U.S. Department of Labor

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

Date Issued: July 8, 1999

Case No.: 1999-INA-0125

In the Matter of:

BEST DONUTS, INC. d/b/a DUNKIN DONUTS.
Employer,

on behalf of

MAHENDRAKUMAR KACHARABLTAI PATEL,
Alien.

Appearance: Jay Bagia, Esq.
Certifying Officer: Richard Panati, Region III

Before: Huddleston, Jarvis, 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

The application was filed on January 14, 1998, by Best Donuts, Inc. d/b/a Dunkin Donuts seeking labor certification for the position of Night Manager (Manager, Bakery) for Mahendrakumar Kacharabltai Patel, Alien (AF 17).[2] The duties of the job were described as follows:

> Manage, direct, and coordinate overnight preparation, process and distribution and retail sales of full range of Dunkin Donuts food products, including but not limited to, muffins, donuts, bagels, cookies, croissants, and danish. Supervise average of five kitchen staff and two sales staff; in charge of hiring, and termination of staff; reconcile sales with receipts; computerize financial records and bookkeeping as per franchise agreement; in charge of safety and security measures; manage sales and supplies to wholesale accounts.

Employer required that applicants have two years of experience in the job offered and a training certificate in shop management and donut production from Dunkin Donuts University and a Servsafe Certificate in the applied food service sanitation course from the National Restaurant Association.

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on August 20, 1998. (AF 112-114) The CO stated that the two year experience requirement is unduly restrictive; that the Dictionary of Occupational Titles' Code (DOT) for the offered job has been changed from Manger, Bakery (189.117-046) to Manager, Fast Food Services 185.137-010) because Employer's business is fast food and the position involves managing a fast food outlet. The CO stated that the Specific Vocational Preparation (SVP) for this position is six months up to and including one year combined education, training and experience; that Employer's requirement of two years experience exceeds the SVP and the norm for the occupation. The CO stated further that although Employer provided a letter in support of the two year experience requirement, there has been no showing that someone with less than two years of experience could not perform the job duties; nor has it been proven that the two year experience requirement conforms to the norm for a Dunkin Donuts franchise.

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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] "AF" is an abbreviation for "Appeal File." The Notice of Finding identifies the job title as "Manager, Bakery (DOT 189.117-046)."

The CO instructed Employer that it could rebut this finding by submitting evidence that the requirement arises from a business necessity. The CO stated that rebuttal must include documentation from Dunkin Donuts franchise headquarters showing that Employer's requirements are the minimum requirements established by Dunkin Donuts for managerial positions nationwide and also information showing that Dunkin Donuts employees who had less than the minimum job requirements now required were unable to perform the duties of the position. In addition, Employer was instructed to prove that the job as currently described existed before the Alien was hired and that the job was previously filled with the same job duties and requirements before the Alien was hired. Employer was instructed to include position descriptions, organizational charts, payroll records, resumes of former incumbents, and copies of job advertisements for other managerial positions during the last three years that were not associated with labor certifications. The CO stated that rebuttal must establish that the position and its present requirements existed before the Alien was hired; that if the job/requirements did not exist prior to the hiring of the Alien, then Employer must document that a major change in business caused the job to be created after the Alien was hired or Employer must reduce the requirements to the DOT standard.

Employer, by counsel, submitted rebuttal consisting of the NOF, the ETA 750 A and B, a rebuttal letter, the franchise agreement with Dunkin Donuts and tax returns for 1992-97. (AF 7-109) The rebuttal letter from Mr. G. Patel, owner, objected to changing the job title, stating that although Dunkin Donuts operates as a franchise, Employer primarily operates as an independent bakery; that each shop varies substantially with respect to the range of products, size of operation and staffing requirements. Mr. Patel stated that even for the position of Manger, Fast Food Services, the required experience of two years is justified because the franchiser does not set experience requirements for franchisee's employees; the franchiser only requires that there be training in Dunkin Donuts policies and methods; that it is left to the franchisee to determine the extent of experience required for employees in its shop based upon its specific needs; that the position of night manager existed before the Alien was offered the job.

The CO issued a Final Determination denying certification on November 4, 1998 (AF 4-6) The CO stated that rebuttal did not indicate the length of training mandated by the Franchiser and did not include information about Employer's experience with employees having less than two years of experience or documentation that the two year experience requirement for the job existed before the Alien was hired. The CO concluded that the application remained in violation of Federal regulations.

Employer, by counsel, filed a request for reconsideration and/or review on December 9, 1998. (AF 2-3) The request for reconsideration was denied by the CO on December 14, 1998 and the case was referred to the Board of Alien labor Certification Appeals for review. Employer, by counsel, filed a brief in support of its appeal on march 22, 1999.

DISCUSSION

The issue is whether the two year experience requirement for the offered job is unduly restrictive.

20 CFR § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive job requirements are prohibited is because they have a chilling effect on the number of U.S. workers who may apply for and/or qualify for the job opportunity. The purpose of Section 656.21(b)(2) is to make the job available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) *(en banc*) If an employer cannot document that the job requirements are consistent with those specified for the job in the DOT or are normal for the occupation in the United States then the regulation requires that employer establish business necessity for the requirements. The Board defined how an employer can establish "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (en banc). The *Information Industries* standard requires that employer demonstrate that the requirement bears a reasonable relationship to the occupation in the context of employer's business, and that the requirement is essential to performing, in a reasonable manner, the job duties described by 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) Employer bears the burden of proof.

The record reflects that Employer's shop is a franchised fast food outlet that primarily sells donuts, as well as muffins, bagels, cookies, croissants and danish, all fast food items which require short preparation periods. Bakeries, on the other hand, which are not considered fast food outlets, traditionally sell a variety of baked goods, including cakes, pies, breads, and dessert pastries, many of which require hours of preparation. The DOT does not describe the Bakery Manager's job as including the management of a franchised fast food outlet. The job of Manager, Fast Food Services does include management of franchised fast food outlets. Based on the description of the offered job, the job descriptions in the DOT and the nature of Employer's business, it appears that the CO correctly changed the title of the offered job to Manager, Fast Food Services. (DOT 185.137-010) *Promex Corp.*, 89-INA-331 (Sept. 12, 1990) Moreover, the duties described in the DOT for a Fast Food Manager are more similar and consistent with the duties of the offered job than are the duties of a Bakery Manager.

Employer's general unsubstantiated rebuttal statements do not establish that the two year experience requirement for the offered job bears a reasonable relationship to the occupation in the context of Employer's business or that it is essential to performing the described job duties in a reasonable manner. Moreover, there has been no showing that a person with less experience could not perform the job duties in a reasonable manner. The franchising agreement that Employer has with Dunkin Donuts requires that managers satisfactorily complete a training program at Dunkin Donut University. The length of the training program is not specified and Employer did not represent that it is a two year program. (AF 108) Moreover, Employer did not document that the previous managers it hired had or were required to have two years of experience. Mr. Patel's tax returns show an increase in his taxable income suggesting, as he contends, that his business is growing. But this fact alone does not establish business necessity for the two year experience requirement. Moreover, Employer failed to provide the documentation requested by the CO in the NOF, such as: position descriptions, resumes of former

incumbents, copies of job advertisements not associated with alien labor certification proceedings and payroll records.

On the basis of this record, we conclude that Employer failed to rebut the finding in the NOF that the two year experience requirement is unduly restrictive. Accordingly, certification was properly denied.

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

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 a 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 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 the 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.