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Issue Date: 02 September 2004

BALCA Case No.: 2003-INA-20
ETA Case No.: P2000-CA-09507268

In the Matter of:

THE JACK RANCH CAFE,
Employer,

on behalf of

NERIDA RANGEL-MONDRAGON,
Alien.

Appearance: Peter H. Morgan, Jr., Esquire
Pico Rivera, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Nerida Rangel-Mondragon (“the Alien”) filed by The Jack Ranch Cafe (“the Employer”) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (“the Act”), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer (“CO”) of the United States Department of Labor, San Francisco, California, denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon

which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On January 11, 2000, the Employer, The Jack Ranch Cafe, filed an application for labor certification to enable the Alien, Nerida Rangel-Mondragon, to fill the position of Cook. (AF 36). The job duties for the position were to prepare Mexican food, plan menus, and purchase food and supplies. The only stated job requirement for the position was two years of experience in the job offered.

In a Notice of Findings ("NOF") issued on June 7, 2002, the CO proposed to deny certification on the grounds that the Employer's requirement of specialized experience in Mexican food preparation is unduly restrictive under 20 C.F.R. § 656.21(b)(2)(i)(A). (AF 32-34).

The rebuttal and exhibits were initially filed on June 12, 2002. (AF 9-31). However, the rebuttal was signed by Sandra Warner, Bookkeeper, *not* by Loren Comstock, owner of The Jack Ranch Café. (AF 9-10). Because the rebuttal was not signed by the Employer, the CO found that it was procedurally flawed, and in a letter dated July 8, 2002, denied certification pursuant to the provisions of 20 C.F.R. § 656.25(d)(1). On July 16, 2002, Loren Comstock, owner, stated that she was re-submitting the rebuttal evidence and requested reconsideration of the denial of certification. (AF 4).

After reconsidering the Employer's submissions, on August 27, 2002, the CO issued a Final Determination ("FD") denying certification on substantive grounds. (AF 5-6). On September 6, 2002, the Employer filed a Request for Review. (AF 1-3).¹

¹ Upon initial review of the file, we found that the Employer's Rebuttal made references to certain attachments which were not contained in the AF, and that the FD also referred to such evidence. Accordingly, the Board contacted the CO, who was unable to identify any missing pages from the AF. Because the attachments were deemed necessary for adequate appellate review, the Board issued an Order

DISCUSSION

Under 20 C.F.R. § 656.21(b)(2)(i), a job requirement which exceeds that which is normally required for the performance of the job in the United States and as defined for the job in the D.O.T. is presumed to be unduly restrictive. The presumption may be overcome if the employer adequately documents that it arises from business necessity. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*). To establish business necessity, the 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 by the employer. *Id.*

In the present case, the job opening is listed as Cook. The job duties, as stated in the ETA 750A and as advertised, generally conform with the D.O.T., with one notable exception: experience in cooking and preparing Mexican food. (AF 36, 44-46). As stated above, the Employer has set forth a requirement of two years of experience in the job offered. Accordingly, the job duties are engrafted within the job requirement. *See Bel Air Country Club*, 1988-INA-223 (Dec. 23, 1988)(*en banc*).

In the NOF, the CO stated that the Mexican food experience requirement is unduly restrictive, and instructed the Employer either to amend the requirement, to justify it based on business necessity, or to show that it is usual in the occupation or industry. (AF 33).

The rebuttal, including the documents obtained pursuant to our Order, consisted of the Employer's initial response, signed by Sandra Warner, Bookkeeper, the Employer's virtually identical supplemental response, signed by Loren Comstock,

dated March 16, 2004, whereby the Employer was ordered "to provide a copy of the original rebuttal, with attachments, within twenty-one (21) days of the date of this Order." (AF 94). On March 26, 2004, the Employer filed copies of various documents, including those which had been missing on the initial transmittal from the CO. The above-referred documents have been included in the AF, and have been marked and received as pages 65 through 94.

duplicate copies of the Employer's menu, and multiple copies of the menus from The Whole Enchilada, and the Mountain Crossing Restaurant. (AF 9-31, 68-86).²

The Employer argued in rebuttal that the restaurant serves authentic Mexican cuisine, which requires special seasoning and preparation. The Employer stated that this required two years of experience because it is not "standard domestic fare," but uses special sauces, seasonings, and other special ingredients not found in "ala americana" Mexican food. (AF 9-10, 85-86).

In the FD, the CO stated that the majority of the Employer's menu consisted of burgers and salads, with only a few standard Mexican items. The CO did not believe that the Employer was a Mexican specialty restaurant and therefore, found the experience requirement to be excessive. (AF 6).

Upon review, we have considered the Employer's position and reviewed the Employer's full menu, as well as the menus of The Whole Enchilada and the Mountain Crossing Restaurant. (AF 12-31, 77-84). The menus from the other two restaurants provide little assistance in analyzing this matter. As the name implies, the menu from The Whole Enchilada establishes that it is clearly a Mexican restaurant, and virtually the entire menu consists of Mexican breakfast dishes, soups, ala carte items, drinks, and entrees. On the other hand, the Mountain Crossing Restaurant menu is almost exclusively American. The menu only includes five Mexican dishes, which are listed under "Express Car Straight from Mexico." (AF 28). Similarly, there are four Italian dishes. (AF 28).

The Employer's menu is somewhat more problematic. As stated by the Employer, The Jack Ranch Café's menu does include eight Mexican entrees and fourteen

² The AF, as initially provided to the Board, only included the first page of the Employer's menu. (AF 11). However, the Employer's March 26, 2004 submissions included two copies of the Employer's full menu. (AF 77-84). In contrast, duplicate copies of the full menus of the other two restaurants were contained in the AF, when it was initially forwarded by the CO. (AF 12-31). Therefore, the fact that one page of each of the other two menus is missing from the Employer's submissions on March 26, 2004 is inconsequential. (AF 68-74).

ala carte Mexican dishes. However, based upon our careful review of Employer's menu, we note that most of the Mexican dishes are relatively light fare. Thus, the eight "South of the Border Entrees" consist of one taco dish, five enchilada dishes, one pork dish, and one combo plate. Similarly, the fourteen ala carte Mexican dishes are enchiladas, tacos, burritos, and tostados. (AF 82). Moreover, the vast majority of the menu consists of light American fare, such as pancakes, eggs, sandwiches, omelets, burgers and fries. (AF 81-84). We also note that the cover of the Employer's menu provides a history of The Jack Ranch Café and urges customers to "enjoy our simple, homemade food," but makes no reference whatsoever to any Mexican dishes. (AF 84).

In view of the foregoing, we find that the Employer has failed to adequately document that the two year requirement of experience in the job offered, which incorporates the duty of Mexican cooking, is not unduly restrictive. With only a few Mexican dishes on the menu, the Employer has not demonstrated that two years of experience cooking Mexican style food bears a reasonable relationship to the occupation or that it is essential to perform the job duties. The inclusion of a few Mexican dishes on an otherwise American menu does not establish the need for a cook with two years of experience in Mexican style cooking. *See, e.g., Kim, Oh, Cho, Inc.*, 1994-INA-490 (Mar. 26, 1996) (a requirement of knowledge of Chinese cooking is unduly restrictive when the menu includes two to three Chinese dishes that are sufficiently common in the United States and are not considered Chinese specialties). The Employer has failed to establish business necessity for the requirement, as required when the job duties fall outside those specified in the D.O.T. *See Garland Community Hospital*, 1989-INA-217 (June 29, 1991). Therefore, we find that 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 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, N.W., 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 ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.