that it had not contacted the U.S. applicant until March 16, 1987. Employer argued, however, that it contacted the applicant and submitted a recruitment report to the EDD well before the EDD's deadline of April 9, 1987. Employer contended it should not be penalized for fully using the time permitted it to find and hire U.S. applicants.

In response to the CO's finding that Employer had not proved it had in fact contacted the applicant, Employer submitted two signed declarations. The declaration of Charles Bernold, general manager (AF9) stated that he mailed the applicant a letter by certified mail, return receipt requested. Mr. Bernold further stated the applicant, Mr. MacLaine, called the club on March 27, 1987, and told Mr. Bernold's receptionist he would be unable to attend the interview as scheduled. The declaration of the executive chef, Karl Huggel (AF10), states that he returned Mr. MacLaine's call that same morning and spoke with the applicant. Mr. MacLaine told Mr. Huggel he was no longer interested in the job, but gave no further explanation.

On October 23, 1987, the CO issued a Final Determination, rejecting Employer's application for labor certification (AF3-4). The CO determined that Employer still had not established a good-faith effort to recruit U.S. workers, as the certified mail money receipt was not postmarked. The CO added that the letter to the applicant did not adequately identify the job offer. (AF4).

The CO further found that although the advertisement did not require Swiss and Scandinavian speciality experience,

Any job applicant that [sic] reads the ad would be deterred by the combination of specialties listed there, so regardless what employer meant, the effect of the listed specialties is to deter otherwise qualified chefs.

(AF4). The CO also determined that menus previously submitted (AF 46-53) did not prove business necessity of Scandinavian and Swiss cooking because the items were tailored to the alien's abilities rather than to business necessity (AF4). The CO concluded that convincing evidence that the applicant was not able or available to work at the time of recruitment had not been submitted. (AF4).

## Discussion

Ordinarily, an applicant is considered qualified for a job if the applicant meets the minimum requirements specified for that job in the labor certification application. An applicant who meets those minimum requirements cannot be rejected only because his resume does not show experience in specific areas set out in the job description. In the Matter of Microbilt Corp., 87-INA-635 (January 12, 1988). The job requirements and the job description are not synonymous. Indeed, such is the structure of the application for alien employment certification. Question 13 asks the employer to "[D]escribe Fully the Job to be Performed (Duties).\" (Emphasis in original). Question 14 goes further. \"[S]tate fully the MINIMUM education, training and experience for a worker to perform satisfactorily the job duties described in Item 13 above.\" (Emphasis added.) Finally, Question 15 requests the employer to identify \"other Special Requirements.\" The very application form thus emphasizes the logical distinction between a detailed description of all of the duties which will be performed by the incumbent and the minimum requirements any applicant must possess before it can be assumed that he could satisfactorily perform those duties with little or no additional training.

At issue in this case is whether Employer must prove that descriptive specialized job duties arise from a business necessity where the job requirements do not require prior experience in those specific duties.

While the job description in the ETA 750 and the advertisement does identify specialized duties (preparation of Swiss, Scandinavian and continental cuisine), the job requirements clearly do not include experience in preparing specialized cuisine, but are instead general requirements for a chef. Employer stated in its rebuttal, \"There is no special requirement of experience in Swiss and Scandinavian cuisine. . . \" On the facts of this case, Employer did not intend the specific job duties to be job requirements. It assumed that any applicant with 2 years of training as a cook plus either 2 years experience in the job or 2 years experience as an assistant chef/cook could successfully prepare the Swiss and Scandinavian cuisine items it serves.

The structure of the application form is consistent with the framework and language of the applicable regulations. Section 656.21(b)(2) specifically deals with job requirements. Under that regulation, and employer who imposes requirements beyond \"those normally required for the job in the United States\" or those \"defined for the job in the Dictionary of Occupational Titles. . . ,\" or which include \"a language other than English,\" must document that the requirements it imposes arise from \"business necessity.\"

The distinction between \"job duties\" and \"job requirements\" is not always neatly discernible, however. \"Job duties\" is a description of the details of the facets of the job as it is performed while requirements are those prerequisites to the ability to perform the duties with little or no additional training or experience. Thus, it is incumbent upon an employer to set the level of MINIMUM requirement such that any applicant fulfilling those requirements can

reasonably be expected to perform the job duties with a minimum of job training.<sup>1</sup> Indeed, where an employer believes that the job could only be performed by applicants who have, in the past, performed essentially the same job duties, it may indicate so by limiting the MINIMUM requirements (in item 14 of the application) to a number of years of experience in the "job offered". Reasonably interpreted, such an application would be taken to mean that the employer believes that only applicants who have actually performed the same or similar job duties for any employer may be assumed to be able to perform the job duties of the offered job with a minimum of training.

That is not to say that a CO cannot find, as a matter of fact that an employer is imposing as a job requirement past experience in performing some or all of the duties of the offered job. Such a finding is proper grist for the mill of the Notice of Findings.

In this case, as Employer argued on rebuttal, there is no special requirement of experience in Swiss and Scandinavian cuisine in its application. Rather, Employer claimed it was ready to accept either two years experience in preparing those dishes or two years experience as an assistant chef/cook. There is nothing in this record contrary to Employer's assertion. The mere fact, as relied upon the CO, that Employer chose to identify the types of cuisine it served as well as set out examples of specific dishes, in its job opportunity advertising does not, by itself demonstrate that Employer was de facto requiring experience in the preparation of those particular dishes as requirements.

Because the "job requirements" imposed by employer did not include the "job duties," there was no "unduly restrictive" job requirement calling for a "business necessity" justification.

Finally, in regard to job requirements, the CO's statement in the Final Determination that "the effect of the listed specialties (in the help-wanted advertising) is to deterr (sic.) otherwise qualified chefs" amounts to the same argument, i.e., that Employer was imposing unduly restrictive job requirements. For the reasons above, we reject this argument.

Job duties need not be justified by business necessity where the actual minimum job requirements are not unduly restrictive. Because Employer's job requirements were clearly stated and were not unduly restrictive, the job opportunity did not violate §656.21(b)(2)(i).<sup>2</sup>

We also find without merit the CO's determination that Employer failed to show a good-faith effort to recruit U.S. workers. The copy of the letter sent to the applicant, the certified mail receipt, though unstamped by the Post Office, and the signed declarations of Employer's executive chef and general manager are sufficient documentation of Employer's recruitment

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<sup>1</sup> The purpose of section 656.21(b)(2) is to establish minimum requirements so as to make the job opportunity available to as many U.S. workers as possible.

<sup>2</sup> Employer, in a brief before us, argues in the alternative that submitting menus was a reasonable means of showing business necessity. Because we find that there was no specialized job requirement, we need not address this issue.

efforts. The CO's Final Determination does not state why the declarations, which were timely submitted with Employer's Rebuttal, were not sufficient to show a good faith recruitment effort. The CO totally ignored Employer's argument in rebuttal that its compliance with the local office's time limits for recruiting precluded the CO from finding its recruitment efforts to be untimely. In addition, although the CO in the Final Determination again mentioned the lack of postmark on the certified mail money receipt, he also ignored the signed declarations as to the dates of the mailing of the letter (AF9) and the phone contact with the applicant (AF10). Both declarations submitted on rebuttal assert facts constituting completion of recruitment within the time allowed by the local office. In failing to acknowledge, address or discredit Employer's rebuttal statements, the CO failed to meet the requirements of In the Matter of Gencorp, 87-INA-659 (1988).

Finally, we reject the CO's use as a ground for denial, his conclusion that the letter to Mr. MacLaine did not adequately identify the job offer. This ground for denial was not included in the Notice of Findings. The CO's grounds for denial of labor certification must be set forth in a Notice of Findings, giving an employer an opportunity to rebut or if possible cure alleged defects. The CO's grounds may not be stated for the first time in the Final Determination. 20 C.F.R. 656.25. In the Matter of Downey Orthopedic Medical Group, 87-INA-674 (March 14, 1988).

#### ORDER

The determination of the Certifying Officer denying certification is REVERSED, and the application for labor certification is hereby GRANTED.

MICHAEL H. SCHOENFELD  
Administrative Law Judge

Administrative Law Judge Jeffrey Tureck, joined by  
Administrative Law Judge James Guill, dissenting:

Although I agree with the majority's determination that the job requirements in this case did not include experience as a chef of Swiss and Scandinavian cuisine, the advertisements for this job (see Judge Brenner's dissenting opinion for the text of the advertisement) doubtless could have created the impression that such specialized experience was required. Accordingly, qualified U.S. workers may not have applied for the position.

Since the Certifying Officer did not separately raise the issue of the ambiguity of the advertisements until the Final Determination, I would remand the case to the CO to give the

Employer the opportunity to readvertise the position in a manner which clearly differentiates between the job's requirements and duties.

JEFFREY TURECK  
Administrative Law Judge

In the Matter of BEL AIR COUNTRY CLUB, 88-INA-223  
Judge LAWRENCE BRENNER, dissenting.

I disagree with the majority that the ability to cook Swiss and Scandinavian cuisine, including specific dishes given as examples, is not being required of U.S. applicants. My colleagues have accepted the argument of the Employer, in rebuttal to the Notice of Findings, that the requirement found restrictive by the C.O. is only a duty listed in that section of the application, and not a requirement. However, the C.O. is correct in his Final Determination (AF 4) that a U.S. applicant reading the advertisement for employment would believe that the present ability to cook Swiss and Scandinavian cuisine, including the specific examples of dishes listed in the advertisement, is a requirement for applicants for the job.

The advertisement, in pertinent part, states:

CHEF (Continental/Scandinavian/Swiss Cuisine)-Prepare and cook dishes such as gravlax, beef a la rydberg, rabbit dishes, snails, venison, etc. 2 yrs. training & 2 yrs. exp. as Chef or 2 as Asst. Chef/Cook.

(AF 32). If the Employer was only requiring the general training and experience claimed by the majority, and was willing to train such an applicant to cook the Scandinavian and Swiss cuisine, no one reading this advertisement would know that.

The advertisement in this case is clearly distinguishable from the one in Prospect School, 88-INA-184 (Dec. 21, 1988) (en banc). In that case, the Board found that the description of an elementary school as one which "uses British primary teaching methods" did not make British teaching methods experience a requirement in the context of that advertisement for the stated job title of "teacher". Here, the advertisement context, including the parenthetical modifier of the job title and the present tense commands "prepare and cook" specific dishes (rather than ability to learn to do so), specifically reinforces the message that the present demonstrated ability to cook Scandinavian and Swiss cuisine is required.

Indeed, even the Employer abandons this argument before us in its request for review (AF 1-2), its brief on appeal dated May 17, 1988, and in its May 19, 1988 reply to the letter from counsel for the C.O. Instead, the Employer argues that it has shown business necessity for the restrictive requirement, or in the alternative the case should be remanded to the C.O. so the Employer can show that its menus prove its business necessity because, contrary to the apparent allegation raised by the C.O. for the first time in his Final Determination, the dishes served by the Employer have not been tailored to the Alien because such cuisine had been served by the

Employer prior to its employment of the Alien. I would decide this case on the business necessity issue.<sup>1</sup>

LAWRENCE BRENNER  
Administrative Law Judge

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<sup>1</sup> The Employer claims on appeal that the C.O. raised a combination of duties issue for the first time in the Final Determination as a basis for requiring business necessity. I disagree that the C.O. raised this issue, and in any event would not allow it to be raised for the first time in the Final Determination.