UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D.C. 20001

DATE: February 13, 1998

CASE NO. 96-INA-466

In the Matter of:

LORETTA PITT,
Employer,

on behalf of

PATRICIA BRAHAM,
Alien.

Appearances: Harry Spar, Esquire
for Employer and Alien

Before: Burke, Guill and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam: This case arises from Loretta Pitt's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification on behalf of Patricia Braham, ("Alien").[1]

This decision is based 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

Employer, Loretta Pitt, filed this application for labor certification on behalf of the above-named alien for the position of "live-in cook" on March 20, 1995 (AF-62-64). Employer offered

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[1] The certification of aliens for permanent employment is governed by §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. Unless otherwise noted, all regulations cited to in this decision are in Title 20.

a salary of $430.80 a week for this position that required 40 hours a week and $16.15 for overtime hours. The job duties included planning and preparing meals for working couple, business and social guests as suitable for the occasion, according to recipes and considering taste and dietary requirements. The duties also included setting the table, serving the meals, and cleaning the utensil, dishes and kitchen following the meal. The job included free private room and board and requirement two years experience in the job offered. Employer stated the hours would be 8:00 a.m to 8:00 p.m. with morning break from 10:00 to 11:00 a.m, lunch break from 12:30 p.m. to 1:30 p.m., afternoon break from 3:30 p.m. to 4:30 p.m. and dinner break from 6:00 p.m. to 7:00 p.m. (AF 62)

The Certifying Officer (CO) issued a Notice of Findings (NOF) on February 1, 1996, proposing to deny certification (AF-29-31). The CO noted first that the duties listed did not appear to constitute full-time employment in violation of §656.50 (re-codified at §656.3). Employer was directed to document the number of meals daily and weekly which the cook would prepare, the length of time for preparation, and the number of people present for each meal. The CO also directed Employer to submit an entertainment schedule for the past twelve months with a notation of the number of guests and meals served.

The CO also stated that a live-in requirement is not normal for this job opportunity in the U.S., thus, was unduly restrictive in violation of §656.21(b)(2)(i). The CO found that Employer had not demonstrated the live-in requirement arose from a business necessity. The CO directed Employer to provide specific entertainment and/or volunteer work schedule for the past twelve months with details to establish that the live-in requirement bears a reasonable relationship to the occupation in the context of employer's business and that the live-in requirement is essential to perform, in a reasonable manner, the job duties as described by Employer (AF 29-31).

Employer submitted rebuttal evidence on March 3, 1996. Employer stated generally that the cook would prepare between 13 and 17 gourmet meals a week in addition to breakfasts on a daily basis and lunch or brunch occasionally on an overtime basis. Employer stated the job opportunity would involve significant overtime. Employer stated the schedules of the various members of the household are as follows:

Employer — leaves from 7:00 to 8:00 a.m. and returns from 5:00 to 7:00 p.m.
Employer's husband — leaves between 7:00 a.m. and 12:00 noon and returns between 5:00 and 8:00 p.m.
13 year old child — leaves 8:15 a.m. and returns 5:15 to 6:30 p.m.
8 year old child — leaves 8:00 a.m. and returns 6:00 p.m.
2 year old child — leaves for daycare at 8:00 a.m. and returns 6:30 p.m.

Employer stated her husband's dual occupations as a minister and owner of a construction firm both require after-hours discussions and meetings. In addition, she stated visiting ministers are often provided accommodations in their home. She stated caterers currently provide the late evening meals, but that caterers are not available to provide breakfasts. Employer stated that a twelve month entertainment schedule was not available, but she submitted a list of guests for December, 1995, January and February, 1996. This list indicated one guest stayed for an

extended visit during the three month period. In addition, 7 nights in December, 4 nights in January and 5 nights in February were listed as entertainment events (AF 18-28).

On June 11, 1996, the CO issued a Final Determination on June 11, 1996 denying certification (AF-12-17). The CO concluded adequate documentation had not been provided to establish that the job opportunity was permanent full-time work. The CO noted Employer's family's schedules indicated all but one member of the family were gone from the home by 8:00 a.m. and the fifth member, the 13 year old child, left at 8:15 a.m. Thus, the CO questioned whether the cook would prepare breakfast since her regular starting time was 8:00 a.m. The CO also noted there was no regular need for lunch preparation based on the family's schedules. Finally, the CO stated the family's late evening arrival at the home indicated the cook would usually have no one to prepare dinner for within the time frame of her regular schedule. The CO stated that based on Employer's statement, in situations when the services of a caterer had been used, the cook would be off-duty. Thus, the CO found Employer remained in violation of Section 656.3 which requires the job opportunity be full-time work.

The CO also found Employer failed to establish a business necessity for the live-in requirement. In discussing this violation, the CO again noted the discrepancy between the proposed schedule for the cook and the family's schedule and stated there does not seem to be a need for the services of a full-time live-in cook.

Since Employer remained in violation of federal regulations on the issues of full-time employment and the live-in requirement, the CO concluded labor certification could not be granted (AF 13-17). Employer requested reconsideration by the CO on June 28, 1996 (AF 4-12). On July 3, 1996, the CO denied the request for reconsideration since it did not raise issues which could not have bene addressed in the rebuttal (AF 3). On July 16, 1996, Employer requested administrative judicial review (AF 1).

DISCUSSION

Pursuant to § 656.21(b)(2)(iii), in instances where a worker is required to live on the employer's premises, the requirement will be deemed unduly restrictive unless the employer adequately documents that the live-on-the-premises requirement arises from a business necessity. To establish the business necessity for a live-on-the-premises requirement, the employer must demonstrate that the requirement is essential to perform, in a reasonable manner, the job duties as described by the employer. ***Marion Graham***, 88-INA-102 (Mar. 14, 1990) (*en banc*). In ***Marion Graham***, the Board stated that when applying the business necessity test in a live-in domestic situation, in order for written assertions to be considered documentation, they generally should be specific enough to enable the CO to determine whether there are cost-effective alternatives to a live-in requirement and whether the needs of the household for a live-in worker are genuine. An employer's burden of proof is not met merely because an assertion is considered "documentation." Additional documentation (e.g., travel vouchers, written estimates of costs of alternatives such as baby-sitters) is encouraged to bolster written assertions of need. Employer's undocumented assertions in rebuttal do not carry its burden. Employer puts forth that in the past he has "hired caterers in his home, or commuting temporary cooks ... to prepare meals for his

business guests ... [but] he has no one available to prepare breakfast for his overnight guests." (AF 23). However, Employer does not provide any receipts nor does he explain how a live-in cook that does not begin work until 8:00 a.m. and then has an hour long break at 10:00 a.m., can prepare breakfast when the entire household leaves by 8:15 a.m. We agree with the CO that the record herein does not support a finding that the live-in requirement is essential to the reasonable performance of the job duties; rather it shows Employer's preference that the Cook live-in the premises.[2]

Because we find that certification was properly denied on the basis of failure to establish business necessity of the live-in requirement, we need not address the other issues. Accordingly, the following Order shall issue.

ORDER

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

Entered at the direction of panel:

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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

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[2] Subsequent to the FD, Employer submitted additional evidence detailing the household schedule. Because the regulations clearly provide that the Board shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made, the request for review and any statements of position or legal briefs, this evidence was not considered in this determination. *See* ***Capriccio's Restaurant***, 90-INA-480 (Jan.7, 1992).

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 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.