



**Issue Date: 29 March 2004**

**BALCA Case No.: 2003-INA-7**  
ETA Case No.: P2000-CA-09500810/JS

*In the Matter of:*

**TJ ENTERPRISES, INC.,**  
*Employer,*

*on behalf of*

**YOO SOON KIM,**  
*Alien.*

Appearances: Anna A. Darbinian, Esquire  
Beverly Hills, California  
For 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 arises from an application for alien labor certification filed by TJ Enterprises, Inc. ("Employer") on behalf of Yoo Soon Kim ("the Alien") for the position of Pharmacy Director.<sup>1</sup> The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

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<sup>1</sup> Permanent 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 Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision 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. 20 C.F.R. § 656.27(c).

## STATEMENT OF THE CASE

On March 22, 1999, Employer filed an application for labor certification on behalf of the Alien for the position of Pharmacy Director. (AF 155). The position required a Bachelor's degree in pharmacy or the equivalent and four years of experience in the job offered. The job duties included directing the activities of two pharmacies. Applicants were required to speak, read, and write in Korean. (AF 155).

On March 26, 2002, the CO issued a Notice of Findings ("NOF") proposing to deny certification. (AF 150-153). Citing 20 C.F.R. § 656.20(c)(7), the CO found that the occupation of Pharmacy Director may require the job holder to be licensed and the Alien did not appear to be legally eligible to perform the job because she did not possess the required license. Employer was directed to provide documentation which (1) showed clearly what job duties would temporarily be performed by the Alien until she had her license and that she was legally eligible to perform the full range of duties shown on the ETA 750A and (2) that the Alien upon receiving immigrant status would be eligible to take the licensing examination or otherwise be eligible to obtain the license. Alternatively, Employer could show that the duties to be performed did not require a license by providing a statement from the appropriate licensing authority which affirmed that those duties could be legally performed by an unlicensed employee. The statement needed to show that all of the duties listed on the ETA 750, Box 13 could be performed by an unlicensed worker. If a license was not required, the CO questioned why a degree in pharmacy as opposed to a business degree was being required. (AF 151-152).

The CO also found the Korean language requirement to be unduly restrictive, in violation of 20 C.F.R. § 656.21(b)(2)(i)(A), given that there was no patient contact and the staff being supervised was not Korean-American. Employer was advised that it could rebut this by (1) submitting evidence that the requirement arose from business necessity; or (2) deleting the restrictive requirement. If establishing business necessity, Employer was warned that it needed to provide documentation that the job requirements bore a

reasonable relationship to the occupation in the context of Employer's business and were essential to perform, in a reasonable manner, the job duties. (AF 151-152).

Employer submitted rebuttal on June 4, 2002. (AF 77-149). Attached were several documents and a rebuttal argument signed by Employer's counsel and the president of the company. Employer contended that it had submitted several requests for a written advisory opinion from the California Board of Pharmacy; however, no response was received to those requests. (AF 85). By way of rebuttal, Employer argued that the position at issue entailed primarily administrative duties. There were no pharmacist duties to be performed, the position being that of "Director of Pharmacy Services." Employer stated that the position was more that of a general manager than a pharmacist and that none of the duties involved dispensing drugs or any sort of hands-on interaction with prescription medication sales. Therefore, the position did not require a pharmacist license. (AF 87-96). Employer asserted that the Alien did hold an intern pharmacist license, a copy of which was attached to the rebuttal. (AF 98-99). According to Employer, an intern pharmacist could be employed in the position offered.

With regard to the foreign language requirement, Employer argued that the offered position involved management of operations of the pharmacy, including customer service. A large percentage of Employer's clientele was Korean and Employer estimated that nearly half of its clients spoke Korean. Employer asserted that its owner was the only individual who spoke, read and wrote Korean at any of his pharmacies; however, he was unable to take care of all of his duties and keep the level of personalized customer service satisfactory, especially among his Korean-speaking clientele. Employer contended that it was only with Korean language skills that the director of pharmacy services could handle all of the administrative tasks, including the handling of correspondence and customer service concerns. The director was required to orally translate for Korean-speaking customers, translate instructions when necessary and deal with the company's advertising focus in the Korean-American market. Employer contended that the amount of usage of the Korean language would be significant and was essential for the reasonable performance of the listed job duties. (AF 87-96).

On June 21, 2002, the CO issued a Final Determination (“FD”) denying certification. (AF 74-76). The CO found Employer had failed to show that the licensing board had reviewed the job duties. The general information provided by the licensing board could not be directly applied to a review of this application because the job duties as shown on the application had not been addressed. The CO pointed out that the position included directing personnel and functions at two pharmacy locations, including training and developing quality assurance techniques. The CO determined that Employer had failed to show that such duties as training and quality assurance could be run by someone in the category exempt from any licensure requirements, who was not a pharmacist or pharmacist-in-charge. There was no indication that Employer had asked the licensing authority if such duties could be performed by an unlicensed individual. (AF 75).

With regard to the Korean language requirement, the CO found that the information and documentation submitted did not connect directly to the job duties on the ETA 750A. Although Employer advertised in the Korean language, the job duties of the position did not involve marketing. The job duties did not involve filling prescriptions or communicating in Korean with patients about prescriptions. Therefore, Employer failed to justify the Korean language requirement for this position. (AF 75).

On July 11, 2002, Employer submitted a request for review of the denial of certification and the CO denied reconsideration on August 8, 2002. (AF 1-73). The matter was docketed in this Office on October 8, 2002 and Employer submitted a Statement of Position and Legal Brief on November 20, 2002.

## **DISCUSSION**

Twenty C.F.R. § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. An employer cannot use requirements that are not normal for the occupation or are not included in the Dictionary of Occupational Titles

("DOT") unless it establishes a business necessity for the requirement. The purpose of 20 C.F.R. § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Rajwinder Kaur Mann*, 1995-INA-328 (Feb. 6, 1997).

An employer can establish a business necessity by showing that (1) the requirement bears a reasonable relationship to the occupation in the context of the employer's business and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). Vague and incomplete rebuttal documentation will not meet the employer's burden of establishing business necessity. *Analysts International Corp.*, 1990-INA-387 (July 30, 1991).

When applying the *Information Industries* test to foreign language requirements, it has been held that the evidence must establish that (1) the employer's business includes clients, co-workers or contractors who speak a foreign language and that a substantial percentage of the employer's business involves the foreign language and (2) the employee's job duties require communication or reading in a foreign language. *Coerk's Pedigreed Seed Co.*, 1988-INA-48 (Apr. 19, 1989) (*en banc*). Unsupported conclusions are insufficient to demonstrate that the job requirements are supported by business necessity. *Alfa Travel*, 1995-INA-163 (Mar. 4, 1997).

In this case, Employer has demonstrated that its business included customers who speak Korean. Yet, the job duties as stated in the ETA 750A do not require communication or reading in a foreign language. Although Employer contends that it is marketing to the Korean population and that Employer's owner communicates with customers in Korean, the job duties set forth for the instant position do not include patient contact or marketing. Even though Employer listed knowledge of Korean as a special requirement on the ETA 750A, the duties of the job do not include any tasks to be conducted in Korean. (AF 155). Employer has described a number of duties which involve communication in Korean. However, none of these duties is listed on the ETA 750A outlining the job requirements. The duties listed on the ETA 750A are primarily

managerial in nature and involve directing the operations of the pharmacy. Therefore, the job duties do not require communication in Korean. Accordingly, Employer has failed to establish the business necessity of the Korean language requirement for the position being advertised. Labor certification was properly denied and the remaining issue need not be addressed.

## **ORDER**

The Certifying Officer's denial of labor certification 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 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, 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.