



Issue Date: 18 February 2004

BALCA Case No.: 2002-INA-265
ETA Case No.: P2000-NJ-02459051

In the Matter of:

CLARE AND HARVEY ANGER,
Employer,

on behalf of

KRZYSZTOF SASINOWSKI,
Alien.

Certifying Officer: Dolores DeHaan
New York, New York

Appearances: Amy J. Turizo, Esquire
New York, New York
For Employer

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by Clare and Harvey Anger (“Employer”) on behalf of Krzysztof Sasinowski (“the Alien”) for the position of Household Manager. (AF 16-17).² The following decision is based on

¹ Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(5)(A) and 20 C.F.R. Part 656.

²“ AF” is an abbreviation for “Appeal File”.

the record upon which the Certifying Officer (“CO”) denied certification and Employer’s request for review, as contained in the Appeal File (“AF”), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On January 7, 1998, Employer filed an application for alien employment certification on behalf of the Alien for the position of Household Manager. Minimum requirements for the position were listed as two years experience in the job offered.³ Responsibilities of the job included operations and maintenance of all aspects of Employer’s household. (AF 17).

By letter dated June 13, 2000, Employer was advised by the State Alien Employment Certification Office that the job description contained duties generally found in two or more occupations: Housekeeper, Home and Social Secretary. Employer was instructed to provide a breakdown of the percentage of time per period spent in each major activity and to provide a statement citing the business necessity for the combination of duties, or delete any requirements not justified by business necessity. In addition, noting that a household manager supervises “household” employees performing duties such as cooking, the case manager instructed Employer to explain how a household manager supervises outside contractors, landscapers and maintenance people and “manages repairs” and also to explain the duty to “oversee treatment protocol.” (AF 9-11).

Employer responded by deleting the social secretary job duties and then maintained that the remaining duties are all contained in the one occupation of Housekeeper, Home (also called Household Manager), as described in the *Dictionary of Occupational Titles* (“DOT”), Code 301.137-010. Employer further stated that the Alien no longer supervised any actual employees but that he supervised the household staff

³ Employer also initially required at least one year of experience in a household of an elderly patient; this requirement was later deleted. (AF 17).

which all happened to be outside contractors at that time, including two cleaning people, three landscapers and various repair people. (AF 12-21).

Employer received two applicant referrals in response to its recruitment efforts, both of whom, Employer reported, failed to respond to their contact efforts. (AF 23-24).

A Notice of Findings (“NOF”) was issued by the CO on February 22, 2002, proposing to deny labor certification based upon a finding that Employer’s job requirement of supervising independent contractors who are not normally considered employees appeared restrictive. The CO noted that according to the DOT, the Household Manager by definition “is one who supervises and coordinates the activities of household **employees** in a private residence employing a **large** staff.” DOT Code 301.137-010. Employer was instructed either to justify business necessity for or to delete the requirement of supervising outside contractors. (AF 54-56).

In Rebuttal, Employer attempted to document business necessity for its job requirements, stating that he and his wife run a time-consuming business and both his father and mother have medical conditions requiring specialized and continued care. Employer stated that since the Alien began employment in 1997, the number of workers has fluctuated but the management and supervision of all household workers has always been solely the responsibility of the household manager. Employer stated that all of the workers in the household are hired and, if necessary, fired by the household manager and Employer. Employer indicated that there are no third parties involved such that the Alien’s duties in directing and supervising these workers do not change, regardless of whether the workers are independent contractors or “true” employees. Employer further detailed the breakdown of the position’s job duties and the percentage of time spent on each. (AF 57-62).

On June 4, 2002, the CO issued a Final Determination (“FD”) denying labor certification based upon a finding that Employer had failed to adequately document business necessity for its job requirements. Noting that contractor landscapers and

maintenance people are not full-time employees, the CO reiterated her finding that it did not appear the Employer's job offer meets the definition of a private residence employing a **large** staff. (AF 99-100).

Employer filed a Request for Review by letter dated July 9, 2002 and the matter was docketed in this Office on September 3, 2003. (AF 140-142). Employer filed an Appeal Brief dated September 16, 2002.

DISCUSSION

Twenty C.F.R. § 656.21(b)(2) requires an employer to document that its requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the successful performance of the job in the United States. Abnormal requirements would preclude the referral of otherwise qualified U.S. workers. One of the measures by which a job requirement is tested to determine whether it is unduly restrictive is inclusion of the requirement in the definition of the job in the DOT. To determine whether a particular job requirement falls within the applicable DOT code, the CO must determine the job title which best describes the job and determine whether the job requirements specified by the employer fall within those defined in the DOT. *LDS Hospital*, 1987-INA-558 (Apr. 11, 1989)(*en banc*).

The DOT was developed in the mid-1930s by the U.S. Employment Service to supply standardized occupational information to support job placement activities. It is now also used for employment counseling, occupational and career guidance, and labor market information. DOT definitions are organized by occupational code numbers and include a task element statement describing worker actions, the purpose or objective of these actions, machines, tools, equipment, or work aids used, materials processed, products made, subject matter dealt with, or service rendered, the nature and complexity of instructions followed, and the job tasks actually performed by the worker. In classifying job duties, the DOT is merely a guideline and should not be applied mechanically. *Promex Corporation*, 1989-INA-331 (Sept. 12, 1990). The DOT is not to

be applied in a pigeonhole fashion where there must be a complete matching of duties between the job offered and the DOT classification. *Trilectron Industries, Inc.*, 1990-INA-176 (Dec. 19, 1991).

In the instant case, the DOT definition and job title determined by the CO to best describe Employer's job offer was that of Household Manager. The duties of Household Manger as described in the DOT are:

Supervises and coordinates activities of household employees in a private residence: Informs new employees of employer's desires and gives instructions in work methods and routines. Assigns duties, such as cooking and serving meals, cleaning, washing, and ironing, adjusting work activities to accommodate family members. Orders foodstuffs and cleaning supplies. Keeps record of expenditures. May hire and discharge employees. Works in residence employing large staff.

DOT Code 301.137-010.

The duties of Employer's job opportunity as initially described were:

Responsibility for all aspects of employer's household operations and maintenance; supervise housekeeper, employees and contractor landscapers and maintenance people; manage repairs; order household supplies and medical necessities prescribed by physicians; keep accurate expense records; prepare budget; pay bills; plan and manage schedule for ill household member re the medical team; schedule medical appointments and arrange transportation; oversee treatment protocol and food and grooming care.

(AF 17).

The duties involving personal and medical care were thereafter deleted, such that Employer's job opportunity and the DOT description for Household Manager appear substantially similar. In determining to deny labor certification, the CO focused on the fact that the persons to be supervised by Employer's Household Manager were

independent contractors as opposed to employees. Because the requirement was not included in the DOT, Employer was instructed to establish business necessity for the requirement or to delete it. 20 C.F.R. § 656.21(b)(2). Pursuant to *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*), in order to establish “business necessity” an employer must show that the requirement is essential to performing, in a reasonable manner, the job duties as described.

In rebuttal, Employer provided a detailed discussion in an effort to document business necessity. However, the CO did not address the majority of Employer’s rebuttal evidence in her FD, but rather, summarily denied certification on the basis it did “not appear that the employer’s job offer meets the definition of a private residence employing a **large** staff.” (AF 99-100). The CO’s review appears cursory in nature. Moreover, she erroneously stated that two NOFs were issued in the case when in fact there was only one. Where the FD does not address an employer’s timely rebuttal evidence and arguments, the challenge may be deemed to be successfully rebutted and not at issue before the Board. *Barbara Harris*, 1988-INA-392 (Apr. 5, 1989). The matter may be remanded or the denial may be reversed. *See American Jewish Theatre*, 1991-INA-346 (Dec. 16, 1992); *H.P. Laboratories*, 1991-INA-87 (Mar. 12, 1992).

In the instant case, it is determined that the matter should be remanded to the CO so that she may consider and address the evidence presented in rebuttal.

ORDER

The Certifying Officer’s denial of labor certification is hereby **VACATED** and labor certification is **REMANDED** for further consideration in light of this opinion.

For the panel:

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JOHN M. VITTON
Chief Administrative Law Judge

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 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 ten 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.