U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 March 2004

BALCA Case No.: 2002-INA-224
ETA Case No.: P2001-NJ-02471873

In the Matter of:

SCOTT & ROSE (SHOSHANA) NEWMAN,
Employer,

on behalf of

SHANTI SHERPA,
Alien.

Appearances: Ira M. Denhoffer, Esquire
New York, New York
For Employer and the Alien

Certifying Officer: Delores Dehaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification on behalf of Shanti Sherpa ("the Alien") filed by Scott & Rose (Shoshana) Newman ("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 the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") denied the application, and 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 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 December 18, 1998, Employer, Scott & Rose (Shoshana) Newman, filed an application for labor certification to enable the Alien, Shanti Sherpa, to fill the position of Live-in Cook. The job duties for the position included cooking meals for the family and guests. (AF 23). On May 25, 2001, the job duties were amended to cooking Kosher meals for the family and guests. The stated job requirement for the position, as specified on the application, was two years experience in the job offered, or, in the alternative, two years experience in the related occupation of Restaurant Cook. (AF 23).

In a Notice of Findings ("NOF") issued on February 11, 2002, the CO proposed to deny certification on the grounds that the Kosher cooking requirement was unduly restrictive. (AF 40-43). Employer submitted its rebuttal on or about March 14, 2002. (AF 44-61). The CO found the rebuttal unpersuasive and issued a Final Determination ("FD"), dated April 16, 2002, denying certification on that basis. (AF 69-70). On or about April 24, 2002, Employer requested review of the FD, and submitted additional documentation in support thereof. (AF 71-73). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals. Following our issuance of a "Notice of Docketing and Order Requiring Statement of Position or Legal Brief," dated June 26, 2002, Employer's counsel submitted a letter, dated July 1, 2002, together with supporting documents. The latter were mostly duplicates of submissions made with the review request.[1]

[1]We note that the caption on the Notice of Docketing failed to include the Employer's last name, Newman.

DISCUSSION

In consolidated cases which the Board reviewed *en banc*, we considered the method of review of applications involving domestic cooks with job requirements for experience in specific styles or types of cuisine. The Board held that cooking specialization requirements for domestic cooks are unduly restrictive and must be justified by business necessity. The business necessity standard found in 20 C.F.R. §656.21(b)(2) should be analyzed prior to using a bona fide job opportunity analysis under 20 C.F.R. §656.20(c)(8). *See Martin Kaplan*, 2000-INA-23; *Glenda Ablack*, 2000-INA-117; *Adam Bak*, 2000-INA-178 (July 2, 2001)(*en banc*).

Similarly, in the present case, the CO questioned Employer's inclusion of a Kosher cooking requirement. In the NOF, the CO stated that the requirement of experience in Kosher cooking was Employer's preference, not a normal job requirement, given that the Dictionary of Occupational Titles does not list particular ethnic/religious foods as common to the job description. The CO noted that Employer may instruct the worker to prepare certain types of food, but Employer cannot require two years specialized experience with Kosher cooking. The CO determined that this experience requirement was unduly restrictive. (AF 40-41). Employer was advised that he could rebut this finding by submitting evidence that the requirement arose from a business necessity or by deleting the specialized requirement. (AF 40).

Employer's rebuttal consisted of a cover letter by Employer's counsel, dated March 14, 2002 (AF 61); Employer's signed statement, dated March 6, 2002 (AF 44, 60); and other unrelated documentation (*i.e.,* Employer's tax returns and calendar) which addressed another deficiency (AF 45-59), which the CO subsequently found to be successfully rebutted in the FD. (AF 69).

Employer stated in rebuttal that the minimum requirements did not require experience as a Kosher cook; however, the duties of the job include Kosher cooking.

Employer stated that he would train the worker to cook in the Kosher tradition. (AF 44, 60).

In the FD, the CO found that Employer's rebuttal regarding the Kosher cooking requirement was inadequate. In summary, the CO stated that Employer failed either to document the business necessity of experience in Kosher cooking or to delete the requirement. Employer's rebuttal failed to document Employer's willingness to provide training or instruction in Kosher cooking to any U.S. workers who applied for the job. The CO denied certification on these grounds. (AF 69). We agree.

As stated above, Employer's rebuttal asserted that Kosher cooking is simply a duty, not a requirement. However, it is well settled that a requirement of experience in the job offered includes experience in the job duties as described item 13 of the ETA 750A form, and not just experience in the job title. *See, e.g., National Institute for Petroleum and Energy Research*, 1988-INA-535 (Mar. 17, 1989)(*en banc*); *Integrated Software Systems, Inc.*, 1988-INA-200 (July 6, 1988). Therefore, for the purpose of Employer's requirement of two years experience *in the job offered*, Employer has, in effect, required such experience in the stated job duties, including Kosher cooking. (AF 23). For the purpose of the alternative experience requirement, namely two years experience as a Restaurant Cook, there does not appear to be any such requirement of Kosher cooking experience. (AF 23). We note that this seemingly inconsistent consideration of the Kosher cooking requirement/duty, and the inclusion of an alternative experience requirement, appears to be tailored to the Alien's credentials. As set forth in the Statement of Qualifications of Alien, Ms. Sherpa's only prior experience before being hired by Employer was as a cook at Saino Restaurant & Bar in Nepal, where she apparently had no kosher cooking experience. (AF 13). Furthermore, in Employer's statement, in May 2001, Employer noted that when the Alien was hired, in January 1999, Employer taught the Alien how to be a Kosher cook. However, Employer added that, due to a more demanding schedule, Employer has no time to train a new worker. (AF 12).

As outlined above, the CO offered Employer the option of submitting evidence to document that the Kosher cooking requirement arises from business necessity, or deleting the specialized ethnic/religious requirement. (AF 40-41). Employer's rebuttal failed to either document business necessity or delete the requirement. Instead, Employer questioned the CO's characterization of Kosher cooking as a requirement, while acknowledging that Employer was training the worker to cook in the Kosher tradition. (AF 44, 60).

As stated in the FD, because Employer failed to document business necessity or delete the specialized requirement, Employer's rebuttal was inadequate. Furthermore, the NOF specifically directed Employer that, if it chose to delete the specialized ethnic/cooking requirement, Employer must amend the application and return the amended application by the specified due date (*i.e.,* March 18, 2002). (AF 40, 43). Moreover, Employer was also advised that efforts to cure the deficiencies after the rebuttal period would not be considered. (AF 40).

Notwithstanding these specific instructions, Employer did not delete the Kosher cooking requirement, or submit the amended application until the request for review and the response to our Order, dated June 26, 2002. We also note that the belated offer to train a U.S. worker, as stated in the letter of Employer's counsel, dated July 1, 2002, is inconsistent with Employer's earlier assertion, as set forth above, that Employer's demanding schedule precludes her from training a U.S. worker. (AF 12). Furthermore, the new evidence submitted by Employer with the request for review and the statement on appeal is not properly before us on appellate review, because such evidence should have been provided prior to the issuance of the FD. *See, e.g., Meta Engineers, P.C.*, 1995-INA-415 (July 2, 1997); *Memorial Granite*, 1994-INA-66 (Dec. 23, 1994); *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *see also* 20 C.F.R. §656.26(b)(4). In view of the foregoing, we find 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 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.