U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: February 19, 1998

Case No.: 97-INA-369

In the Matter of:

50's BURGERS
Employer,

On Behalf of:

LUIS RUBIO
Alien.

BEFORE: Burke, Guill, and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This matter arises from a request for review by the Board of Alien Labor Certification Appeals of a denial of alien labor certification by a U.S. Department of Labor Certifying Officer ("CO").[1] Employer is a restaurant seeking to fill the position of "Cook, Mexican Specialty." (AF 28).[2]

In a Notice of Findings dated May 20, 1996, the CO proposed to deny certification on the ground that, *inter alia*, the requirement of three years of experience in the job offered was too restrictive for the position sought to be filled. (AF 23-26). The CO found that the position was that of a "Cook, Fast Food,"(AF 24), rather than "Cook, Specialty, Foreign Food" as espoused by Employer. Thus, the CO found that the experience requirement could only be six months to one year. As the employer required three years experience for the position, (AF 28), the CO determined that those requirements "would preclude the referral of otherwise qualified U.S. workers," and thus violated 20 C.F.R. Sec. 656.21 (b)(2)(i)(A). (AF 24).

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[1]Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A), and the implementing regulations at 20 C.F.R. Part 656.

[2]References to the appeal file are abbreviated "AF".

Employer submitted rebuttal claiming that the CO improperly characterized the position as a "Cook, Fast Food."[3] (AF 9-22). Employer claimed that the position was more analogous to a "Cook, Specialty, Foreign Food."[4] (AF 11). According to Employer, because the cook prepares food from scratch only after it is ordered, takes kitchen inventory and orders supplies, and prepares day-to-day specials, the position is more like that of a "Cook, Specialty, Foreign Food," than a "Cook, Fast Food." (AF 11-12).

The CO issued a Final Determination dated August 21, 1996, denying Employer's labor certification, based on a finding that the evidence submitted in rebuttal did not prove a need for a "Cook, Specialty, Foreign Food." (AF 7-8).

Employer's arguments on appeal do not establish that the CO erred in concluding that the cook filling Employer's position is going to work in a restaurant serving fast food, and that the Mexican dishes prepared are generic, and therefore also fast food. (AF 24).

First, we find that the fact that the cook only prepares food after it is ordered does not distinguish the position from that of a "Cook, Fast Food." According to the Dictionary of Occupational Titles ("DOT") definition, a fast food cook only prepares food upon receipt of the order. Employer suggests that the difference turns on the preparation time, and cites the *Webster's Dictionary* definition of fast food, "of or specializing in standardized foods, ... prepared and served rapidly," as proof of this assertion. However, nowhere in the record is there any evidence proffered by Employer comparing the amount of time required for preparation of its Mexican dishes against preparation of one of its other, non-Mexican, menu items. Further, as the

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[3]313.374-010 COOK, FAST FOOD (hotel & rest.) Prepares and cooks to order foods requiring short preparation time: Reads food order slip or receives verbal instructions as to food required by patron, and prepares and cooks food according to instructions. Prepares sandwiches [SANDWICH MAKER (hotel & rest.) 317.664-010]. Prepares salads and slices meats and cheese, using slicing machine, [PANTRY GOODS MAKER (hotel & rest.) 317.684-014]. Cleans work area and food preparation equipment. May prepare beverages [COFFEE MAKER (hotel & rest.) 317.684-010]. May serve meals to patrons over counter.
GOE: 05.10.08 STRENGTH: M GED: R3 M2 L2 SVP: 5 DLU: 81

[4]313.361-030 COOK, SPECIALTY, FOREIGN FOOD (hotel & rest.)
Plans menus and cooks foreign-style dishes, dinners, desserts, and other foods, according to recipes: Prepares meats, soups, sauces, vegetables, and other foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Estimates food consumption and requisitions or purchases supplies. Usually employed in restaurant specializing in foreign cuisine, such as French, Scandinavian, German, Swiss, Italian, Spanish, Hungarian, and Cantonese. May be designated according to type of food specialty prepared as Cook, Chinese-Style Food (hotel & rest.); Cook, Italian-Style Food (hotel & rest.); Cook, Kosher-Style Food (hotel & rest.); Cook, Spanish-Style Food (hotel & rest.).
GOE: 05.10.08 STRENGTH: M GED: R3 M3 L2 SVP: 7 DLU: 77

CO pointed out in her Final Determination, the Mexican dishes are "generic," (AF 8),[5] and thus can likely be prepared rather quickly. Although Employer argues that the Mexican dishes are "authentic," (AF 14), that does not make them unique or establish the length of time it takes to prepare such foods, and therefore, its rebuttal on that point is inapposite.

Second, the cook's taking of kitchen inventory and ordering of supplies does not equate to the "Cook, Specialty, Foreign Food" requirement that a cook "estimate[] food consumption and ... purchase[] supplies."[6] The taking of inventory, and restocking where shortages exist, is rather ministerial compared to the discretion which would have to be exercised in estimating consumption.

Third, in its request for review, Employer argues that the cook would participate in the "planning and preparation of day-to-day specials." (AF 2). By using the term "planning" we take Employer to mean that the cook will be expected to engage in some amount of menu planning, a requirement for a "Cook, Specialty, Foreign Food." In the ETA 750, Employer only describes the position as one which requires the cook to "prepare day-to-day specials," and says nothing about planning. The first suggestion that the cook might be expected to contribute items to the menu comes in the rebuttal.[7] (AF 14). This argument fails because the meal planning requirement was not in the original ETA 750 (AF 28), or the newspaper advertisements. (AF 47-49). An employer may not belatedly seek to add even more restrictive requirements and use them as a basis for rejecting a U.S. worker. *Metal Cutting Corp.*, 89-INA-90 (Jan. 8, 1990).

Even assuming, *arguendo*, that Employer did include the expectation for the cook to "suggest new items for the menu," that does not mean that the cook is planning the menus. In fact, Employer's rebuttal says that the cook would prepare the regular menu items and weekly specials, which are presumably already planned. (AF 14). We do not think that a periodic addition to the menu of a dish suggested by the cook raises that responsibility to one of planning the menu. Therefore, the position does not meet that criterion for being a "Cook, Specialty, Foreign Food."

Finally, Employer operates a restaurant that serves hamburgers, sandwiches, and now Mexican food. The DOT definitions state that the foreign food cooks are usually in ethnic restaurants such as French, Italian, etc. Employer argues that since the definition uses the term "usually" instead of, for instance, always, that the drafters intended restaurants like "50's Burgers" to be able to hire foreign food specialty cooks. Read in context with the other requirements, we cannot believe that the definition was intended to be extended to restaurants that cook "Big Bopper" hamburgers and "Turkey Rancher" sandwiches. (AF 35). Those are precisely the types

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[5]Employer's menu lists such standard Mexican dishes as tacos, enchiladas, quesadillas, and burritos. (AF 35).

[6]*Supra* note 4.

[7]"We desire a cook who can ... suggest new items for the menu ...."

of foods which call for a "Cook, Fast Food,"[8] as they are "standardized" and require "short preparation time."

Had Employer shown a need for a foreign food specialty cook, the Specific Vocational Preparation ("SVP") would be 7-- requiring between two and four years of experience[9]-- and Employer's three year experience requirement would not be in violation of the regulations. *See Manuel Reyes*, 89-INA-22 (Nov. 28, 1989); *Kamal Farah*, 89-INA-5 (Oct. 13, 1989). Here Employer only established a need for a fast food cook-- which has an SVP of 5, six months to one year-- and therefore, the three year experience requirement was overly restrictive for the position offered.

ORDER

Accordingly, the Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

SO ORDERED.

Entered at the direction of the Panel:

TODD R. SMYTH
Secretary to the Board of
Alien Labor Certification Appeals

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[8]*Supra* note 3.

[9]DOT, Appendix C, II SVP, level 7 (4th Ed., Rev. 1991).