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Issue Date: 28 September 2004

BALCA Case No.: 2003-INA-239
ETA Case No.: P2003-NY-02489638

In the Matter of:

ANITA CASSANDRA,
Employer,

on behalf of

ROSARIO BARROS,
Alien.

Certifying Officer: Delores DeHaan
New York, New York

Appearances: Barbara S. Reede, Esquire
Forest Hills, New York
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by a household owner for the position of Domestic Cook. (AF 4-5).² 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”). 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.

² “AF” is an abbreviation for “Appeal File.”

STATEMENT OF THE CASE

On April 30, 2001, the Employer, Anita Cassandra, filed an application for alien employment certification on behalf of the Alien, Rosario Barros, to fill the position of Domestic Cook. The job duties included planning menus, marketing, cooking and serving for guests and family, taking into consideration dietary needs of the family, such as high cholesterol, preparing Hispanic foods, and cleaning the kitchen. Hours of employment were listed and “variable” at a 35-hour workweek. Minimum requirements for the position were listed as two years of experience in the job offered.

A Notice of Findings (“NOF”) was issued by the CO on February 1, 2003, proposing to deny labor certification on several bases. (AF 25-30). The CO questioned the existence of a bona fide job opportunity clearly open to U.S. workers and the Employer’s ability to pay the wages offered, questioned the Employer’s two year experience requirement on the basis that the Alien did not appear to possess two years of experience as a Domestic Cook, and found the Employer’s requirement of two years of experience in Hispanic Style cooking unduly restrictive. In rebuttal, the Employer was instructed to submit responses and documentation to eight enumerated questions, to document that the Alien had the qualifications now required at the time of hire or why it is not now feasible to hire a worker with less training, and to document business necessity for its Hispanic Style cooking requirement.

In Rebuttal, the Employer submitted documentation addressing its need for and ability to pay a full-time cook. In documenting the Alien’s experience, the Employer stated that “the alien previously owned and operated a restaurant in Ecuador.” With respect to the Hispanic Style cooking requirement, the Employer stated that all individuals in the home and most of their guests are of Hispanic heritage, and that while someone with two years of experience could adopt the Hispanic style of cooking, the Employer’s needs are immediate. (AF 35-40).

A Final Determination (“FD”) denying labor certification was issued by the CO on March 20, 2003, based upon a finding that the Employer had failed to document that the Alien has the past paid experience required and had failed to document that the ethnic requirement of two years of experience in Hispanic style cooking arises out of business necessity. (AF 40-42).

The Employer filed a Request for Review and supporting documents by letter dated April 23, 2003, and the matter was docketed on July 21, 2003. (AF 43-61).

DISCUSSION

Pursuant to 20 C.F.R. § 656.21(b)(5), an employer is required to document that its requirements for the job opportunity are the minimum necessary for performance of the job and that it has not hired or that it is not feasible for employer to hire workers with less training and/or experience. Twenty C.F.R. § 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a bayside Motor Inn*, 1989-INA-105 (Feb. 14, 1990).

In the instant case, the Employer set its requirements for the job at two years of experience as a Domestic (Private Household) Cook. The Employer provided no related experience alternatives. The Employer has indicated that the Alien has experience as a cook in a restaurant but has not documented experience as a domestic cook in a private household. Hence, we agree with the CO that the Alien does not meet the Employer’s stated job requirements. Because U.S. workers were required to meet standards that the Alien does not meet, certification cannot be granted in accordance with 20 C.F.R. § 656.21(b)(5). *Keithley Instruments, Inc.*, 1987-INA-717 (Dec. 19, 1988).

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.

In rebuttal, the Employer cited two factors as justification for the Hispanic style cooking requirement: that all individuals in the home and most guests are of Hispanic heritage, and that the need was immediate. 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 instructed to show why a cook with two years of experience could not readily adapt to a Hispanic style of cooking, why a cook without prior Hispanic style cooking experience is not capable of preparing Hispanic style food, and why the Employer or a family member could not provide training or instruction in Hispanic style cooking. Other than to state that the Employer’s mother-in-law, the person who previously performed the job, could no longer prepare the meals due to her age and responsibilities caring for the Employer’s children, the Employer did not address any of the three specific points requested by the CO.

The burden of proof in the 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).

The Employer’s rebuttal provides no evidence whatsoever that an otherwise experienced domestic cook could not adapt to cooking Hispanic cuisine within a

reasonable period of taking the job. *Kaplan, supra*. The Employer stated that an individual who is raised eating Hispanic dishes would know the difference in Hispanic cooking, and that each meal prepared would include rice, but the Employer did not document that this type of cooking requires extensive training and experience or demonstrate in any way that an experienced cook would not be capable of picking up and adjusting to Hispanic style cooking within a reasonable period of time.

On this basis, the Employer has not adequately documented business necessity for its unduly restrictive requirement of two years of experience in Hispanic 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.