

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 29 September 2003**

**BALCA Case Nos.: 2003-INA-00105, 2003-INA-00106**  
ETA Case Nos.: P2001-CA-09512875/ML, P2001-CA-09512873/ML

*In the Matters of:*

**IL FORNAIO,**

*Employer,*

*on behalf of*

**MANUEL CRUZ, ADORACION NAVARIZ,**

*Aliens.*

Appearance: Susan Jeannete  
Del Mar, CA  
For the Employer

Certifying Officer: Martin Rios  
San Francisco, CA

Before: Burke, Chapman, and Vittone  
Administrative Law Judges

**JOHN M. VITTON**  
Chief Administrative Law Judge

**DECISION AND ORDER**  
**OF REMAND**

These cases arise from applications for labor certification<sup>1</sup> filed by Il Fornaio restaurant

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<sup>1</sup> 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 20 C.F.R. Part 656.

("Employer") on behalf of Manuel Cruz and Adoracion Navariz ("Aliens") for the position of cook.<sup>2</sup> The following decision is based on 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). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11

### **STATEMENT OF THE CASE**

On April 30, 2001, Employer filed an application for alien employment certification on behalf of the Alien, Manuel Cruz, to fill the position of cook. (AF 12). The job duties were described as "prepare wide range of Italian menu items, according to recipes. Use, operate standard restaurant equipment, utensils, appliances." Two years of experience in the position offered was required. Employer also stated that a "Food Handler's card, if hired" was required. (AF 12). The application was presented as a reduction in recruitment request. (AF 16-68).

The local employment service referred the application to the Federal CO, and on June 25, 2002, the CO informed Employer that its RIR was denied because the application "contains deficiencies." The CO also informed Employer that the application would be processed on schedule with other non-RIR cases. (AF 72). The CO issued a Notice of Findings ("NOF") on October 16, 2002, indicating his intent to deny the certification application. (AF 8-10). The CO found that the Alien did not meet the requirements of the job; specifically, the Alien did not have a Food Handler's card. (AF 9). The CO stated that Employer could either submit an amendment to the ETA 750 B to correct the qualifications if the Alien met these requirements or Employer could amend the ETA 750 A and re-recruit.

Employer submitted its Rebuttal by letter dated October 23, 2002, stating that the Alien did

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<sup>2</sup> In this Decision, "Alien" refers specifically to Manuel Cruz and references to the Appeal File ("AF") refer to Cruz's Appeal File as representative of both the appeals. A virtually identical application was filed for both Aliens and the issues raised and dealt with by the CO in both cases are identical.

in fact possess the qualifications, and submitting a copy of the Alien's Food Handler's card. (AF 7). Employer indicated that an amendment to the ETA 750 B was not necessary, as the Food Handler's card was a requirement only if hired. (AF 6).

The CO issued a Final Determination ("FD") denying certification on December 12, 2002. (AF 4-5). The CO stated that although Employer submitted a copy of the Alien's Food Handler's card, there was no indication that the Alien possessed this card at the time of hire. As such, the CO found that Employer was offering U.S. workers terms and conditions of employment less favorable than those offered the Alien. (AF 5).

By letter dated January 2, 2003, Employer filed a Request for Reconsideration, which was denied on January 29, 2003, and a Request for Review. (AF 1-3). The matter was docketed in this office on February 20, 2003.

## **DISCUSSION**

An employer must state and advertise accurately and completely the actual minimum requirements for the position, so that the CO may ascertain whether the alien was qualified at the time he or she was hired by the employer. *O'Malley Glass & Millwork Co.*, 1988-INA-49 (Mar. 13, 1989). The employer must establish that the alien possesses the stated minimum requirements for the position. *Charley Brown's*, 1990-INA-345 (Sept. 17, 1991); *Pennsylvania Home Health Services*, 1987-INA-696 (Apr. 7, 1988). When the alien did not possess the minimum job requirements at the time of hire, certification is properly denied under 20 C.F.R. § 656.21(b)(6); *Hagopian & Sons, Inc.*, 1994-INA-178 (May 4, 1995); *Martson & Martson, Inc.*, 1990-INA-373 (Jan. 7, 1992).

In the instant case, the CO properly raised the issue of whether the Aliens possessed qualifications when hired that are now required of U.S. applicants. The NOFs, however, only stated a finding that the Aliens lacked a food handling card. They did not mention any need for proof that the Aliens had such a card when hired. The rebuttal provided copies of the Aliens' food handling

cards. Those cards only bear an expiration date and do not show a date of issuance. The Final Determination were based solely on a finding that "[t]here is no indication [the Aliens] had the card at time of hire." The motions for reconsideration were based, in part, on the argument that "reasonable mis-interpretation of the NOF due to lack of specificity is grounds for remand. See *Motorola Communications & Electronics, Inc.*, [19]91-INA-278 (Feb. 23, 1993); *Gobi Primak, Inc.*, [19]92-INA-161 (Mar. 11, 1993)."

Employer has accurately stated the rulings in *Motorola Communications* and *Gobi Primak*. Moreover, the full Board in *Miaofu Cao*, 1994-INA-53 (BALCA Mar. 14, 1996)(*en banc*), reaffirmed the principle that the Notice of Findings must give notice which is adequate to provide the employer an opportunity to rebut or cure the alleged defects. Although a savvy employer might have realized that what the CO wanted in rebuttal was proof that the Alien had the card when hired, the CO did not expressly ask for such proof, and we find that Employer's submission of copies of the Aliens' food handling cards exhibited a good faith attempt to comply with the NOFs' citation. Accordingly, under the circumstances of this case, we will remand these cases for further clarification of the Employer's true job requirements and the Aliens' possession of such qualifications when hired.

We observe that it is unclear from the record before us whether Employer's food handling card requirement means that the successful applicant must possess the card when applying for the job, or only be amenable to obtaining such a card if hired. If the latter, whether the Aliens possessed such cards when hired would not be relevant. However, it would suggest that the pre-application advertisements were imprecise and potentially reduced the pool of applicants, thereby making a RIR inappropriate and a remand for supervised recruitment necessary.

If, however, Employer is requiring a food handling card at the time an application is made, it must present proof that the Aliens had such a card when hired, and may need to establish why such a requirement is not an unduly restrictive job requirement or establish business necessity for such a requirement, if the CO chooses to raise that issue. If Employer is requiring that applicants already have a food handling card, but can establish that the Aliens had such a card when hired and that the

requirement is either not unduly restrictive or is justified by business necessity, the CO should reconsider whether the RIR was properly denied and whether a remand for supervised recruitment is necessary. If, however, Employer maintains that it is a job requirement that applicants already have a food handling card, but fails to prove that the Aliens had such a card at the time of hire, or that requirement is either not unduly restrictive or justified by business necessity, the CO may deny the application without a remand for supervised recruitment before the local employment service.

### **ORDER**

The Certifying Officer's denials of labor certification are **VACATED** and these matters **REMANDED** for further proceedings consistent with the above.

For the panel:

**A**

**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 twenty days from the date of service a party petitions for review by the full Board. 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 the Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K St., 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.