



Issue Date: 07 July 2004

BALCA Case No.: 2003-INA-93
ETA Case No.: P2000-CA-09509166/ML

In the Matter of:

LUCCI'S CATERING CO.,
Employer,

on behalf of

THEREZINHA DE JESUS DOS SANTOS,
Alien.

Appearance: Ruben E. Hernandez, Esquire
Santa Ana, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

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 Therezinha de Jesus Dos Santos ("the Alien") filed by Lucci's Catering Company ("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 Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). 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 May 12, 2000, the Employer, Lucci's Catering Company, filed an application for alien employment certification on behalf of the Alien, Therezinha Dos Santos, to fill the position of Manager, Food Service (Catering). Minimum requirements for the position were listed as four years experience in the job offered or in the related occupation of Restaurant Manager. The job duties included coordinating food service activities, estimating costs, purchasing supplies, booking and planning catering events, training new employees, developing new menus and monitoring budgets on the computer. (AF 19-20).

The Employer received two applicant referrals, both of whom were rejected by the Employer as uninterested in the job. The Employer reported that both applicants stated that they were not interested in working for a "deli/bakery/sandwich" catering shop. (AF 22-23).

On October 3, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny labor certification based upon a finding that the Employer's job requirement of two years of experience was unduly restrictive,¹ in violation of 20 C.F.R. § 656.21(b)(i)(A), in that it is not normally required for the successful performance of the job in the United States. Noting that the menu the Employer submitted showed that it prepared mostly soups, salads and sandwiches, the CO classified the occupation as Fast Food Manager, Dictionary of Occupational Titles ("DOT") Code 185.137-010.² The CO found that the Employer's requirement far exceeded the DOT Specific Vocational Preparation time of

¹ The CO misstated the Employer's minimum requirements. The ETA 750A and the Employer's advertisements listed the requirement as four years of experience. (AF 19, 29-31).

² At the time this application was filed, the DOT was being used. The title of the occupation set forth above, along with its corresponding DOT Code, was what was set forth on the Transmittal Form by the California Employment Development Department (EDD) when the case was sent to the CO for processing. (AF 18). The DOT listed the Specific Vocational Preparation (SVP) for this occupation as seven, indicating that the amount of experience normally required for this occupation is from two to four years. Subsequently, the CO changed the title of the occupation to Fast Food Manager, DOT Code: 185.137-010, which has an SVP of five, indicating that no more than one year of experience may be required for this occupation.

six to twelve months for the occupation. The Employer was instructed to rebut the findings either by deleting the restrictive requirement and retesting the labor market, by documenting that the requirement is a common one for the occupation in the United States, or by justifying the restrictive requirement on the basis of business necessity. In addition, the CO proposed to deny labor certification based upon a finding of an insufficient recruitment effort. The CO questioned the timeliness and actual contact of both applicants and instructed the Employer to further document its recruitment efforts. (AF 14-17).

On October 30, 2002, the Employer submitted its Rebuttal, which contained copies of three different menus, including two different catering menus which it used, depending on whether it was catering a wedding or a corporate or holiday party. (AF 7-13). In its rebuttal letter, the Employer pointed out that its wedding menu contained “highly elaborate meals including a variety of hors d’oeuvres, Filet mignon, Beef Wellington, a variety of fish meals, veal chops, plus various types of accompaniments.” (AF 7). The Employer added “[p]lease note that there are different meals for different wedding occasions. (Platinum, Gold and Silver wedding menus.)” (AF 7-8). Accordingly, the Employer asserted that it specialized in high end meals, supplemented with everyday meals. Regarding its recruitment efforts, the Employer stated that it was not informed of the requirements regarding documentation of contact with the applicants. (AF 8-10). Thus, the Employer argued that its actions constituted good faith recruitment efforts.

A Final Determination (“FD”) denying labor certification was issued by the CO on December 4, 2002, based upon a finding that the Employer had failed to provide documentation justifying its experience requirement or its good faith contact effort. (AF 5-6).

The Employer filed a Request for Review by letter dated December 20, 2002, and a Statement in Support dated January 7, 2003. (AF 1-4). The matter was docketed in this

Office on February 19, 2003 and the Employer filed an Appeal Brief, which was received on April 22, 2003.

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*). Where the employer cannot document that the job requirement is normal for the occupation or that it is included in the DOT, the employer must establish business necessity for the requirement. 20 C.F.R. § 656.21(b)(2).

In the instant case, the CO noted that the menu shows that the Employer prepares mostly soups, salads and sandwiches. Based on this documentation, the CO determined that the job title which best describes the Employer's job opportunity was that of Fast Food Manager, DOT 185.137-010. This position carries an experience requirement of six to twelve months. Thus, the CO found that the Employer's experience requirement was unduly restrictive.

In rebuttal, the Employer submitted copies of two other menus and asserted that the experience requirement is justified by the more specialized dishes shown on these menus. (AF 12-13). However, in the recruitment report, the Employer contended that the two applicants were not hired because they were not interested in working for a "deli/bakery/sandwich" catering shop. (AF 22). The Employer now attempts to argue

that that it is not a deli catering business. The Employer submitted a one page wedding catering menu containing more complicated catering dishes. The Employer also submitted a breakfast menu consisting of omelettes and egg dishes. This is the only evidence provided to justify the experience requirement. The Employer argues that the EDD did not forward copies of catering menus previously submitted. However, the Employer did not submit them again, as requested by the CO. Instead, the Employer relied on its bare assertion that it was a “high end” catering business. The menus submitted show more deli fare than gourmet food. The only items that are not “fast food” type items are those listed on the one page wedding catering menu. This alone cannot sustain the Employer’s burden to document its requirement of four years of experience. As such, the CO properly denied certification.

ORDER

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

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:

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.