United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

Date: December 4, 1997

Case No. 95 INA 671

In the Matter of:

MICHAEL MILLER,
Employer

on behalf of

HALINA BERLINSKA,
Alien

Appearance: B. J. Lewyskyj, Esq., of New York, New York

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of HALINA BERLINSKA (Alien) by MICHAEL MILLER (Employer) under § 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 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the

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[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

This case involves an application (ETA 750A) for permanent full time employment of the Alien as a Kosher/Diet Cook with the following duties:

> Prepares, seasons, and cooks soups, meats, vegetables, etc. according to the principles of Kosher Cuisine and requirements of low fat and high-carbohydrate diet. Plans menus. Bakes, broils and steams meat, fish and other food. Prepares Kosher meals such as Kasha, Blintzes, Matzas, Gefilte Fish;, Potato Kugel, Kreplach, Stuffed Cabbage, Matzo Balls and deserts such as Mandel Bread and Tzimmis. Serves meals. Purchases foodstuff and accounts for the expenses incurred. Cleans the kitchen, washes the dishes.[3]

AF 37-40. In the form ETA 750A the Employer said the Alien was to work a basic 40 hour week with no overtime anticipated. The hours were to be from 10:30 a.m. to 7:00 p.m., at the rate of $12.81 per hour. The required education was high school graduation and two years of experience in the Job Offered. AF 05.[4]

Notice of Findings. On May 12, 1995, the Notice of Findings stated that, subject to the Employer's rebuttal, the application

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]Quotation is verbatim and without correction.

[4]Alien graduated high school in Poland. From August 1988 to September 1990, she worked in a regional hospital in Poland, where she was a diet cook, preparing food according to the special requirements of different hospital departments and various kinds of diets. On the job she tested and ordered the component foods, and coordinated diet recipes with the dietician. From May 1992 to June 1994 she was employed in a residence, where her duties were the same as those stated in Employer's job description. After July 1994 she was self-employed in the catering business.

would be denied on grounds that the duties described in the ETA 750A did not appear to constitute the full-time position required by 20 CFR § 656.3. The CO advised the Employer that he could rebut this finding by amending the job duties or by submitting evidence that the position constitutes full time employment and has been customarily required by the Employer. After stating specific information that the CO required the Employer to submit as proof, the NOF also noted that the educational requirement was excessive, in that a high school education is not required for the occupation of domestic cook by the DOT. AF 27-29.

Rebuttal. In his rebuttal the Employer provided a time schedule to account for the work of a full time cook, offering functions intended to occupy an eight hour day from 10:30 A.M. to 7:00 P.M. The Employer said there was no entertainment component contemplated, that the cook would have no duties other than those of cooking and maintaining the kitchen, as noted supra, and that he had not previously employed a household cook. The Employer contended, however, that a high school education was required by the DOT for this and similar positions, and he explained his reasons for this requirement. AF 33-35.

Final Determination. In the Final Determination issued June 20, 1995, the CO denied Employer’s application for certification on grounds that Employer's rebuttal failed to sustain his burden of proof under 20 CFR § 656. AF 41-43.[5] Appraising the work that Employer described in the rebuttal, the CO found that the central issue of the application was whether or not the position constituted full time employment of forty hours per week, regardless of the type of food the Cook is to prepare. The CO also rejected Employer's reasons for requiring applicants to have a high school education. Concluding that it was not usual or customary in the United States to require more than an eighth grade education for this job, the CO explained that the Employer's contention that carrying out instructions and performing assigned tasks was not an adequate reason for this special educational requirement in this position. AF 41-42.

Appeal. The Employer appealed on July 12, 1995. Arguing in his brief that the position proffered is full time, he said the CO's finding was subjective and speculative, and was unsupported by fact. He said the CO's analysis was arbitrary, capricious, and speculative, and that it was "an improper subjective opinion being promulgated as Labor Department policy."

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[5]The CO's citation of the definition of Employment is corrected from 20 CFR § 656.50 to 20 CFR § 656.3.

DISCUSSION

The primary issue on which the CO appears to have decided this application focused on whether or not Employer had proven that a the position was full time, and did not discuss whether or not the Employer established the business necessity of this position. In addition, the Employer hotly contested the CO's finding as to the educational requirement he established in his application. Consequently, the two issues to be considered are whether (1) the CO's conclusion that full time employment is not being offered and (2) the CO's rejection of Employer's special educational requirement are supported by the evidence of record.[6]

(1) The CO rejected Employer's estimate of the time the cook would take to perform the proposed job duties because the CO considered the time the Employer assumed the work would require to be unrealistic and contradictory. The CO cited inter alia the need for the cook to prepare and serve a "late lunch" for two persons from 2:30 P.M. to 4:00 P.M., which is followed by dinner for the entire family of four at 5:30 P.M. While the one and one-half hour period for the "late lunch" is not a major part of the contemplated work day, it does represent between 20% and 25% of the day. Moreover, the serving of a "late lunch" one and a half hours before a full supper meal at 5:30 P.M., overlaps the parents' work schedule. AF 34-35. Finally, it would appear that the "late lunch" is uncomfortably close to the full meal the cook would prepare and serve for supper, and that, when this is combined with the overlapping of the family events noted in the rebuttal, the CO's opinion was not necessarily arbitrary, capricious, and speculative, or a subjective opinion, in spite of the Employer's argument on appeal.

(2) Employer's rejection of the CO's finding that the position does not require a high school education is unsupported by either the DOT or evidence of business necessity. Employer argued that, "A household cook is not any lesser qualified or skilled than an institutional or commercial cook or chef." AF 33. While the rhetorical ring of Employer's language is impressive, the record does not contain any evidence that a high school education is normally required for the performance of this job in the United States. AF 27. Moreover, the Employer did not supply any proof that his business necessity requires the cook in his household to have a high school education. The failure of the Employer's recruiting advertisement to attract an adequate response suggests that this job requirement, itself, was an obstacle

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[6]This Employer's application for alien employment certification definitively indicated the nature and conditions of the job offered. 28 U.S.C. § 1746; and see 20 CFR § 656.20(c)(9). The application stated that forty hours of work are being offered each week at an hourly rate of $12.48, the adequacy of which is not at issue.

to the recruitment of U. S. workers for the position that the Employer offered.

Summary. While the Act does not prevent the Employer from imposing such personal preferences as he may fancy in choosing a Household Cook, to secure certification in his application for relief under the Act the Employer must meet its criteria and comply with its provisions. The CO clearly pointed out in the Final Determination that the Employer's Application and Rebuttal are inconsistent with the Act and regulations, either in the job that he offered or in the conditions he imposed on his hiring of U. S. workers for this job. Accordingly, we find that the CO's rejection of the Employer's application for labor certification in behalf of this Alien was adequately supported by the evidence of record and that the following order should enter.

ORDER

The Certifying Officer's decision denying certification under the Act and regulations is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

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, 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 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.