

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 August 2003

BALCA Case No.: 2002-INA-229
ETA Case No.: P2000-CA-09500753/ML

In the Matter of:

CALIFORNIA CONSTRUCTION CO.,
Employer,

on behalf of

HYUN KI KANG,
Alien.

Appearances: Dennis John Sanchez, Esq.
Los Angeles, California
For the Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "Supervisor, Roofing."¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

¹ Permanent alien labor certification is governed by Section 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 ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision 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

On July 30, 1999, Employer, California Construction Co. (“Employer”) filed an application for labor certification on behalf of the Alien, Hyun Ki Kang (“Alien”) to fill the position of "Supervisor, Roofing." (AF 37). The requirements for the job were three years of high school, two years in the job offered, and the ability to speak Korean “since over 80% of the customers are Korean.”

The CO issued a Notice of Findings ("NOF") on March 27, 2002, proposing to deny certification, based on the fact that the occupation of roofing supervisor was not one which normally required a foreign language, and none of the duties involved customer contact. (AF 34). Therefore, the requirement was a restrictive requirement in violation of 20 C.F.R. §656.21(b)(2)(i)(C). Employer needed to delete the foreign requirement or document it as either a business necessity or a customary requirement for such jobs in the United States. The CO advised Employer that business necessity did not mean merely for the convenience and personal preference of Employer. Employer needed to demonstrate that the job requirement bore a reasonable relationship to the occupation in the context of the employer’s business and it was essential to perform, in a reasonable manner, the job duties.

Employer's rebuttal consisted of a letter from its counsel, dated April 23, 2002, along with a letter from Employer’s owner dated April 17, 2002. (AF 9). In the letter from Employer’s owner, it was argued that it presently had “more than 95% [customers], all of which mostly speak Korean only.” Employer contended that it needed to have someone who could be fluent in Korean, otherwise it would not be able to communicate with customers and fully understand their requests. Employer supplied a list of customers, an invoice, a Proposal and Contract written in Korean, and several letters from employees and customers indicating their preference for a Korean speaker.

The CO issued a Final Determination ("FD") on May 10, 2002, denying certification. (AF 6).

The CO found that Employer had failed to rebut the finding rendered in the NOF, pointing out that Employer had failed to provide evidence that the position at issue had regular customer contact or that it was common for the occupation to have customer contact. The CO determined that Employer had failed to document the necessity or normalcy of roofing supervisors dealing with Korean-speaking customers. The requirement was unduly restrictive and non-compliant with the regulations.

By cover letter dated May 20, 2002, Employer's counsel requested review of the denial of certification. (AF 1). Attached to the letter was a Request for Review of Denial of Certification signed by Employer's owner and counsel. This matter was then forwarded to the Board of Alien Labor Certification Appeals. ("Board" or "BALCA").

DISCUSSION

In its Request for Review, Employer argues that its rebuttal evidence established that the job requirement bore a reasonable relationship to the occupation in the context of the Employer's business and was essential to perform the job duties in a reasonable manner. Employer asserts that it is Korean-based and has "stated the certain necessity of having an employee who was proficient in Korean to meet the needs of Employer, employees and customers." Employer's statements in this respect, however, are assertions made without supporting foundation.

Twenty C.F.R. § 656.21(b)(2) provides that an employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements. It further provides that the job opportunity's requirements, unless adequately documented as arising from business necessity:

- (A) Shall be those normally required for the job in the United States;
- (B) Shall be those defined for the job in *the Dictionary of Occupational Titles (D.O.T.)* including those for subclasses of jobs;
- (C) Shall not include requirements for a language, other than English.

Job requirements which do not comply with all three subsections A, B and C, are unduly restrictive unless adequately documented as arising from business necessity. Furthermore, if the DOT description of the occupation does not support the use of a foreign language, the employer's burden of proof is compounded. The employer must establish that in spite of the lack of support for the foreign language in the DOT description, in the context of the employer's specific business, the use of a foreign language bears a reasonable relationship to the occupation.

The standard for establishing business necessity was addressed in *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*), wherein it was stated as follows:

...to establish business necessity under Section 656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer. This standard, in assuring **both** that the job's requirements bear a reasonable relationship to the **occupation** and are essential to perform the **job duties**, gives appropriate emphasis to the Act's presumption that qualified U.S. workers are available. An employer cannot obtain alien labor certification by showing that the job requirements merely "tend to contribute to or enhance the efficiency and quality of the business."

(Footnotes omitted)(emphasis added).

Although the facts in *Information Industries* did not involve a foreign language requirement, the Board has held that the reasoning therein is equally applicable where the requirement at issue does involve a foreign language. In *Lucky Horse Fashion, Inc.*, 1997-INA-182 (Aug. 22, 2002)(*en banc*), the Board clarified the proper way in which to analyze the business necessity for a foreign language requirement, holding that there must be a two part analysis. First, it must be determined whether a foreign language requirement is shown to bear a reasonable relationship to the **occupation itself**, in the context of employer's business. Second, it must be determined whether the foreign language is

essential to perform, in a reasonable manner, the **job duties** as described by the employer.

In the instant case, the job offered is that of a roofing supervisor, a position which is not described in the DOT as one which requires the use of a foreign language. Therefore, the Employer bears the burden of proof to establish that the requirement that the roofing supervisor speak Korean bears a reasonable relationship to the occupation of roofing supervisor within the context of the Employer's business. Employer has submitted no evidence to establish that the use of a foreign language is normal to the occupation of roofing supervisor. The Employer's only evidence presented in rebuttal is its statement that a high percentage of its customers speak Korean, as do some employees. There is no evidence that the roofing supervisor has regular contact with Employer's customers, or that the foreign language requirement otherwise bears a reasonable relationship to the occupation in the context of employer's business. With regard to the assertion that some of its employees speak Korean, the result of permitting an employer to establish business necessity for a foreign language solely because its employees speak that language would be to create a self-perpetuating foreign labor force, which would exclude U.S. workers, certainly contrary to the purposes of the Act.

The evidence provided by Employer fails to establish that fluency in Korean bears a reasonable relationship to the occupation of roofing supervisor within the context of Employer's business. Furthermore, Employer has also failed to establish that the language is essential to perform, in a reasonable manner, the job duties described. Therefore, Employer has not satisfied the *Information Industries* business necessity test.

ORDER

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

Entered at the direction of panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for 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 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten 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.