



Issue Date: 26 February 2004

BALCA Case No.: 2002-INA-298
ETA Case No.: P2000-CA-09506685/JS

In the Matter of:

BRUCE'S GOURMET CATERING, INC.,
Employer,

on behalf of

JOSE MERAZ,
Alien.

Certifying Officer: Martin Rios
San Francisco, CA

Appearance: Gloria G. Suazo
Los Angeles, CA
For Employer

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 Jose Meraz ("Alien") filed by Bruce's Gourmet Catering, Inc. ("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 Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") denied the application and 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 Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties.

STATEMENT OF THE CASE

On August 2, 1999, Employer filed an application for labor certification on behalf of the Alien, for the position of Cook, Foreign Specialty Food. (AF 41-42).

On May 22, 2002, the CO issued a Notice of Findings ("NOF") indicating the intent to deny the application on two grounds. (AF 35-39). The first ground noted by the CO was Employer's unduly restrictive requirement of a class one driver's license for the position of cook. The CO found that a class one driver's license was not normally required for the successful performance of the job. The CO suggested that Employer could arrange for the applicant to satisfy the requirement after she was hired. To remedy the deficiency, the CO advised Employer to delete the unduly restrictive requirement and to retest the labor market. In the alternative, Employer would be required to justify the restrictive requirement on the basis of business necessity. (AF 36-37).

The second ground for denial noted by the CO was Employer's unlawful rejection of three qualified U.S. workers: David Neff, Oscar Mancía and Michael Flores. (AF 37-38). The CO found that Employer's objection to Mr. Neff's "lower quality caterers" experience was not a legitimate basis for rejection. Employer's rejection of Mr. Mancía based on a negative reference from a previous employer was also invalid. The CO found that the nature of the negative reference was not indicated and the specific employer who gave the reference was not identified. The CO found that Employer delayed interviewing Mr. Flores and the excessive delay had a discouraging effect on this applicant. Consequently, the CO could not determine that Mr. Flores was unavailable at the time of the initial interview. To remedy the deficiency the CO advised Employer to document lawful and job-related reasons for rejecting all three U.S. applicants. (AF 38-39).

In its Rebuttal dated June 13, 2002, Employer asserted that the nature of its business was to serve movie producers, actors and their crew at filming locations. (AF 30). Two trucks were needed to provide the service; the cook had the responsibility to drive one of the trucks to the locations because the production companies did not pay for a driver. Therefore, Employer required the cook to have a license. Employer added that the Alien had a license when hired and provided a copy of the license. (AF 33).

Regarding the rejection of U.S. workers, Employer indicated that it did not know if Mr. Flores was discouraged by the delay in scheduling the follow-up interview. Employer did know that the initial interview was during a hectic period in the motion picture catering business, followed by a long delayed vacation, and that all the applicants were made aware of those facts. Employer, however, contacted Mr. Flores soon after the business came back to normal. (AF 31).

Employer provided the name of the source that gave Mr. Mancina the negative reference. Employer added “the fact that [Mr. Mancina’s previous employer] indicated that he was not eligible for rehiring speaks volumes in this business.” (AF 31). Mr. Neff was actually hired by Employer but Employer found that his culinary skills did not meet Employer’s requirements. (AF 30-32).

On June 28, 2002, the CO issued a Final Determination (“FD”) denying certification. (AF 28-29). The CO found that Employer did not demonstrate that the requirement of a class one driver’s license was a normal requirement for the position of cook. The CO noted that the Alien had a class c driver’s license, which is the normal driver’s license and not the driver’s license required by Employer. Therefore, Employer did not prove that the Alien had a class one driver’s license at the time he was hired. Additionally, Employer’s assertion that the producers would not pay for a driver was not substantiated. (AF 29).

The CO also found that Employer did not overcome the NOF’s finding that he unlawfully rejected three qualified U.S. applicants. The CO found that Employer did not

demonstrate that it made a good faith effort in recruiting Mr. Flores or that Mr. Flores was truly unavailable. The statement that Mr. Mancina was not eligible for rehire by a former employer did not provide objective or sufficient grounds for determining that he was not a qualified and available U.S. worker. The CO also found that Employer's hiring of Mr. Neff diminished Employer's initial argument against Mr. Neff's qualifications. Employer's subsequent objections did not persuade the CO. (AF 29).

On July 18, 2002, Employer filed its Request for Review. (AF 1-2). Employer stated that it was deleting the driver's license requirement. Employer noted that the U.S. applicants were not rejected for failing to have a class one driver's license but for other reasons. (AF 1).

In regard to Mr. Flores, Employer asserted that at the time of the initial interview Mr. Flores was advised that he would be contacted at a later date and he was contacted as promised. Employer noted that it was Mr. Flores who did not have time to demonstrate his cooking skills at the time of the first interview. Employer added that the follow-up interview was postponed due to Employer's and the applicant's hectic schedules and not due to Employer's bad intentions. (AF 1).

In regard to Mr. Mancina, Employer stated that it had to rely on a former employer's statements because Mr. Mancina was unknown to Employer. Additionally, Employer indicated that he knew the individual that made the negative comments about Mr. Mancina. (AF 1).

In regard to Mr. Neff, Employer argued that it demonstrated its good intentions by hiring Mr. Neff so as to test his skills. Employer concluded that Mr. Neff was not suitable because he worked for lower quality caterers. (AF 1).

In a brief received on October 7, 2002, Employer requested a waiver to amend any of the deficiencies and comply with any new requirements.

DISCUSSION

The issue is whether the requirement of a class one driver's license was an unduly restrictive requirement reflecting lack of good faith recruitment or whether the requirement was supported by business necessity. A good faith recruitment effort is implicit in the regulations. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Therefore, an employer may not place unnecessary burdens on the recruitment process. *Lin and Associates*, 1988-INA-7 (Apr. 14, 1989). If an employer acts in a way which indicates a lack of good faith recruitment, such as actions which discourage U.S. workers from pursuing their applications, denial of certification is appropriate. *Vermillion Enterprises*, 1989-INA-43 (Nov. 20, 1989); *Berg & Brown, Inc.*, 1990-INA-481 (Dec. 26, 1991).

Twenty C.F.R. § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. Unduly restrictive requirements are prohibited because of the chilling effect on the number of U.S. workers who may apply or qualify for the job opportunity. The purpose of 20 C.F.R. § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 1987-INA-569 (Jan. 13, 1989) (*en banc*). A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the Dictionary of Occupational Titles ("DOT") and the requirements are those normally required for a job in the United States. *Ivy Cheng*, 1993-INA-106 (June 28, 1994). *Lebanese Arak Corp*, 1987-INA-683 (Apr. 24, 1989) (*en banc*). The job definition of Cook, Foreign Specialty Food as found in code 313.361-020 of the DOT does not include a class one driver's license requirement. Additionally, Employer has not shown that the requirement is one normally required for the job in the United States.

Employer consistently alleged that a class one driver's license was required for the position and that the requirement was a business necessity. To establish business necessity under 20 C.F.R. § 656.21(b)(2), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the

employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer. *Information Industries*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). In support of its business necessity argument, Employer argued that the cook had to transport trucks from one filming location to another and had to maneuver the trucks into difficult and varied terrain.¹ Additionally, Employer asserted that the producers would not pay for an employee that limited his work to driving.

The Alien did not have a class one driver's license at the time he was hired. Further, the Alien, up to the date of Employer's Rebuttal², did not meet the requirement that Employer was imposing on the potential U.S. candidates in the application and in the job advertisement, the class one driver's license. Thus, there is no support for Employer's argument that the cook must be the holder of a class one driver's license to perform the job, as the Alien was able to perform the job without the class one driver's license. Therefore, we find that the class one driver's license requirement is not business necessity, as it is not required to perform the job and consequently is an unduly restrictive job requirement.

We note that Employer, in its Request for Review, amended its initial requirements by deleting the requirement of a class one driver's license. This amendment cannot be considered by this Panel because our review must be based on the record upon which the CO reached his decision. Evidence first submitted with the Request for Review cannot be weighed. *Memorial Granite*, 1994-INA-66 (Dec. 23, 1994). Additionally, an employer cannot be allowed to state a restrictive requirement and reshape the requirement until one is found to which the CO would not object. Employer cannot avoid a FD denying labor certification by merely stating that it is willing to readvertise. In such a situation an employer is not engaging in a good faith effort to recruit. *See, e.g., Spanish American Institute*, 1990-INA-435 (Mar. 18, 1991).

¹AF 41, box 15.

²AF 33 (copy of the alien's class c driver's license)

Since Employer cannot require more experience from U.S. applicants than what was required from the Alien, Employer's requirement of a class one driver's license is not the true minimum requirement, a violation of 20 CFR § 656.21(b)(5). Therefore, the job opportunity as advertised was not clearly open to any qualified U.S. worker, a violation of 20 CFR § 656.20(c)(8).

We hold that the requirement was unduly restrictive, was intended to discourage U.S. applicants, had a chilling effect, and did not constitute good faith recruitment. Consequently, as the record supports the CO's findings and for the above stated reasons, we affirm the CO's denial and the following order will enter³:

ORDER

The CO's denial of labor certification in this matter 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 of Labor 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:

³ As we are affirming the CO's denial for the above stated grounds, it is not necessary to address the CO's finding of unlawful rejection of qualified U.S. applicants.

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.