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Issue Date: 08 September 2003

BALCA Case No.: 2002-INA-91
ETA Case No.: P1998-CA-09407428/ML

In the Matter of:

EXOTIC PET FOODS dba BAYOU,
Employer,

on behalf of

JOSE ALFREDO ARZETA,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: David W. Williams, Esquire
Law Offices of Leonard W. Stitz
Santa Ana, California
For Employer

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by an aquatic foods supplies company for the position of Cook/Aquatic Foods. (AF 15-16).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 September 25, 1997, Employer, Bayou, filed an application for alien employment certification on behalf of the Alien, Jose Arzeta, to fill the position of Cook/Aquatic Foods. Minimum requirements for the position were listed as two years experience in the job offered. The job to be performed was described as follows:

Cook and prepare aquatic foods for pet fish and reptiles. Prepare meals according to species and nutritional requirements. Pare, clean, mince and prepare brine shrimp, worms, krill, plankton, squid and mussels. Use pots, pans, weighing scales, knives (sic), measuring cups and blender. Clean kitchen and cooking utensils and order food items and kitchen supplies.

(AF 15-16).

Employer was notified by the Local Job Service Office on March 12, 1998 that its job opportunity appeared to be a combination of job duties and that the experience requirement exceeded the Specific Vocation Preparation time normally required for this position. (AF 42-46). Employer responded that the petitioned position is a “specialized” position which requires a minimum of two years experience. (AF 40-41).

Employer received no applicant referrals in response to its recruitment efforts for the position. (AF 18).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on April 4, 2001, proposing to deny labor certification based upon a finding that Employer’s job requirement of two years experience in the job offered is unduly restrictive, and thus in violation of 20 C.F.R. § 656.21(b)(i)(A), in that it is not normally required for the successful performance of the job in the United States. Employer was instructed to rebut the findings by either deleting the restrictive requirement and retesting the labor market; by documenting that the requirement is a common one for the occupation in the United

States; or by justifying the restrictive requirement on the basis of “business necessity”. (AF 11-13).

In Rebuttal, Employer attempted to document business necessity for its experience requirement, stating that when it had hired someone with less than two years experience they were unable to perform the tasks adequately, properly or in a timely fashion, which had an adverse effect on the business and its success and reputation. (AF 5-6).

A Final Determination denying labor certification was issued by the CO on August 20, 2001, based upon a finding that Employer had failed to provide documentation justifying its excessive requirement as either normal to the occupation or based on business necessity. (AF 3-4).

Employer filed a Request for Review by letter dated September 3, 2001, and the matter was referred to and docketed in this Office on February 21, 2002. (AF 1-2). Employer’s Statement of Position was received in this Office on March, 19, 2001.

DISCUSSION

Federal regulations at 20 C.F.R. § 656.21(b)(2) require 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 successful performance of the job in the United States. Abnormal requirements would preclude the referral of otherwise qualified U.S. workers. One of the measures by which a job requirement is tested to determine whether it is unduly restrictive is inclusion of the requirement in the definition of the job in the *Dictionary of Occupational Titles* (DOT). To determine whether a particular job requirement falls within the applicable DOT code, the CO must determine the job title which best describes the job and determine whether the job requirements specified by the employer fall within those defined in the DOT. *LDS Hospital*, 1987-INA-558 (Apr. 11, 1989)(*en banc*). Where the employer cannot

document that the job requirement is normal for the occupation or that it is included in the DOT, Employer must establish business necessity for the requirement. 20 C.F.R. § 656.21(b)(2). Pursuant to the Board of Alien Labor Certification Appeals' holding in *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*), in order to establish "business necessity" an employer must show that the requirement is essential to performing, in a reasonable manner, the job duties as described.

In the instant case, Employer's job title was not listed in the DOT, but the Local Job Service Office determined, based upon the job duties as described, that the job title which best describes the job was that of Cook, Helper, DOT 529.687-050, which carries an experience requirement of up to 30 days.³ (AF14). In the NOF, the CO observed that Employer had asserted that the petitioned position was a "specialized position" which calls for more experience, and hence, requested documentation to support this position. Employer proffered no such documentation. In rebuttal, Employer simply stated that in some cases, where a person with less than two years experience is hired, they cannot proficiently perform the job. As was noted by the Board in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), "a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof." *Uy* at 9, citing *A.V. Restaurant*, 1988-INA-330 (Nov. 22, 1988); *Our Lady of Guadalupe School*, 1988-INA-313 (June 2, 1989).

Congress enacted Section 212(a)(14) of the Immigration and Nationality Act of 1952 (as amended by Section 212(a)(5) of the Immigration Act of 1990 and recodified at 8 U.S.C. § 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." *Cheung v. District Director, INS*, 641 F.2d. 666, 669 (9th Cir., 1981); *Wang v. INS*, 602 F.2d 211, 213 (9th Cir. 1979). To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Consequently, the burden of proof in the

³ The Job Service Office considered several other job descriptions and titles, all of which had a specific vocational preparation (SPV) of 2 and hence required up to 30 days experience as well. (AF 46-47).

labor certification process is on the Employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. § 656.2(b). Moreover, as was noted by the Board of Alien Labor Certification Appeals in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), “[u]nder 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.” *Id.* at 8.

In the instant case, Employer failed to provide documentation to adequately rebut the issue raised by the CO in the NOF, and accordingly, labor 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,