

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 16 June 2004

BALCA Case No.: 2003-INA-30
ETA Case No.: P2000-MA-01311857

In the Matter of:

TONY'S FENCE COMPANY, INC.,
Employer,

on behalf of

KRYSTYNA DZIALOWSKA,
Alien.

Appearances: Albert S. Lefkowitz , Esquire
New York, New York
For Employer and the Alien

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Krystyna Dzialowska ("the Alien") filed by Tony's Fence Company, Inc. ("the Employer"), pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO

denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On February 28, 2001, the Employer, Tony's Fence Company, Inc., filed an application for labor certification to enable the Alien, Krystyna Dzialowska, to fill the position of Office Manager. (AF 2). The job duties for the position included clerical functions and preparation of budget and monthly financial reports. The stated job requirements were a Masters degree or "master of economy," two years of experience in the job offered and the ability to speak English and Polish.

In a Notice of Findings ("NOF") issued on May 30, 2002, the CO proposed to deny certification on the grounds that the stated requirements for the job opportunity do not represent the Employer's actual minimum requirements because the Employer failed to establish that it had not hired workers with less training or experience or that it is not feasible to hire workers with less training or experience. The CO also found that the Employer's requirements of a Masters degree in economics, two years in the job offered, and fluency in Polish were excessive and tailored to the Alien. Further, the CO noted that the Employer had not established the business necessity for the foreign language requirement. (AF 33-35).

In rebuttal, dated June 6, 2002, the Employer stated that he had employed less qualified workers who performed the duties "adequately and minimally." However, the Employer noted that the Alien did "a far superior job" due to her education and skills. In addition, the Employer argued that the percentage of his customers who only speak Polish has increased. Although the job duties did not include customer interaction, the Employer wanted someone "continuously on the premises" who could translate between the staff and customers. (AF 39).

In a second NOF (“SNOF”), dated August 19, 2002, the CO proposed to deny certification. (AF 36-38). The CO stated that the Employer did not demonstrate the need for a worker with a Masters degree or the ability to speak Polish. The CO found that these requirements were restrictive and tailored to the Alien. The CO also found that the Employer did not provide documentation to substantiate his assertion that he has seen a “50% increase” in Polish-speaking customers. The CO instructed the Employer to delete the restrictive requirements, to amend the ETA 750A and to re-recruit. (AF 37-38).

Under cover letter, dated September 13, 2002, Employer submitted its rebuttal to the SNOF. (AF 40-71). The CO found the rebuttal unpersuasive and issued a Final Determination (“FD”), dated October 29, 2002, denying certification. (AF 72-73). On November 26, 2002, the Employer filed a Request for Review, along with a supporting brief and additional evidence. (AF 74-80). The matter was docketed in this Office on December 10, 2002.

DISCUSSION

In the FD, the CO summarized the deficiencies, as set forth in the NOFs, as well as the Employer’s rebuttal submissions. Regarding the more recent rebuttal evidence, the CO stated that the Employer had agreed that a Masters degree was not required for the position. However, the Employer stated that the Alien’s educational level is a “decided bonus.” The CO stated that the Employer was given the opportunity to readvertise the position without the excessive requirements, but chose not to do so. The CO further found that the Employer failed to document business necessity for the job requirements. (AF 73).

The CO, in the original NOF, provided specific instructions to the Employer to demonstrate business necessity for the language requirement and the need for the education requirement. The CO noted that the education requirement exceeded the SVP for the job. (AF 34). In rebuttal to the NOF, the Employer conceded that the Masters

degree requirement was simply a preference, noting that the advanced degree was “an advantage rather than a requisite.” (AF 39). Furthermore, the Employer failed to provide the documentation reasonably requested by the CO to establish the business necessity for the Polish language requirement. Accordingly, it would have been appropriate for the CO to have issued a FD denying certification following the Employer’s initial rebuttal. Instead, the CO issued a SNOF, in which he provided the Employer with an opportunity to delete the unduly restrictive requirements, to amend the ETA 750A, and to re-advertise.

In the rebuttal to the SNOF, the Employer failed to amend the ETA 750A, notwithstanding the admission that the Masters degree was not a requirement. The Employer has acknowledged that the degree was not required for the position, but was added because the Alien possessed the degree. (AF 39). The Employer did not present any evidence establishing that the degree was required for the position; however, the Employer did not amend the ETA 750A to delete the requirement. Therefore, the CO correctly denied certification on this ground, as the Masters degree was not the actual minimum requirement. *See* 20 C.F.R. § 656.21(b)(5).

In addition, the Employer failed to establish business necessity for the Polish language requirement. The Employer did not submit any of the documentation requested by the CO to establish business necessity for the requirement. The Employer first stated that the Alien functioned as a translator between the staff and the customers. (AF 39). In the second rebuttal, the Employer listed seven employees who are supervised by the worker and who speak little or no English. (AF 41). Therefore, the Employer argued that the position required fluency in Polish and English. The Employer also stated that most of the wood is ordered from Poland and the worker needed to speak Polish to perform this duty. Accompanying the rebuttal was a number of receipts and purchase orders for goods from Poland. However, the majority of these receipts are printed in English. (AF 43-49). The Employer has not demonstrated how the knowledge of the

Polish language is a business necessity.¹ See, e.g., *Lucky Horse Fashion*, 1997-INA-182 (Aug. 22, 2000)(*en banc*); *Best Roofing Co., Inc.*, 1988-INA-125 (Dec. 20, 1988)(*en banc*).

Finally, we decline to consider any new evidence and argument submitted by the Employer with its request for review because such evidence and argument should have been raised prior to the issuance of the FD and is not part of the record on appeal.² See, e.g., *Meta Engineers, P.C.*, 1995-INA-415 (July 2, 1997); *Memorial Granite*, 1994-INA-66 (Dec. 23, 1994).

In view of the foregoing, we agree with the CO's determination that the Employer has failed to document that its job opportunity has been and is being described without unduly restrictive job requirements, in violation of 20 C.F.R. § 656.21(b)(2). Accordingly, we find that labor certification was properly denied.

¹ As noted by the CO in the FD, the Employer has belatedly attempted to justify the Polish language requirement as business necessity. This option was not offered in the SNOF; rather, to correct the deficiency, the Employer was instructed to delete the Masters degree requirement and to amend the ETA 750A, which it failed to do. (AF 73).

² The Employer belatedly submitted a list of twenty-eight customers, dated November 26, 2002, who purportedly "speak only the Polish language...although [they] love the English language." Furthermore, the customers state that they are the Employer's "sole customers," they recommend other Polish-speaking friends to use Employer's services, and they would go elsewhere if the Polish language was not spoken by the Employer's staff. (AF 77-80). Although not the basis for this decision, if this submission had been timely filed as rebuttal, we would find it unpersuasive. The Employer asserts that the customers listed "are exclusively Polish speaking with no fluency in the English language;" however, the translation from Polish to English was made by Ewa Nowak, who is among the listed customers. (AF 76-80). Moreover, the customers state that "without Polish language being spoken by their [Employer's] staff, we will go elsewhere and the company will lose immensely." (AF 80). However, the Employer previously acknowledged that the office manager's "job description does not involve interacting with customers." (AF 39). Furthermore, we note that while the customers listed may represent the Employer's Polish-speaking clients as of November 2002, it does not establish the Employer's customer base as of February 28, 2001, when the application for labor certification was filed, nor does it satisfactorily explain and document how the Employer's Polish-speaking customers were serviced prior to the Alien's hiring.

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.