



DATE: MAY 31, 1989
CASE NO. 88-INA-138

IN THE MATTER OF

SYSKO INTERMOUNTAIN FOOD SERVICES
Employer

on behalf of

SHU WAI "THOMAS" CHAN
Alien

Appearances: David E. Littlefield, Esq.
For the Employer

Vincent C. Costantino, Esq.
For the Certifying Officer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and
Brenner, Guill, Tureck, and Williams
Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

The Employer, Sysco Intermountain Food Services, a Utah food service marketer and distributor, filed the application for labor certification on behalf of the Alien, Shu Wai Thomas Chan, for the position of Oriental Product Buyer and Promotion Manager on November 20, 1986 (AF 45-46). The requirements for the job, as stated by the Employer on the ETA 750A, were a B.A. in Business, ability to communicate in Mandarin and Cantonese, detailed knowledge of Cantonese, Mandarin and Szechuan foods and processes, knowledge of restaurant operations, ability to use computers and writing ability. The job duties included maintaining lists of oriental food accounts, analyzing market, acting as interpreter between the Employer and oriental suppliers and oriental restaurants, working with buyers of oriental products, and planning and searching for new lines of products.

The Certifying Officer (C.O.) proposed to deny the application for labor certification in a Notice of Findings (NOF) dated July 23, 1987 (AF 32-35). The C.O. asserted that each of the requirements of the position were unduly restrictive and requested the Employer to justify the "business necessity" of the requirements. On September 25, 1987, the Employer submitted its rebuttal to the NOF (AF 7-31). The C.O. denied the application for labor certification in her Final Determination on October 28, 1987 (AF 3-6) and the Employer filed a Request for Review dated November 19, 1987 (AF 1-2). The C.O. filed a brief before this Board in support of her position dated March 22, 1988. The Employer did not file a brief.

Discussion

The sole issue before this Board centers around the business necessity of the Employer's requirements for the position. Specifically, this Board is required to determine whether the Employer's foreign language requirement, knowledge of Cantonese, Mandarin and Szechuan foods, and knowledge of restaurant operations are justified under the doctrine of business necessity.¹

¹ The C.O., in her Final Determination, accepted the Employer's rebuttal concerning the requirements of a B.A. in Business, knowledge of computers and writing ability (AF 5). Additional bases for the denial, deficiencies in advertising, posting and actual minimum requirements of the job, the C.O. admits, are based upon the alleged unduly restrictive nature of (continued...)

In Information Industries, Inc., 88-INA-82 (February 9, 1989) (en banc), this Board issued its standard for business necessity cases arising under section 656.21(b)(2)(i). The Board held that in order to establish business necessity "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." In a recently decided case, Coker's Pedigreed Seed Co., 88-INA-48 (April 19, 1989) (en banc), the Board applied the same analytical test to the business necessity of a foreign language requirement, which arises under section 656.21(b)(2)(i)(C).

The Employer has consistently asserted that the requirements are necessary in order to perform the job duties. In a letter to the Utah Job Service dated December 4, 1986, the Employer stated that it has \$60 million in total sales and that its oriental food market division has current sales of over \$1 million and is expected to grow in the future (AF 93). The Employer also stated that of the 84 retail outlets in the oriental foods area, the management of 83 speak Chinese as a principal language and that buying and selling must be done in Chinese.

Likewise, in a subsequent letter to the Utah Job Service dated June 7, 1987, the Employer asserted that the employee will train and assist the company's marketing associate in knowledge of oriental food products, and will deal directly with customers and buyers (AF 47-49). The Employer stated that the foreign language requirement was necessary to communicate with suppliers of Chinese food, as well as restaurant operators.

In its rebuttal to the NOF the Employer again stated that the employee must be able to communicate between suppliers and users, who are typically Chinese speakers (AF 11). The Employer had provided dual-language price lists of a large variety of oriental foods to the Utah Job Service (AF 56-69). In rebuttal to the C.O., the Employer provided additional dual-language price lists (AF 23-27), and computer printouts of two years of its promotional sales of a variety of oriental foods showing substantial sales to many different oriental business customers, apparently mostly restaurants based on the names (AF 12, 15, attachments 9, 10 and 11). The C.O. does not contest the Employer's assertions and evidence with regard to the amount of its business transactions with oriental foods and customers.

The Employer also submitted affidavits by Laura L. Rackley, Director of the Nutrition Care Service of the University of Utah (AF 16-17), and by a Chinese restaurant manager (AF 19) and an importer of oriental groceries (AF 20). According to Ms. Rackley, it is "imperative" for an employee in the job offered by the Employer to have multi-lingual capabilities as many of the individuals in the oriental food market speak little English. She also addressed the requirement of knowledge of the specified Chinese cuisine, stating that each type of oriental cookery is unique

¹(...continued)

the requirements and are therefore dependent upon the determination of the business necessity of those requirements. C.O.'s Brief at 4. We also note that an additional basis of denial, the Employer's alleged requirement of an M.B.A. in its posting of the position, is factually incorrect as the Employer reposted the position without the M.B.A. requirement subsequent to the NOF (AF 18). See also the newspaper advertisements which did not require the M.B.A. (AF 51-52).

and has products unique to that type of cuisine. Ms. Rackley bases her statements on her fourteen years of experience in the food service industry, including dealing with ethnic groups, among them oriental. Likewise, the credible affidavits of a Chinese restaurant manager and of an importer of oriental groceries support the business necessity of the knowledge of oriental restaurants and specialty foods and the Chinese languages. Also in the rebuttal, the Employer stated that since the most typical users of its products are small restaurant operations, a general knowledge of restaurant procedures is critical (AF 12).

In contrast to the detailed arguments and supporting evidence provided by the Employer, the C.O., in her Final Determination, employed a cursory analysis in rejecting the business necessity of the requirements (AF 3-6). Rejecting the business necessity of the foreign language requirement, the C.O. stated solely that the requirement constituted a preference or convenience and that the Employer's business can be conducted without the language requirement (AF 4). Likewise, the C.O. summarily rejected the business necessity of knowledge of oriental cuisine and general restaurant operations (AF 5).

The C.O.'s brief before us, however, does contain an additional substantive argument. The C.O. argues that the foreign language requirements are not justified as the restaurants with which the Employer conducts business are within the United States and the owners of such restaurants must be able to communicate in English. Thus, according to the C.O., "the [E]mployer's business can be conducted without these language requirements." C.O.'s Brief at 8.²

We reject this argument. The fact that the restaurants are located in the U.S. does not prove, in and of itself, that the restaurant's owners (as opposed to the restaurant's customers) are sufficiently versed in English to conduct business transactions in English. The Employer has persuasively stated that virtually all of the restaurant operators it conducts business with speak Chinese as their principal language and many do not speak English at all, and that given the complexity of the transactions, and the necessity of precision in communication concerning the various food products, the employee must have the ability to communicate in Cantonese and Mandarin. Moreover, the Employer has demonstrated that the employee's contact with suppliers of oriental food products also requires the ability to communicate in Chinese.

Applying the test of Information Industries, we hold that the Employer's foreign language requirements are reasonably related to the job of Oriental Product Buyer and Promotion Manager, given the significant portion of the Employer's business distributing oriental food products, and that the language requirements are essential to perform the duties of the position as described by the Employer. Likewise, we hold that the knowledge of the specific oriental cuisine and general restaurant knowledge requirements are, given the credible assertions of the Employer and the lack of any specific consideration on the part of the C.O., reasonably related to the job offered and essential to perform the duties of the position as described by the Employer.

² The C.O.'s brief advances a business necessity standard which would require the "essence of the business" to be undermined before the Employer's requirements can be validated. C.O.'s Brief at 4-7. This standard was explicitly rejected in Information Industries, slip op. at 8-10.

ORDER

The Final Determination of the Certifying Officer denying labor certification is REVERSED, and the application for labor certification is hereby GRANTED.

LAWRENCE BRENNER
Administrative Law Judge

LB/DC/gaf