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Issue Date: 18 June 2004

BALCA Case No.: 2003-INA-28
ETA Case No.: P2002-MA-01318431

In the Matter of:

TONY'S FENCE COMPANY, INC.,
Employer,

on behalf of

STANISLAW DZIALOWSKI,
Alien.

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

Appearances: Albert S. Lefkowitz, Esquire
New York, New York
For Employer and the 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 a fence installation company for the position of Welder (Production line). (AF 2-3).² The following decision is based on the record upon which the Certifying Officer ("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).

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"AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

On April 10, 2001, the Employer, Tony's Fence Company, Inc., filed an application for alien employment certification on behalf of the Alien, Stanislaw Dzialowski, to fill the position of Production Line Welder. Ability to speak English and Polish was listed as the sole requirement for the position. (AF 2-3, 28). The Employer received no applicant referrals in response to its recruitment efforts. (AF 23). In a letter dated July 31, 2001, the Employer justified its foreign language requirement as based on its Polish-speaking clients' need to feel comfortable communicating with its crewmembers in the Polish language. (AF 32).

A Notice of Findings ("NOF") was issued by the CO on September 26, 2002, proposing to deny labor certification based upon a finding that the Employer's job requirement of fluency in Polish was unduly restrictive, in violation of 20 C.F.R. § 656.21(b)(i)(C), unless adequately documented as arising from business necessity. Noting that a preference for the language was insufficient, the Employer was instructed either to delete the restrictive requirement and to retest the labor market or to justify the restrictive requirement on the basis of business necessity. (AF 35-37).

In Rebuttal, the Employer attempted to demonstrate business necessity, listing his six employees and stating that "since virtually my entire staff is comprised of native Polish speakers who have minimal fluency in English, it is imperative that everyone in my employ speak Polish." (AF 38-39).

A Final Determination ("FD") denying labor certification was issued by the CO on October 29, 2002, based upon a finding that the Employer had failed to provide adequate documentation justifying its foreign language requirement as based on business necessity. (AF 48-49).

On November 26, 2002, the Employer filed a Request for Review, including a statement in Polish signed by twenty-eight customers. (AF 52-56). The Employer

claimed that it would lose these customers if it no longer employed Polish-speaking workers. (AF 53-56). The matter was docketed in this Office on December 13, 2002.

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. A job requirement is considered to be unduly restrictive when it is not normal for the occupation or not included in the *Dictionary of Occupational Titles* (“DOT”) job description. 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 order to establish business necessity, an employer must show that the requirement is essential to performing, in a reasonable manner, the job duties as described. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*).

When analyzing the business necessity for a foreign language requirement, the Board in *Lucky Horse Fashion, Inc.*, 1997-INA-182 (Aug. 22, 2000)(*en banc*) established a two part analysis: “[f]irst, it must be determined whether a foreign language requirement is shown to bear a reasonable relationship to the **occupation itself**, in the context of employer’s business. Second, it must be determined whether the foreign language is essential to perform, in a reasonable manner, the **job duties** as described by the employer.” Id.

In the instant case, the Employer’s rebuttal argued that business necessity is shown solely because the co-workers of the job applicant are native Polish speakers who have minimal fluency in English.³ There is a significant distinction between an

³ The Employer stated in a letter, dated July 31, 2001, that it was “crucial for our business that our clients are comfortable with our crew members and feel their requests will be understood and carried out according to their wishes without unnecessary miscommunications due to a language barrier or cultural

employee's need to communicate with "clients, contractors and customers" and his need to communicate with "co-workers." *See Lucky, supra.* "The result of permitting an employer to establish business necessity for a foreign language, solely because all of its employees only speak a foreign language is to create a self-perpetuating foreign labor force that, as a practical matter, excludes all but a few U.S. workers, contrary to the purposes of the Act." Id.

Because the Employer's job requirements include the use of a foreign language, under 20 C.F.R. § 656.21(b)(2)(i), the Employer must establish the business necessity of the foreign language requirement. According to the test established in *Information Industries*, the Employer must first establish that the use of the Polish language bears a reasonable relationship to the occupation of production line welder within the context of its business. The DOT job description for the occupation of "welder, production line" neither explicitly nor implicitly supports the use of the Polish language. The Employer has submitted no evidence to establish that the use of a foreign language is normal to the occupation of welder, production line. The Employer's only evidence presented in rebuttal is that virtually his entire staff is comprised of native Polish speakers with minimal fluency in English.

Similar to the facts in *Lucky*, we hold that this evidence, standing alone, does not establish that the use of the Polish language bears a reasonable relationship to the occupation of welder, production line within the context of the Employer's business. Therefore, the Employer has not satisfied the first prong of the *Information Industries* business necessity test. On this basis, we conclude that labor certification was properly denied.

differences." The Employer later stated in rebuttal "I am the only one who interacts with customers and suppliers and my knowledge of English is sufficient to be understood by them." (AF 31, 39).

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.