



Issue Date: 23 February 2004

BALCA Case No.: 2002-INA-268
ETA Case No.: P2001-NY-02471047

In the Matter of:

JEAN-FRANCOIS DREYFUS,
Employer,

on behalf of

ELIZABETH JANE FORBES,
Alien.

Appearances: Amy J. Turizo, Esquire
New York, New York
For Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from an application for labor certification¹ filed by Jean-Francois Dreyfus (“Employer”) on behalf of Elizabeth Jane Forbes (“the Alien”) for the position of Household Manager. (AF 86-87).² The following decision is based on the record

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.”

upon which the Certifying Officer (“CO”) denied certification and 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 January 13, 1998, Employer filed an application for alien employment certification on behalf of the Alien for the position of Household Manager. Minimum requirements for the position were listed as two years experience in the job offered or in the related occupations of Executive Housekeeper or Butler. The job duties included managing Employer’s household, including supervision of a baby-sitter, a cook, and a housekeeper. (AF 87).

By letter dated November 24, 2000, Employer was instructed by the State Alien Employment Certification Office to document the full-time continuous nature of the job offer and whether there were any U.S. workers employed in the home. (AF 83-84). Employer responded that the Alien has been employed in their home on a full-time basis since January 1996 and that due to his and his wife’s employment responsibilities a full-time Household Manager is required. Employer identified their babysitter, their housekeeper and independent contractors such as their chef service, for which receipts were supplied, as workers the Household Manager would supervise. In addition, Employer provided receipts from various contractors the Household Manager would be expected to oversee and supervise. (AF 3-88).

Employer received two applicant referrals in response to its recruitment efforts, both of whom, upon being contacted by Employer, indicated they were not interested in the position. (AF 115-116).

A Notice of Findings (“NOF”) was issued by the CO on October 3, 2001, proposing to deny labor certification based upon a finding that Employer’s job requirement of managing and supervising “independent contractors” who are not

normally considered employees appeared restrictive. Employer was instructed either to justify business necessity for or to delete the cited requirement. (AF 123-125).

In Rebuttal, Employer attempted to cure the deficiency by deleting the cited restrictive requirement. Employer further stated that babysitter supervision had also been eliminated from the described duties, as the wife was currently out of work and Employer was no longer employing a babysitter. (AF 126-130).

A second NOF was issued by the CO on January 2, 2002, proposing to deny labor certification on the basis that Employer's job offer, as described, remained unduly restrictive. Noting that Employer had amended its job offer to delete "supervise employee babysitter and independent contractors, including housekeeper and cook," the CO observed that the amendment effectively removed the position offered from the Household Manager classification and the job as now described represented a combination of duties, specifically that of Child Monitor and Personal/Social Secretary. The CO noted that in a private residence, a Household Manager, by definition in the *Dictionary of Occupational Titles* (DOT), supervises and coordinates a **large** staff. In addition, the CO noted that Employer's alternative experience requirement as an Executive Housekeeper or Butler was not substantially equivalent to either the position of Household Manager or Child Monitor/Personal-Social Secretary. Employer was instructed either to justify business necessity for or to delete the combination of duties requirement and to submit evidence that its alternative experience requirement is substantially equivalent to its primary requirement. (AF 131-134).

In rebuttal, Employer stated that his wife was again employed and maintained that the job duties as described arise from business necessity due to the long hours and sometimes unpredictable work schedules of their high-level professional and demanding careers. Employer further asserted that the duties are logically related to each other and appropriately performed by a single employee and that while Employer's "Household Manager" (or Child Monitor/Personal Secretary) position is not yet found in a single

occupation in the DOT, the job is one that is normally found in the United States today. (AF 135-142).

On June 1, 2002, the CO issued a Final Determination (“FD”) denying labor certification. Noting that Employer had deleted supervising babysitter and independent contractors which included housekeeper and cook, yet still maintains that its need for a Household Manager is based on business necessity, the CO concluded that Employer’s job opportunity for a Household Manager did not meet the requirement of supervising a large staff. (AF 143-144).

Employer filed a Request for Review by letter dated July 3, 2002, reiterating that the job as described, while not in existence when the DOT was first published in 1938, is in fact a commonplace position in today’s world. (AF 149-156). The matter was referred to and docketed in this Office on September 5, 2002.

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. One of the measures by which a job requirement is tested to determine whether it is unduly restrictive is inclusion of the requirement in the definition of the job in the DOT. To determine whether a particular job requirement falls within the applicable DOT code, the CO must determine the job title which best describes the job and determine whether the job requirements specified by the employer fall within those defined in the DOT. *LDS Hospital*, 1987-INA-558 (Apr. 11, 1989)(*en banc*).

The DOT was developed in the mid-1930s by the U.S. Employment Service to supply standardized occupational information to support job placement activities. It is now also used for employment counseling, occupational and career guidance, and labor

market information. DOT definitions are organized by occupational code numbers and include a task element statement describing worker actions, the purpose or objective of these actions, machines, tools, equipment, or work aids used, materials processed, products made, subject matter dealt with, or service rendered, the nature and complexity of instructions followed, and the job tasks actually performed by the worker. In classifying job duties, the DOT is merely a guideline and should not be applied mechanically. *Promex Corporation*, 1989-INA-331 (Sept. 12, 1990). The DOT is not to be applied in a pigeonhole fashion where there must be a complete matching of duties between the job offered and the DOT classification. *Trilectron Industries, Inc.*, 1990-INA-176 (Dec. 19, 1991).

In the instant case, the DOT definition and job title determined by the CO to best describe Employer's job offer was that of Household Manager. The duties of Household Manger as described in the DOT are:

Supervises and coordinates activities of household employees in a private residence: Informs new employees of employer's desires and gives instructions in work methods and routines. Assigns duties, such as cooking and serving meals, cleaning, washing, and ironing, adjusting work activities to accommodate family members. Orders foodstuffs and cleaning supplies. Keeps record of expenditures. May hire and discharge employees. Works in residence employing large staff.

DOT 301.137-010 (Housekeeper, Home; Manger, Household).

The duties of Employer's job opportunity as initially described are:

Responsibility for managing employer's household: supervise employee babysitter and independent contractors, including housekeeper and cook. Keep inventories and order supplies, computerize household expenses, maintain budget and filing system. Oversee activities of 2 small children and coordinate childcare arrangements. Supervise business social functions. Make hotel and travel arrangements. Oversee residential renovation work.

(AF 87).

The duties of Employer's initial job opportunity appear to, in large part, mirror those of the DOT description for Household Manager. In determining to deny labor certification, the CO focused on the fact that the persons to be supervised by Employer's Household Manager were independent contractors as opposed to employees. Because the requirement was not included in the DOT, Employer was instructed to establish business necessity for the requirement or to delete it. 20 C.F.R. § 656.21(b)(2). Pursuant to *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*), 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.

In rebuttal, Employer elected to delete the requirement, and in essence, substantially changed the job requirements. As justification for the petitioned position, Employer maintained that he needs "an employee who can responsibly oversee the household" and a single employee with whom he can communicate his needs. Employer also wanted "one employee performing the related tasks of management, coordination, scheduling, and communication," yet Employer deleted this key part of the job.

In his second rebuttal, Employer attempted to justify business necessity for its newly created job that was identified by the CO as a combination Child Monitor/Personal Secretary position. While Employer still termed the job Household Manager (or Child Monitor/Personal Secretary), Employer provided detailed discussion regarding the duties the employee would perform and the percentage of time spent on each. Employer also noted his position that the job should be considered as a single occupation in today's world, none of which was addressed by the CO.³ The CO summarily denied certification

³ As was noted by Employer in his rebuttal, citing the Department of Labor's website (www.doleta.gov):

The Dictionary of Occupational Titles, first published in 1938, emerged in an industrial economy and emphasized blue-collar jobs. . . . But its usefulness waned as the economy shifted toward information **and services** and away from heavy industry. The need for occupational

on the basis the prospective employee would not supervise a “large staff.” Where the FD does not address Employer’s timely rebuttal evidence and arguments, the challenge may be deemed to be successfully rebutted and not at issue before the Board, the matter may be remanded, or the denial may be reversed. *Barbara Harris*, 1988-INA-392 (Apr. 5, 1989); *American Jewish Theatre*, 1991-INA-346 (Dec. 16, 1992); *H.P. Laboratories*, 1991-INA-87 (Mar. 12, 1992).

In the instant case, it is determined that the matter should be remanded to the Certifying Officer so that she may address the evidence presented in rebuttal.

ORDER

The Certifying Officer’s denial of labor certification is hereby **VACATED** and labor certification is **REMANDED** for further consideration in light of this opinion.

For the panel:

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JOHN M. VITTONI
Chief Administrative Law Judge

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

information that is more relevant to the modern workplace spurred the creation of O*NET. Although currently in use, O*NET has a lot of growing to do. [emphasis added]

Employer further observes that “[w]hile the transition is made from DOT, which has not been updated in several years, to the O*NET, which, as stated by the Department of Labor, is not yet an all-inclusive guide, it is expected that many reasonable and acceptable positions have not been documented in O*NET.” Employer asserts that its position is such a position and that is it justified.

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.