U.S. Department of Labor Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: December 17, 1998

Case No.: 1996-INA-00328

In the Matter of:

EURO DELI,
Employer

On Behalf Of:

MARIUSZ KOWALEWSKI,
Alien

Certifying Officer Delores DeHaan, Region II

Appearance: Paul W. Janaszek
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), 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.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. 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.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On March 22, 1994 Euro Deli ("Employer") filed an application for alien labor certification[2] to enable Mariusz Kowalewski ("Alien") to fill the position of Sausage Maker (AF 61-64). The job duties for the position are:

> Prepare meat to make sausage: grind meat, mix different kinds of meats in accordance with the recipes for Polish Sausage, White Sausage, Hunter's Sausage, Cracow Sausage. Add condiments, such as pepper, marjoram, garlic, juniper berries and others. Prepare calf's brain: wash it an [sic] lean carefully removing membrane, mince brain and mix it with various ingredients according to the formulas of Polish- or Vienna-style. Use electric grinding machines, electric mixers, microwave ovens, high pressure cookers.

The requirements for the position are eight years of grade school and two years in the job offered. (AF 64).

The CO issued a Notice of Findings on October 27, 1995 proposing to deny certification on three separate grounds: Employer failed to document that the job opportunity is as described; Employer's experience requirement is excessive, restrictive, and tailored to the experience of Alien; and, Employer failed to properly document its newspaper advertisements for the position. (AF 12-15).

The CO directed Employer to document that it could guarantee full-time permanent employment for its entire staff. (AF 15). The CO described the minimum evidentiary requirements as follows:

> Evidence must include, but not be limited to:
>
> a. The total annual dollar volume of the company for the last three years.
>
> b. The number and titles of employees each year for the last three years and the number and titles of current employees. How many of these employees were hired through the U.S. labor market?
>
> c. Is the alien required to perform other job duties? If yes, list each duty and the frequency of performance.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

[2] The index lists the application at pages 1-10, however, it is filed on page 64 with the Request for Review.

d. Employer must provide evidence to support the facts to include: tax returns, social security payroll records and financial statements.
e. Provide a menu for establishment.
f. Provide copies of ingredient lists, purchase orders, etc.

(AF 15).

The CO directed Employer to establish its requirement of 24 months experience as the absolute minimum in light of the *Dictionary of Occupational Titles*' (DOT) 30 day Specific Vocational Preparation requirement for a sausage maker. (AF 14). The CO stated that "Employer may rebut this finding by: a. reducing requirements to the D.O.T. standard, or b. documenting how the requirement arises from business necessity." (AF 14). Some ways in which Employer could demonstrate business necessity for the requirement include: demonstrating "that all previously hired 'sausage makers' had two years of experience prior to hire;" submitting "**independent evidence** that similar employer's [sic] require two years experience;" or, providing "copies of previously ran classified advertisements indicating a two year experience requirement." (AF 14, emphasis in original).

The CO directed Employer to document its compliance with the advertisement requirement at 20 C.F.R. 656.21(g) by providing either original full page tearsheets or photocopies of the entire page containing the ad for each date it was run. (AF 13).

Accordingly, Employer was notified that it had until December 1, 1995, to rebut the findings or to cure the defects noted. (AF 16).

On November 30, 1995 Employer requested an extension of the time period in which it could file its rebuttal. (AF 20). In a letter dated January 24, 1996 the CO granted Employer's request. (AF 26). Employer was notified that it had until February 9, 1996 to rebut the findings or to cure the defects noted. (AF 26).

In its rebuttal, dated February 7, 1996 (AF 17-56), the Employer contended that its business could support and pay the advertised position, that its two year experience requirement is both a business necessity and a normal requirement of similar businesses, and that the position was properly advertised. Employer's rebuttal included a menu (AF 50), tax returns (AF 30-49), photocopies of the classified ads (AF 23-25), the resume of Wieslaw Kacpierski showing over two years experience as a sausage maker (AF 28-29), a letter signed by Janusr Zagrada, dated February 5, 1992, and detailing a work history of more than two years experience as a sausage maker (AF 27), and the addresses of four businesses Employer believed would have similar experience requirements (AF 53-54). Employer advanced several arguments in support of it contention that the two year experience requirement is a business necessity. First, Employer claims that due to the complexity and uniqueness of its the recipes, the two year experience requirement is reasonable and normal. (AF 54). Second, employer claims that its previous sausage makers possessed two or more years experience at the time of hire. (AF 53). Finally, Employer notes that an application for alien labor certification by Bober Meat Market requiring two years experience for the position of sausage maker was approved, indicating that such a requirement is not excessive. (AF 53).

The CO issued the Final Determination on February 14, 1996 (AF 57-59), denying certification because Employer's two year experience requirement is restrictive and excessive. The CO noted that Employer's rebuttal relied upon the bare assertion "that two years of prior experience has 'always been a condition of hire for the position of a sausage maker in our company'." (AF 58). The CO further states that Employer ignored the CO's request for evidence of the necessity for two years of experience, such as previously run classified ads. (AF 58). Similarly, the CO found Employer's attempt to demonstrate the necessity of its two year experience requirement as arising from the uniqueness of Polish and Eastern European cuisines to consist of conclusory statements and to lack evidence. (AF 57). Finally, the CO stated that Employer's claim "that this is 'normal with the other employers of a like size and type of business'" is supported solely by a list of four other businesses. (AF 57). This, the CO concludes, is an attempt to place the burden of proof on the Department of Labor. (AF 57). Because the CO found Employer's arguments unsupported by evidence, the application was denied. (AF 57).

On March 13, 1996 Employer requested review of the Denial of Labor Certification (AF 65-68). The CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

The issue presented in this case is whether Employer adequately documented its requirement for two years experience as arising from business necessity pursuant to Section 656.21(b)(2). Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of Section 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates*, 87-INA-569 (Jan. 13, 1989) (en banc). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the DOT, the regulation at 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

The Board defined how an employer can show "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (en banc). The *Information Industries* standard requires that the employer show the following: (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and, (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige & Associates, Inc.*, 91-INA-72 (Feb. 3, 1993); *Shaolin Buddhist Mediation Center*, 90-INA-395 (June 30, 1992).

In the present case, Employer makes three arguments to rebut the CO's finding that the two years experience requirement is excessive. First, Employer argues its sausage recipes are unique and complex, making the 30 day SVP for a sausage maker insufficient. (AF 54). Beyond Employer's argument, no evidence supports this claim. Although a written assertion constitutes documentation that must be considered under *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an

employer's burden of proof. *Dunkin Donuts*, 95-INA-192 (Jan. 22, 1997). Employer's unsupported argument fails to demonstrate business necessity for its experience requirement.

Employer's second argument for the business necessity of its experience requirement is that all of its previous sausage makers had two years experience at the time of hire. (AF 53). Employer's evidence on this matter consists of the resume of Wieslaw Kacpierski and a letter signed by Janusr Zagrada. These documents purport to show that these individuals possessed two years of experience prior to being hired. (AF 27-29). There is no evidence, however, to show that they were employed by Employer as sausage makers. The evidence does not support Employer's claim that all of its previous sausage makers were hired with two or more years experience.

Employer's third argument that its experience requirement is not excessive is that other applications for the position of sausage maker containing a two year experience requirement have been approved. (AF 53). Employer notes that in at least one other case, "[t]he U.S. Department of Labor did not find the two year experience [requirement] excessive." (AF 53). Employer's reliance on the precedential effect of other applications is misguided. Every application differs on its facts and issues and, therefore, neither the CO nor the Board are bound by previous application approvals. *Paralegal Priorities*, 94-INA-117 (Feb. 1, 1995).

As discussed above, Employer has not introduced evidence beyond its own argument sufficient to demonstrate the business necessity of its experience requirement. Employer has failed to rebut the CO's finding that the requirement is excessive. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

Judge Holmes, dissenting.

I respectfully dissent. Documentation forwarded by the Employer demonstrates that the requirements of the job are those of a sausage maker of Polish types. Additionally, employer's business has expanded rather rapidly and steadily according to income tax returns, and the need for the specialty, Employer contends, is that the former employees making polish sausages have returned to Europe. Employer offered to provide resumes of these past employees and that they were required to have two years prior experience. Employer has made a *prima facie* case that the business necessity of more than 30 days experience in the job opportunity of "sausage maker" as provided in the D.O.T. is needed, and that a specialty sausage maker is essential to the further

expansion of Employer's business. I find Employer's documentation meets the Gencorp test. If the CO was not satisfied as to the documentation forwarded, she should have issued a supplemental NOF requesting specific additional documentation. Without so finding, I note that the position advertised is very much akin to a specialty cook, restaurant, where 2 years experience is provided under the D.O.T. although the range of "dishes" is much narrower. I would find that Employer has satisfactorily rebutted the CO's findings on this issue.

However, the NOF stated that two previous certifications had already been granted for this Employer. Additionally, Employer acknowledged that in 1995 is had two part-time sausage makers among its seven or eight employees, and that the owner formerly did the work of sausage maker. The issue was raised in the NOF and not adequately answered by Employer as to whether or not a genuine full time job opportunity existed. Nevertheless, the Final determination did not deny labor certification on this basis. I would, therefore, remand for certification. Barbara Harris, 88-INA-21 (April 5, 1989).

NOTICE OF 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 decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such 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
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 a petition, the Board may order briefs.