

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: 07 April 2010

BALCA No.: 2009-PER-00237
ETA No.: A-06207-42833

In the Matter of:

LA CANTINA TOSCANA,
Employer,

on behalf of

FERNANDO ROMERO,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Robert J. Shannon, Esquire
Roura, Melamed, & Shannon, LLP
New York, New York
For the Employer

Gary M. Buff, Associate Solicitor
Frank P. Buckley, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Colwell, Johnson and Wood**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

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.”).

BACKGROUND

On June 30, 2006, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Cook.” (AF 48-58).¹ The Employer required that the applicant have 2 years of experience in the job offered. (AF 51).

On November 2, 2006, the CO denied certification on the ground that a selection was not made for Section I-11 for the name of the newspaper for the second advertisement. (AF 23-25). On November 17, 2006, the Employer submitted a request for review, arguing that its failure to list the name of the newspaper for the second advertisement on ETA Form 9089 was “an inadvertent omission and the New York Daily News should be inserted.” (AF 15). The Employer attached copies of its advertisements to show that it had advertised the position twice in the New York Daily News, as is required by the regulations.² (AF 18-19).

On February 29, 2008, the CO issued an Audit Notification. (AF 27-29). In explaining the reasons for the audit, the CO found, “The employer’s stated minimum requirements exceed the SVP level assigned by O*NET to the SOC code for the occupation identified in F-2 of ETA Form 9089, and the employer must, therefore, document its requirements as arising from business necessity.” (AF 30). The CO stated that under 20 C.F.R. § 656.17(h)(1), “In order to establish business necessity, an

¹ In this decision, AF is an abbreviation for Appeal File.

² There is no response to this request for review from the CO in the Audit File. Therefore, we presume that the CO accepted the Employer’s argument and this is no longer an issue on appeal.

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." *Id.*

On March 12, 2008, the Employer responded to the Audit, attaching: a copy of the ETA Form 9089; a letter from the owner, explaining the business necessity for the experience requirement; a copy of the Employer's internal posting; a recruitment report; a copy of the job order; a copy of the Employer's prevailing wage determination; and a copy of the newspaper advertisements. (AF 26-47). In the letter the Employer submitted, it stated that the position of cook was "a highly skilled and responsible position" that required "a fully competent cook with advanced cooking skills and knowledge of menu planning." (AF 41). The Employer asserted that although it had hired individuals in the past "with a range of experience usually one year or more," it had found that "individuals with less than 2 years of experience proved unsatisfactory." *Id.* The Employer implied that people with less than 2 years of experience "lacked the knowledge to put together the necessary menus" and "were extremely transient and often disappeared or failed to show up for work." *Id.* The Employer asserted, "A person [with] at least 2 years of experienced [sic] is critical to the continued success of our restaurant." *Id.*

The CO denied certification on July 31, 2008, on the ground that the Employer failed to respond to the Audit Letter by the date specified (3/31/2008). (AF 20-22). On August 13, 2008, the Employer submitted a request for review, asserting that it had sent in a response to the audit request on March 12, 2008. (AF 13-14). The Employer indicated that it was attaching a copy of its audit response, as well as a copy of the Federal Express receipt, indicating it was received by the audit team on March 14, 2008. (AF 14).

On September 26, 2008, the CO again denied certification. (AF 3-5). The CO explained, "The employer's stated minimum requirements exceed the SPV level assigned by O*NET to the SOC code for the occupation identified in F-2 of ETA Form 9089, and the employer has not adequately documented its requirements as arising from business

necessity.” (AF 4). The CO asserted that under 20 C.F.R. § 656.17(h)(1), “The job opportunity’s requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation shown in the O*NET Job Zones.”

On October 14, 2008, the Employer submitted a request for review. (AF 2-12). The Employer contended that, “[a] review of the O’Net qualifications for a cook and a chef indicate both discuss the need to plan menus and [that] should not be a consideration for denial. Additionally, prior to the use of O’Net the job description for a cook required him or her to plan menus and have at least 2 years of experience.” (AF 2). The Employer attached pages from the O*NET website and a page from the Dictionary of Occupational Titles, showing an SVP of 6 for a cook position, DOT Code No. 315.361-010. (AF 10-12). The Employer also attached letters from 4 different restaurants, all of which state that they require a minimum of 2 years of experience for the position of a cook. (AF 6-9).

On March 12, 2009, the CO issued a letter of reconsideration, finding that the Employer’s request did not overcome all of the deficiencies indicated in the determination letter. (AF 1). The CO asserted that although the Employer provided additional explanatory information and evidence with its request for review, this supporting documentation constitutes new evidence not in the record on which the denial was based.

BALCA issued a Notice of Docketing on March 30, 2009. The Employer filed a Statement of Intent to Proceed on April 7, 2009, but did not file an appellate brief. The CO filed a Statement of Position on May 19, 2009, contending that the Employer’s minimum requirements of 2 years of experience for the position of cook exceeds the SVP level assigned by O*Net to the SOC code for the occupation and the Employer failed to submit evidence of business necessity.

DISCUSSION

The regulation at 20 C.F.R. § 656.17(h)(1), provides, in pertinent part:

(1) The job opportunity’s requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*Net Job Zones. 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.

In the instant case, the CO properly found that the Employer’s experience requirement exceeded the SVP assigned to the O*Net Job Zone for a cook position, and therefore properly directed the Employer in the audit notification to establish business necessity for its experience requirement as required by 20 C.F.R. § 656.17(h)(1).

The O*Net is a database containing information on hundreds of standardized and occupation-specific descriptors.³ O*Net job descriptions contain several standard elements, one of which is a “Job Zone.” An O*Net Job Zone “is a group of occupations that are similar in: how much education people need to do the work, how much related experience people need to do the work, and how much on-the-job training people need to do the work.”⁴ The Job Zones are split into five levels, from occupations that need little or no preparation, to occupations that need extensive preparation.⁵ Each Job Zone level specifies the applicable SVP.

In the instant case, the Employer’s cook position was classified under the O*Net Code 35-2014.00 - Cooks, Restaurant. The position summary found on the O*Net web

³ online.onetcenter.org/help/onet/.

⁴ online.onetcenter.org/help/online/zones.

⁵ *Id.*

site describing the Job Zone for the position states an SVP Range of 4.0 to < 6.0.⁶ The O*Net describes SVP levels as follows:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years ^[7]

The same definition is printed in the definitions section of the PERM regulations. 20 C.F.R. § 656.3. The position summary for O*Net Code 35-2014.00 goes on to state under the “Job Training” portion of the “Job Zones” section: “*Employees in these occupations need anywhere from a few months to one year of working with experienced employees.*”⁸ Thus, when the SVP range is stated as “4.0 to < 6.0,” it means that O*Net determined the SVP to be anywhere from three months up to including one year. Stated another way, the top end of the experience requirement must be *less than* an SVP of 6.0 (over 1 year and up to including 2 years).⁹

Therefore, in order to require 2 years of experience for the job opportunity, the Employer had to establish business necessity. The seminal decision on business necessity was *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (en banc). The

⁶ online.onetcenter.org/link/summary/35-2014.00.

⁷ online.onetcenter.org/help/online/svp (citing U.S. Department of Labor. (1991). *Dictionary of Occupational Titles* (Rev. 4th ed.). Washington, DC: U.S. Government Printing Office).

⁸ online.onetcenter.org/link/summary/35-2014.00 (Job Zone Detail section) (emphasis added).

⁹ See also online.onetcenter.org/help/online/zones (interpreting Job Zone Two to go from a few months up to one year).

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.” In the Employer’s response to the audit notification, the Employer only submitted one document pertaining to business necessity for the experience requirement. This document was a letter from the Employer’s owner, which asserted that the position required 2 years of experience due to the fact that it was “a highly skilled and responsible position” that required “a fully competent cook with advanced cooking skills and knowledge of menu planning.” (AF 41). This single, self-serving letter from the Employer does not adequately demonstrate that the Employer’s experience requirement arises from business necessity.¹⁰

Additionally, while § 656.26 provides that an employer may request reconsideration within 30 days from the date of issuance of the denial, it restricts this request by stating that “statements, briefs, and other submissions...must contain only legal arguments and only such evidence that was within the record upon which the denial of labor certification was based.” 20 C.F.R. § 656.26(a)(4)(i). Thus, although the Employer provided additional evidence showing business necessity with its request for review, this documentation constitutes new evidence not in the record on which the denial was based, thus it cannot be considered.¹¹

Based on the foregoing, we affirm the CO’s denial of labor certification.

¹⁰ *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer’s burden of proof).

¹¹ The four letters the Employer submitted with its request for review from other employers, which attested to the 2 year experience requirement, cannot be considered.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

A

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Administrative Law Judge Pamela Lakes Wood, dissenting.

I respectfully dissent. I would vacate the denial of certification in the instant case because Employer has established business necessity for the alternative experience requirement.

The SVP range of three months to one year under O*Net (as explained in the panel decision) is at odds with the over two years for a restaurant cook under the old Dictionary of Occupational Titles (DOT) applicable to labor certification cases arising under the old regulations. Specifically, both the positions of Cook (hotel & rest.), 313.361-014 and Cook, specialty, foreign food (hotel & rest.), 313.361-030 required an SVP of 7, which translates to over 2 years of experience, up to 4 years, as explained in Appendix C of the DOT. Employer has cited the position of Cook (any industry), 315.361-010, primarily relating to institutional cooks, which requires an SVP of 6, which translates to over one year up to and including two years. (AF 2, 10, 27). Other hotel and restaurant cooking jobs (such as specialty cooks or fast food cooks) required a lesser SVP of 5 (translating into 6 months to one year of experience) or (as for short order cooks), even less; however, this job is more similar to the general restaurant cook position. Although these sections of the DOT are based upon data from 1977 to 1981, it

is nevertheless mystifying that the same job has now been determined to require so much less experience. In any event, while now required to be supported by a showing of business necessity, it is clear that a two-year experience requirement for a cook at an Italian restaurant is not an unusual requirement.

With that being said, Employer has clearly established business necessity for the requirement. Specifically, in his statement of March 8, 2008, submitted to the February 29, 2008 audit notification (and resubmitted after the Certifying Officer claimed not to have received it), Employer's owner stated that his restaurant is a four-star restaurant and the cook position to be filled required a fully competent cook with advanced cooking skills and knowledge of menu planning. (AF 26-30, 41). Further, he indicated that he had a negative experience in the past when he hired individuals with less than two years of experience as they were unable to put together the necessary menus and had attendance problems, resulting in an uproar and loss of income. (AF 41). The CO claimed that these duties were not specifically listed on the prevailing wage request or the ETA Form 9089 (AF 4); however, there is certainly no requirement that each and every duty be listed in a job description. Further, the CO's statement that the duties were more indicative of a Chef position (AF 4) is simply wrong; what distinguishes the Chef or Head Cook position (38-1011.00) is the supervisory and administrative duties involved, although the position "may" involve cooking, and the Cook, Restaurant position includes the task "Plan and price menu items." The panel has stated that this "single, self-serving letter from the Employer does not adequately demonstrate that the Employer's experience requirement arises from business necessity" but fails to explain why it does not.

In connection with the reconsideration request, Employer submitted statements from owners of four other restaurants verifying that they, too, required two years of experience for their cooks and the requirement was standard for the industry. (AF 6-9). Neither the CO nor the panel evaluated the sufficiency of this additional proof based upon 20 C.F.R. §656.24 and §656.26, as it was not part of the record upon which the denial was premised. While it would have been preferable for such information to have

been provided with the audit response, it was unnecessary based upon the Employer's statement, which already established business necessity.

Administrative Law Judge Paul C. Johnson, Jr., concurring.

I concur fully in the panel decision. I write separately to address two issues in the dissenting opinion of Judge Pamela Lakes Wood: (1) the difference between the SVP range established under the O*Net and that established under the Dictionary of Occupational Titles, and (2) whether Employer has shown a business necessity for requiring more experience than that required under the applicable regulation.

1. It is true that the SVP range of three months to one year of preparation under O*Net is at odds with the former requirement of over two years to four years of preparation required under the Dictionary of Occupational Titles. I disagree, however, that it is mystifying or even relevant to our decision that the O*Net requires less experience than did the DOT for the same job in 1981. First, 20 C.F.R. § 656.17(h)(1) explicitly requires application of the O*Net Job Zone requirement. Second, the DOT preparation requirement was based on data that are now three decades old, while the O*Net requirement is based on decidedly more current industry information and is "continually updated."¹² Third, and most important, it is not for this panel to substitute its opinion of the "real" experience requirement for the position for which certification was sought in place of the determination of the Employment and Training Administration.

2. The dissent asserts that the panel does not explain why a single, self-serving letter does not adequately demonstrate that the Employer's experience requirement arises from business necessity. In fact, an explanation is presented in footnote 10 of the panel opinion, citing *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999), an en banc decision of this Board holding that a bare assertion without either supporting reasoning or evidence is generally insufficient to meet the burden of proof. In my view, Employer's justification in this case is legally indistinguishable from that in *Carlos Uy III*, as it is an unsupported

¹² See www.onetcenter.org/overview.html.

assertion, and is therefore not sufficient to meet Employer's burden. In addition, it seems self-evident that to permit a single, self-serving letter without supporting evidence to show business necessity would be to disregard the requirement in 20 C.F.R. § 656.17(h)(1) that business necessity be "adequately documented." The dissent's acceptance of such an approach would allow after-the-fact justification, which the regulations are designed to prevent.

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.