



Issue Date: 08 June 2004

BALCA Case No.: 2003-INA-79
ETA Case No.: P95-CA-36714/NOD

In the Matter of:

JADEL JEWELERS,
Employer,

on behalf of

IMELDA FRANCISCO,
Alien.

Appearances: Dan E. Korenberg, Esquire
Encino, California
For Employer and Alien

Certifying Officer: Rebecca Marsh Day
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by a jewelry store for the position of Jewelry Store Manager. (AF 81).² The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification and the 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).

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”.

STATEMENT OF THE CASE

On October 17, 1994, the Employer, Jadel Jewelers, filed an application for alien employment certification on behalf of the Alien, Imelda Francisco, to fill the position of Jewelry Store Manager. The job duties included managing the store, supervising employees, ordering merchandise, and taking inventory, among other tasks. A minimum of two years experience in the job offered was required, as well as the ability to speak, read and write Tagalog (Filipino). (AF 2-3, 28).³

The Employer received six applicant referrals in response to its recruitment efforts, all of whom were rejected as either unavailable or unqualified for the position. (AF 87-88).

A Notice of Findings (“NOF”) was issued by the CO on January 22, 1997, proposing to deny labor certification based upon a finding that the Employer’s foreign language requirement was unduly restrictive, in violation of 20 C.F.R. § 656.21(b)(2)(i)(C), unless adequately documented as arising from “business necessity.” In addition, the CO cited a lack of good faith recruitment, having found that one of the U.S. workers was unlawfully rejected for failure to respond to the Employer’s contact letter. The CO noted that alternative means of contact by phone should have been made. (AF 65-68).

In Rebuttal, the Employer provided a notarized statement that 99% of its clientele is Filipino, that it advertises in newspapers “like ManilaMail, The Eye [and] The Filipino Guardian” and “on the Filipino channel that is being aired in the Bay Area,” and that it holds itself out as offering the Tagalog language. (AF 32). The Employer also provided a list of clients with Filipino surnames. With respect to the good faith recruitment issue, the Employer simply reiterated that the applicant had failed to respond to the contact letter, thus demonstrating a lack of interest in the job. (AF 26-59).

³ The Employer initially required employment at three locations; this requirement was later deleted in response to findings on remand. (AF 71-80).

A Final Determination (“FD”) denying labor certification was issued by the CO on March 27, 1997,⁴ based upon a finding that the Employer had failed to provide adequate documentation justifying its foreign language requirement as based on business necessity and had failed to demonstrate good faith recruitment efforts. In denying certification, the CO stated that “the mere contention that a large customer base is made up of a specific nationality, or listings of names bearing a certain ethnicity, does not substantiate the need of [a] foreign language requirement.”⁵ (AF 18-21).

The Employer filed a Request for Reconsideration which was denied by the CO on May 20, 1997. (AF 1-17). The matter was referred to and docketed in this Office on February 24, 2003.

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. Where the employer cannot document that the job requirement is normal for the occupation or that it is included in the DOT, the employer must establish business necessity for the requirement. 20 C.F.R. § 656.21(b)(2). 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. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*).

⁴ The record contains two identical FDs, one issued on March 20, 1997 and one on March 27, 1997. Because the Denial of Request for Reconsideration cites the March 27, 1997 date, that is the date cited herein. (AF 1, 18-21, 22-25).

⁵ In the FD, the CO cited Census Bureau statistics, indicating that 90-95% of the Filipino migrants in the United States are fluent in English, in addition to Filipino and several dialects. While the Board has held that it was proper for the CO to go outside the record in order to verify the information provided by an employer in a labor certification application, such evidence must be disclosed in the NOF. *Chams, Inc. d/b/a Dunkin’ Donuts*, 1997-INA-40, 232 and 541 (Feb. 15, 2000)(*en banc*). Hence, this evidence is not considered in this Decision on review.

When analyzing the business necessity for a foreign language requirement, a two-part analysis is used. “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.” *Lucky Horse Fashion, Inc.*, 1997-INA-182 (Aug. 22, 2000)(*en banc*).

Because the Employer’s job requirements include the use of a foreign language, under 20 C.F.R. § 656.21(b)(2)(i), the Employer must establish the business necessity of the foreign language requirement. The Employer must first establish that the use of the Tagalog language bears a reasonable relationship to the occupation of jewelry store manager within the context of its business. The *Dictionary of Occupational Titles* (DOT) job description for the occupation of jewelry store manager neither explicitly nor implicitly supports the use of the Tagalog language. The Employer has submitted no evidence to establish that the use of a foreign language is normal to the occupation of jewelry store manager. The Employer’s rebuttal argues that business necessity is shown in the instant case because the majority (99%) of its clientele is Filipino. In support thereof, the Employer has submitted a client list of Filipino surnames, and copies of advertisements and advertising invoices from Filipino newspapers and television stations.

This evidence, standing alone, is insufficient to establish that the use of the Tagalog language bears a reasonable relationship to the occupation of jewelry store manager within the context of the Employer’s business. Notably, each of the copies of advertisements submitted by the Employer is written totally in the English language. While the Employer claims its business “hold[s] itself out is(sic) offering the “Tagalog” (Filipino) language,” there is no mention of this in any of the six ads submitted. (AF 151-156). Moreover, the Employer has submitted a list of Filipino client surnames; this list of surnames does not establish that these clients do not speak English or speak Tagalog. As was noted by the CO, “the mere contention that a large customer base is made up of a specific nationality, or listings of names bearing a certain ethnicity, does not substantiate

the need of [a] foreign language requirement.” Thus, the Employer’s undocumented assertions are insufficient to establish business necessity for the Tagalog language requirement and on this basis, labor certification was properly denied.

Labor certification was also properly denied on the basis that the Employer demonstrated a lack of good faith recruitment effort in its failure to attempt to contact the cited applicant by telephone. As a basis for rejecting this applicant, the Employer reported that it had determined he was disinterested because the applicant failed to respond to its contact letter. In finding that the Employer had failed to conduct recruitment in good faith, the CO noted that an employer genuinely desirous of interviewing a prospective U.S. worker would have also attempted to contact the worker by phone, where the number was readily available, as is the case here. *See, M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 9, 2001)(*en banc*), *citing Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991)(*en banc*) (holding that in some circumstances a reasonable effort to contact requires more than a single type of attempted contact). As such, labor certification was properly denied on this basis as well.

ORDER

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

Entered at the direction of the panel by:

A

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

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.