



Issue Date: 25 February 2004

BALCA Case No.: 2003-INA-26
ETA Case No.: P2001-PA-03363771

In the Matter of:

TRIPURA, INC.,
Employer,

on behalf of

ROHITKUMAR PATEL,
Alien.

Certifying Officer: Stephen W. Stefanko
Philadelphia, PA

Appearance: Simin H. Syed, Esquire
New York, NY
For Employer and Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by Tripura, Inc. (“Employer”) on behalf of Rohitkumar Patel (“the Alien”) for the position of Baker. (AF 51-52).² The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification and Employer’s request for review, as contained in the Appeal File (“AF”). 20 C.F.R. § 656.27(c).

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“A” is an abbreviation for “Appeal File”.

STATEMENT OF THE CASE

On April 13, 2001, Employer, a Dunkin Donuts franchise, filed an application for alien employment certification on behalf of the Alien to fill the position of Baker. (AF 51-52). Hours of employment were listed as Friday – Tuesday, 1:00 a.m. to 9:00 a.m. Minimum requirements for the position were listed as two years experience in the job offered; the job duties included preparing and baking doughnuts and other pastries.

On September 27, 2001, the CO issued a Notice of Findings (“NOF”) stating that due to the nature of Employer’s business and the job duties listed in the application, Employer’s job offer had been re-titled and re-coded from Baker (DOT 526-381-010, SVP of two to four years) to the lesser-skilled position of Doughnut Maker (bakery products)(DOT 526.684-010, SVP of three to six months), also known as Baker, Doughnut. Noting that Employer’s business is part of a nationally franchised fast food outlet that sells doughnuts, muffins, bagels, cookies, croissants and danish, all fast food items which require short preparation periods, the CO found the definition of Baker inappropriate for Employer’s job offer. Employer was instructed to either document business necessity for its requirement or indicate a willingness to reduce the requirements to the DOT standard.³

In Rebuttal, dated October 22, 2001, Employer stated a willingness to reduce its minimum requirements to the DOT standard and re-advertise the position. (AF 39-42).

A second NOF was issued by the CO on May 1, 2002, proposing to deny labor certification based upon a finding that Employer had not documented the lawful, job-related rejection of one U.S. applicant. With respect to applicant Nichols, the CO observed that Employer had stated that the applicant did not possess the required experience. However, absent any documentation to support this claim, such as a resume

³ Consistent with the Board’s holding in *Chams, Inc., d/b/a Dunkin’ Donuts*, 1997-INA-40 (Feb. 15, 2000)(*en banc*), citing *Shaw’s Crab House*, 1987-INA-741 (Sept. 30, 1988)(*en banc*), the CO, in contacting outside sources in order to verify the information provided by Employer, advised Employer of the evidence being used against it in the NOF so that Employer was provided an opportunity to rebut this evidence.

or job application, Employer had not provided a lawful job-related reason for rejecting this applicant. (AF 25-26).

In Rebuttal, Employer submitted applicant Nichols' job application and stated that the applicant did possess the required years of experience in baking doughnuts. Employer acknowledged that applicant Nichols was employed by Dunkin Donuts from 1993 to 1997, but maintained that he was not qualified because at the time of interview he had never baked any of the other baked varieties required for the position. (AF 19-21).

On August 22, 2002, the CO issued a Final Determination ("FD") denying labor certification based upon a finding that Employer had failed to document a lawful, job-related reason for the rejection of applicant Nichols. (AF 17-20). The CO concluded that applicant Nichols' Dunkin Donuts experience from 1993 to 1997 indicated that he exceeded the minimum requirements. The CO cited the fact that Dunkin Donuts is a nationally franchised fast food outlet that sells doughnuts and other baked goods that require a short preparation time. The CO determined that, unlike the complexity of skills and knowledge required in a full service bakery, successful preparation and baking of these food items can be achieved after a brief training period by following simple instructions in a company manual. (AF 18).

By letter dated September 11, 2002, Employer filed a Request for Reconsideration reiterating the applicant's lack of experience in baking goods other than donuts as a valid basis for denial and asserting that rejection was also based on the applicant's unwillingness to work the required hours. (AF 8-16).

Employer's Request for Reconsideration was denied on October 11, 2002. (AF 7). Employer filed a Request for Review on October 31, 2002 and the matter was docketed in this Office on November 25, 2002. (AF 1-5).

DISCUSSION

Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. Twenty C.F.R. § 656.21(b)(6) provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful job-related reasons. The employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*). Twenty C.F.R. § 656.24(b)(2)(ii) states that the CO shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner, the duties involved in the occupation as customarily performed by other workers similarly employed.

In the instant case, Employer is a nationally franchised fast food outlet that sells doughnuts and other baked goods. In the initial NOF, the CO cited a review of the Dunkin Donuts franchise agreement, which indicated that employees can become accredited managers of a Dunkin Donuts by attending a five-week course wherein they learn how to make all of the Dunkin Donut products in just three weeks. The primary product of Dunkin Donuts is doughnuts, which Employer acknowledges the prospective applicant has four years experience in making. Successful preparation of ancillary products such as bagels and muffins can be achieved after a brief training period by following simple instructions in a company manual. An otherwise qualified U.S. applicant cannot be rejected if he could perform the job duties with a nominal period of on-the-job training. 20 C.F.R. § 656.24(b)(2)(ii); *see also Mindcraft Software*, 1990-INA-328 (Oct. 2, 1991). Thus, it is determined that Employer has not documented lawful, job-related rejection of this qualified U.S. worker.

In its Request for Reconsideration, Employer stated that another basis for rejection was the applicant's unwillingness to work the hours of the job offer. (AF 13). However, Employer's initial rejection of the applicant at the time of consideration for the position was solely based on the applicant's lack of qualifications, which has been

determined to be unlawful. Employer made no mention of this alternative basis for rejection until appeal, despite the fact that another applicant was rejected in part on this basis. Moreover, evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *Kelper International Corp.*, 1990-INA-191 (May 20, 1991). Based upon the foregoing, it is determined that labor certification was properly denied.

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 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.