

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 25 February 2009

BALCA No.: 2008-PER-00167
ETA No.: C-06360-94725

In the Matter of:

LOS ANGELES CENTER OF COMMERCE,
Employer,

on behalf of

AMIR ZAMANI,
Alien.

Certifying Officer: Dominic Pavese
Chicago National Processing Center

Appearances: Richard D. Fraade, Esquire
Beverly Hills, California
For the Employer and Alien

Gary M. Buff, Associate Solicitor
Clarette H. Yen, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Chapman, Vittone and Wood**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises under Section 212 (a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the “PERM” regulations found at Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”)¹.

BACKGROUND

The Employer, Los Angeles Center of Commerce (aka LACC), filed a labor certification application on behalf of Amir Zamani online on March 22, 2007. (AF 144-145)². The Employer was seeking to sponsor the Alien for the job of Operations Manager. The job duties included, “Communicate in Farsi with Persian customers.” (AF 154). The Employer is engaged in import/export, and wholesale of general merchandise. (AF 14). It imports its products from China, and sells them to various supermarkets and retailers in the United States, Canada and Mexico. (AF 14-15).

On March 29, 2007, the CO issued a denial letter. (AF 141-143). The CO stated that the Employer had not justified the foreign language requirement by demonstrating a business necessity based on the nature of the occupation or the need to communicate with a large majority of the employer’s customers, contractors, and employees who cannot communicate effectively in English, citing 20 C.F.R. § 656.17(h)(2).

The Employer filed for reconsideration on April 26, 2007, and submitted copies of invoices from the company and advertisements which showed the need for the Farsi language. (AF 4-18). The Employer noted that it had not been provided a previous opportunity to justify the language requirement because it had filed online, and an audit letter had not been issued. The Employer stated that the Farsi language requirement is a business necessity because over 40% of its clients are Farsi speaking. The Employer stated that it is a necessity for the Operations Manager to be able to communicate with the Persian clientele about new products, changes in prices or other changes in the

¹ The final PERM regulations were published on December 27, 2004, 69 Fed. Reg. 77386, and are applicable to permanent labor certification applications filed on or after March 28, 2005. The regulations were amended on June 21, 2006, 71 Fed. Reg. 35522, and May 17, 2007, 72 Fed. Reg 28903.

² In this decision, AF is an abbreviation for Appeal File.

business in Farsi. The Employer stated that Farsi is necessary to be sure that the customers fully comprehend the reasoning behind these changes. The Employer wrote: “There is absolutely no other way of explaining various business issues than to speak in Farsi.” (AF 18). The Employer also stated that Farsi is required to speak to the owner/operators of the two shipping companies it uses. (AF 18).

On March 22, 2007, the CO denied reconsideration. (AF 1-2). The CO stated that the Employer’s evidence did not establish the number and proportion of its clients, contractors or employees who allegedly cannot communicate in English greater than 40%. The CO found that while the Employer identified clientele, shipping companies and potential customers who prefer to speak in Farsi, it failed to allege or show that these individuals could not effectively communicate in English. The CO determined that the denial was valid and, thus, denied reconsideration. Thereafter the CO forwarded the Appeal File to BALCA. (AF 1-2).

BALCA docketed the appeal on August 29, 2008, and issued a Notice of Docketing on September 4, 2008. The Employer filed a Statement of Intent to Proceed on September 11, 2008, indicating that it would rely on the argument and documentation presented with its motion for reconsideration. The CO filed a letter brief dated October 15, 2008. The CO observed that there is a well-developed body of case law concerning the issue of business necessity for a foreign language requirement that was adopted in the PERM regulations, and that the instant case was similar to the Board’s pre-PERM decision in *Ace-Tech Auto*, 1993-INA-484 (July 26, 1994).

DISCUSSION

The regulatory history of the PERM regulations indicates that the drafters of the regulations intended to adopt the well-understood and generally accepted body of case law that had been developed over two decades about when and how language requirements can be used as a job requirement in a labor certification application. *See* 69 Fed. Reg. 77325, 77352 (Dec. 27, 2004). The seminal decision on business necessity was

Information Industries, Inc., 1988-INA-82 (Feb. 9, 1989) (en banc). The basic business necessity test is reflected in the PERM regulations at 20 C.F.R. § 656.17(h)(1): “To establish a business necessity, an employer must demonstrate the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner.” The *Information Industries* test for business necessity was generic to all types of job requirements considered to be unduly restrictive under the regulations. Later BALCA decisions fleshed out application of the *Information Industries* test in the specific context of foreign language requirements. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (en banc); *Coker's Pedigreed Seed Co.*, 1988-INA-48 (Apr. 19, 1989) (en banc); *Construction and Investment Corp.*, 1988-INA-55 (Apr. 24, 1989) (en banc); *Sysco Intermountain Food Services*, 1988-INA-138 (May 31, 1989) (en banc); *Tel-Ko Electronics, Inc.*, 1988-INA-416 (July 30, 1990) (en banc); *Remington Products, Inc.*, 1989-INA-173 (Jan. 9, 1991) (en banc); *International Student Exchange of Iowa, Inc.*, 1989-INA-261 (Apr. 21, 1992) (en banc); *Lucky Horse Fashion, Inc.*, 1997-INA-182 (Aug. 22, 2000) (en banc).

The PERM regulations, however, do not simply recite the BALCA caselaw by rote on the business necessity of foreign language requirements. Rather, they provide a very specific description of the type of evidence that may be used to support a business necessity showing, to wit:

(2) A foreign language requirement can not be included, unless it is justified by business necessity. Demonstrating business necessity for a foreign language requirement may³ be based upon the following:

³ The use of the word “may” in this sentence of the regulation might arguably be construed to mean that the proof elements detailed in subsections 656.17(h)(2)(ii)(A) and (B) are suggestive only, and not required for an employer to establish business necessity for a foreign language requirement.

However, when read in the context of the regulatory history, we find that the proof elements are mandatory. The reason for the use of the word “may” in this sentence was that the drafters viewed the final version of this regulation to be a concession to commenters who wanted to keep the business necessity test, and to expand the types of permissible proof to include communication with co-workers or subordinates. Here is the part of the Federal Register publication of the Final PERM regulations that discusses foreign language requirements:

b. Foreign Language Requirement

(i) The nature of the occupation, e.g., translator; or

(ii) The need to communicate with a large majority of the employer's customers, contractors, or employees who can not communicate effectively in English, as documented by:

(A) The employer furnishing the number and proportion of its clients, contractors, or employees who can not communicate in

The NPRM proposed that a foreign language requirement must be supported by a showing that the foreign language was not merely for the convenience of the employer or its customers, but was required based upon the nature of the occupation or the need to communicate with a large majority of the employer's customers or contractors. The use of the business necessity standard for foreign language requirements in the current system produced a well-understood and generally accepted body of case law that has been developed over 2 decades about when and how language requirements can be used. The business necessity standards contained in these established principles were reflected in the proposed rule. Since we are retaining the business necessity standard in the final rule we have modified this final rule in § 656.17(h)(2) by simply providing that a foreign language cannot be included as a job requirement unless it is justified by business necessity.

We received seven comments that specifically addressed the proposed rule on foreign language requirements. FAIR and the AFL-CIO expressed their strong support of the proposed rule. The majority of commenters (employers and attorneys/interest groups representing employers), while generally favoring the proposal, suggested we expand the rule to include other possible business justifications for foreign language requirements. The most frequently cited example was the need to communicate with co-workers or subordinates. AILA, for example, strongly recommended we include the employer's own employees as a potential class of individuals necessitating a language requirement, noting our recognition of the linguistic difficulties of an employer's contractors, but not of the employer's own staff, appeared inexplicable. After careful consideration, we have concluded these comments have merit. Lastly, we think there are working environments where safety considerations would support a foreign language requirement. In some industries and occupations language impediments could contribute to injuries to workers. Accordingly, this final rule adds the need to communicate with co-workers or subordinates to the ways for justifying business necessity for a foreign language requirement. Lastly, we think there are working environments where safety considerations would support a foreign language requirement.

69 Fed. Reg. 77325, 77352 (Dec. 27, 2004); *see also* 67 Fed. Reg. 30466, 30472-73 (May 6, 2002) (proposed PERM rule; even though business necessity was not part of the proposed rule, the rule was intended to be consistent with the majority of BALCA decisions on foreign language requirements).

In *Lucky Horse Fashion, Inc.*, 1997-INA-182 (Aug. 22, 2000) (en banc), the Board had ruled in a case arising under the pre-PERM regulations that a foreign language requirement business necessity justification could not be solely based on the poor English-language proficiency of the employer's own workforce. Thus, what the final PERM regulations were doing in this section was overturning the *Lucky Horse* ruling, *see Hathaway Childrens Services*, 1991-INA-388 (Feb. 4, 1994) (en banc) (notice and comment rule making is an appropriate method to carve out an exception to a BALCA ruling), and conceding that there may be other types of circumstances that support a finding of business necessity for a foreign language requirement.

English, and/or a detailed plan to market products or services in a foreign country; and

(B) A detailed explanation of why the duties of the position for which certification is sought requires frequent contact and communication with customers, employees or contractors who can not communicate in English and why it is reasonable to believe the allegedly foreign-language-speaking customers, employees, and contractors can not communicate in English.

20 C.F.R. § 656.17(h)(1).

In the instant case, there is no evidence in the record establishing that the occupation of Operations Manager normally requires a foreign language requirement. Thus, the nature of the position in this case does not meet the test of section 656.17(h)(2)(i), and the Employer therefore must rely on other factors to establish the business necessity for its language requirement. Under the regulation at section 656.17(h)(2)(ii), the Employer may demonstrate business necessity by establishing the need to communicate with “a large majority” of customers, contractors, or employees in the foreign language “who can not communicate effectively in English....”

The Employer argues that since 40% of its clientele speak Farsi, and since the two shipping companies are owned by Farsi speaking individuals, a business necessity for the foreign language requirement has been established by the need to communicate with a large majority of the employer’s customers, contractors, or employees as provided in Section 656.17(h)(2)(ii). The shortcoming in the Employer’s argument, however, is plain: (1) forty percent is not a majority – much less a large majority, and (2) the ability of clients and a contractor to speak Farsi does equate to an inability to communicate effectively in English.

As the CO noted in his appellate brief, this case is similar to the facts in *Ace-Tech Auto*, 1993-INA-484 (July 26, 1994). In *Ace-Tech*, the employer required Korean language ability, alleging that sixty percent of its customers only spoke – or preferred to speak – Korean, and that Korean would be used approximately seventy five percent of the time. In its rebuttal, the employer asserted that the Korean community made up the

"majority" of its business and that the "majority" of its Korean customers felt very strongly with regard to the use of Korean. The employer asserted that unless its staff could speak Korean, he would lose his Korean customers. The Board, however, found that the Employer's five page customer list, showing individuals with Korean surnames and other surnames, was by itself insufficient to prove that the Korean surnamed customers require or prefer to speak Korean in their business dealings.

In the instant case, the Employer submitted a list of clients who were "Iranian owned," or had buyers who are Iranians, "and hence Farsi speaking."⁴ (AF 15-17). The Employer also identified two shipping companies it uses which are "Iranian owned and operated." For purposes of this appeal, we will assume *arguendo* that persons with Iranian surnames can speak Farsi. But the Employer has not established that these clients and contractors are unable to communicate in English. The regulations do not provide for a foreign language requirement where the business' customers, employees or contractors prefer to speak in a foreign language. Rather, the regulations provide that an employer may establish a business necessity for a foreign language requirement where "a large majority" of the business' customers, employees or contractors "can not communicate in English." 20 C.F.R. § 656.17(h)(2)(ii)(b).

The Employer argued that there would be no way the purchasing manager could explain various business issues other than speaking Farsi to Persian clientele. The Employer has not documented, however, that its customers are unable to communicate in English and that there is "no way" to explain business issues to these customers in English. While the invoices submitted by the Employer do include notations in Farsi, the basic invoices are produced in English, strongly suggesting that the customers are able to communicate in English, even while, perhaps, preferring to communicate in Farsi.

In conclusion, while the Employer has demonstrated a clientele partially made up of probable Farsi speakers, and the use of shipping contractors who probably have Farsi speaking owners, the Employer has not established that these clients and the shipping

⁴ It is not clear from the Employer's letter whether these companies are owned by persons located in Iran, or owned by U.S. residents or citizens of Iranian descent. The letter makes reference to the large number of Persians living in Southern California.

contractor's employees are unable to communicate in English. Therefore, the Employer has not established a business necessity for the foreign language requirement for this position under the provisions of the regulations at 20 C.F.R. § 656.17(h)(2).

Since the record does not support the Employer's argument that a business necessity has been established for the foreign language requirement, we find that the CO properly denied certification.

ORDER

Based on the foregoing, it is **ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **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 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 Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 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.

