

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 15 September 2003

BALCA Case No.: 2002-INA-151
ETA Case No.: P2000-NY-02444057

In the Matter of:

FRANCIS ARKIN,
Employer,

on behalf of

REJANE RODRIGUES,
Alien.



Certifying Officer: Dolores Dehaan
New York, New York

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 "Domestic Cook."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 January 12, 1998, Employer, Francis Arkin ("Employer") filed an application for labor certification on behalf of the Alien, Rejane Rodrigues ("Alien") to fill the position of "Cook-Kosher." (AF 12). The job duties included planning menus and cooking in a private home according to the tastes/recipes of Employer. Employer required two years of experience in the position offered.

The CO issued a Notice of Findings ("NOF") on October 24, 2001, proposing to deny certification for failure to establish that the job opportunity was clearly open to any qualified U.S. worker as required by 20 C.F.R. §656.20(c)(8).² (AF 31). Employer was advised that the requirement of two years of experience performing the job duties of Kosher style cooking was not a normal job requirement for a domestic cook, and therefore, considered unduly restrictive. To rebut this finding, Employer needed to provide evidence that the requirement of two years of experience in Kosher style cooking arose from a business necessity. This evidence needed to document that (1) an applicant with two years of experience in cooking could not readily adapt to a Kosher style of cooking; (2) an applicant with no prior experience in Kosher style cooking was incapable of preparing Kosher style food; and (3) neither Employer nor anyone in her family, was able to provide training or instruction in the Kosher cooking tradition. Additionally, Employer needed to provide evidence that the position existed before Employer filed the instant application. Alternatively, Employer could delete the specialized ethnic/religious requirement.

Employer's rebuttal consisted of a letter dated January 4, 2002, with attachments. (AF 44). Employer stated that she wanted Kosher meals, in accordance with her religious practice, and needed a cook experienced in Kosher cooking. Employer set forth the dietary rules which needed to be observed and provided a schedule of meals to be prepared.

The CO issued a Final Determination ("FD") on January 15, 2002, denying certification. (AF

²Given that Employer was found to have successfully rebutted this issue, it will not be detailed any further herein.

46). The CO found that Employer had failed to rebut the finding rendered pursuant to 20 C.F.R. §656.21(b)(2), inasmuch as she had failed to document the business necessity for the requirement that the domestic cook have two years of specialized experience preparing Kosher foods. The CO determined that Employer failed to submit any conclusive evidence that an experienced cook, without two years of experience in the preparation of Kosher foods, could not perform the job.

On January 28, 2002, Employer filed a Request for Review with the Board of Alien Labor Certification Appeals (“Board” or “BALCA”). (AF 63).

DISCUSSION

In her Request for Review, Employer states that there is no school for Kosher cooking in the New York City area, and most cooks are trained in the households of observant families. Employer contends that she needs someone who is guaranteed to do things correctly. Included with the Request for Review are a letter from a rabbi and a letter from the owner of a Kosher restaurant, as well as an article on Dietary Laws from VOL. 6, ENCYCLOPAEDIA JUDAICA. This documentation, which was not provided to the CO, will not be considered by this Board. Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. 656.27(c). *See also* 20 C.F.R. § 656.26(b)(4); *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Furthermore, where an argument made after the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

Section 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 require any more strict requirements than are listed in the DOT classification for the job. *Approach, Inc.*, 1990-INA-230 (Aug. 29, 1995).

Employer has required two years of experience in Kosher style cooking. However, this experience is not normally required for the job of domestic cook in the United States, nor is it part of the definition of domestic cook, as that job is listed in the DOT. Thus, the DOT definition for domestic cook, in pertinent part, states that a domestic cook “[p]lans menus and cooks meals, in private home, according to recipes or tastes of employer.” DOT 305.281-010. Employer has made bald assertions regarding the necessity of someone with two years of experience in Kosher style cooking. She has provided no compelling evidence, however, that someone with two years of experience as a domestic cook could not cook meals according to the Employer's recipes. Employer has done no more than state a preference as to a particular cooking style, without proving that it takes two years to learn that style, and that such specialized training is necessary. This being the case, Employer has failed to establish a business necessity for the experience requirement. Labor certification was properly denied, and the following order shall issue.

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.