U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 September 2004

BALCA Case No.: 2003-INA-136
ETA Case No.: P2003-NY-02489789

In the Matter of:

M. BALACHANDRAN & V.G. VEERUBHOTLA,
Employer,

on behalf of

PUSHPABEN PATEL,
Alien.

Appearance: Charles R. Tribbitt, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Delores Dehaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by a private household for the position of Domestic Cook. (AF 19-22). The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

[1] Alien labor certification is governed by § 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.

STATEMENT OF THE CASE

On April 25, 2001, the Employer, M. Balachandran & V.G. Veerubhotla, filed an application for alien employment certification on behalf of the Alien, Pushpaben Patel, to fill the position of Domestic Cook. The job duties were to prepare and to cook Indian dairy and vegetarian dishes, such as curries, lentil and bean soups, cheeses, yogurts, breads and sweets. Minimum requirements for the position were two years experience in the job offered. Hours of employment were 8:00 a.m. to 5:00 p.m., forty hours per week. (AF 22).

A Notice of Findings ("NOF") was issued by the Certifying Officer ("CO") on February 1, 2003, proposing to deny labor certification based upon a question of the *bona fide* full-time nature of the job and the restrictive nature of the ethnic/religious food experience requirement. (AF 29-32). The Employer was instructed to provide documentation of a *bona fide* job opportunity, including responses to six specified questions and either to delete or to document business necessity for the restrictive experience requirement. In addition, the Employer was instructed to document that the job existed before the Alien was hired or that a major change in their household operation caused the job to be created when the Alien was hired.

In Rebuttal, the Employer responded that they are a religiously vegetarian family, and that they work long hours, rarely eat out and do not use ordinary prepared foods, which necessitates the services of a cook. The Employer further stated that prior to hiring the Alien, they had only been married a short time and did not yet have a child, and that they cannot now cope with the task of cooking in addition to heavy work schedules and still have time for themselves and their daughter and family. (AF 33-37).

A Final Determination ("FD") denying labor certification was issued by the CO on March 18, 2003, based upon a finding that the Employer had failed to document business necessity for the restrictive requirement of two years of experience preparing Indian dairy and vegetarian style food. (AF 38-39). In denying certification, the CO

observed that the Employer had failed to supply any evidence that an applicant with two years of cooking experience would be incapable of, or could not readily adapt to, the preparation of Indian dairy and vegetarian style cooking.

The Employer filed a Request for Review by letter dated March 21, 2003, and the matter was docketed in this Office on April 8, 2003. (AF 40-41).

DISCUSSION

Twenty C.F.R. § 656.21(b)(2) requires an employer to document that its requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the United States and as defined for the job in the *Dictionary of Occupational Titles* (DOT). While acknowledging that "cooking specializations are sometimes part of the job," the Board held in *Martin Kaplan,* 2000-INA-23 (July 2, 2001)(*en banc*) that cooking specialization requirements for domestic cooks are unduly restrictive job requirements within the meaning of 20 C.F.R. § 656.21(b)(2), and therefore must be justified by business necessity under the test found in *Information Industries, Inc.,* 1988-INA-82 (Feb. 9, 1989)(*en banc*). Pursuant to the Board's holding in *Information Industries,* in order to establish "business necessity" an employer must show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business and that the requirement is essential to performing, in a reasonable manner, the job duties as described.

The CO in this case identified three specific points for the Employer to address with respect to documenting business necessity for its restrictive cooking specialization requirement. The Employer was asked to show (1) why a cook without prior Indian dairy and vegetarian style cooking experience is not capable of preparing Indian dairy and vegetarian style food; (2) why the Employer or a family member could not provide training; and (3) whether the job, as described, existed before the Alien was hired or there

was a major change in the household operation which caused the job to be created after the Alien was hired.

In rebuttal, the Employer stated that they are a "[r]eligiously vegetarian family and it is important to us to have all of our meals prepared in accordance with our beliefs and practices." The Employer stated that the major change in the household is that they are no longer newly married and now have a child in addition to their heavy workloads, hence they cannot cope with this additional task of food preparation. The Employer further stated that they could not provide training in the preparation of Indian dairy and vegetarian style food as they do not have "the time or ability to teach these methods."

In the instant case, we concur in the CO's finding that the Employer's rebuttal fails to document business necessity for the specific requirement of the two years experience in Indian dairy and vegetarian style cooking. The Employer stated that prior to the Alien's hire, they did not employ a cook and struggled to prepare their own meals despite their heavy schedules. The Employer stated that the Alien was only employed once they had their child and the demands became too great. As justification for the requirement, the Employer stated that it is very important to have meals prepared in accordance with their beliefs and practices, yet further stated that they don't have the time or ability to teach these methods of cooking.

Moreover, as in *Kaplan,* it may well be true that the Employer cannot take the time to train a cook in Indian dairy and vegetarian style cooking, but the NOF also required that the Employer show that such training was necessary. The Employer failed to do so. The Employer provided no evidence whatsoever to show why it would take two years to learn to cook Indian dairy and vegetarian style dishes despite being expressly asked to address this question by the CO in the NOF. Other than to describe some of the foods being prepared and to say that the preparation techniques require skill and experience, the Employer presented no evidence that an otherwise experienced domestic cook could not adapt to cook the desired type of cuisine within a reasonable period of taking the job. *Kaplan, supra.* In *Carlos Uy III,* 1997-INA-304 (Mar. 3, 1999)(*en banc*)

and *Chams, Inc., d/b/a Dunkin' Donuts,* 1997-INA-40, 232 and 541 (Feb. 15, 2000)*(en banc)*, the Board emphasized that an employer's bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

Based upon the foregoing, we conclude that the Employer has not adequately documented business necessity for its unduly restrictive requirement of two years of experience in Indian dairy and vegetarian style cooking, and accordingly, labor certification was properly denied.

ORDER

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

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.