

U.S. Department of Labor



Board of Alien Labor Certification Appeals
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Issue Date: 30 June 2004

BALCA Case No.: 2003-INA-131
ETA Case No.: P2001-CA-09509831/VA

In the Matter of:

ETREBY COMPUTER CO. INC.,
Employer,

on behalf of

RENATE MARQUARDT,
Alien.

Appearance: Esperanza V. Bada, Esquire
La Puente, California
For the 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 labor certification¹ filed by a designer and manufacturer of computer software for the position of Translator – Software Hairstyling and Hair Designing. (AF 27-28).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 March 10, 2000, the Employer, Etreby Computers, filed an application for alien employment certification on behalf of the Alien, Renate Marquardt, to fill the position of Translator – Software Hairstyling and Hair Designing. The job duties were to translate “instructional, promotional and other written documents on hairstyling and hair designing from English to German” and to prepare “translated materials into proper format as computer software for sale and distribution.” (AF 27). Minimum requirements for the position were listed as two years experience in the job offered or in the related occupation of hairstyling, hairdressing and hair designing. Other special requirements were listed as at least two years experience as a hairstylist, hair designer or hairdresser and fluency in English and German. (AF 27-28).

The Employer was notified by the Local Job Service Office on May 1, 2000 that its job opportunity appeared to be a combination of job duties for the occupations of Cosmetologist and Interpreter. The Employer was instructed either to delete the combination or to justify it as business necessity. (AF 52-53). The Employer responded by stating that it was deleting the occupation of Cosmetologist but further stated that a “[c]osmetologist background and licensure is extremely essential for performing the . . . job duties.” (AF 33).

A Notice of Findings (“NOF”) was issued by the CO on October 18, 2002, proposing to deny labor certification based upon a finding that the Employer’s job requirement of two years experience in “hairstyling, hairdressing or hair designer” is unduly restrictive, in violation of 20 C.F.R. § 656.21(b)(i)(A), in that it is not normally required for the successful performance of the job in the United States. The CO observed that the requirements appeared to be tailored to the Alien’s background in an attempt to qualify the Alien for the position. The Employer was instructed to rebut the findings by deleting the restrictive requirement and retesting the labor market, by documenting that the requirement is a common one for the occupation in the United

States, or by justifying the restrictive requirement on the basis of business necessity. (AF 22-25).

In Rebuttal, the Employer attempted to document business necessity for its experience requirement, stating that without two years experience as a hairstylist, the English material on hairdressing would not be understood and properly translated because the material contained language, terminology, and expressions unique to the hair styling business. (AF 15-21).

A Final Determination (“FD”) denying labor certification was issued by the CO on December 20, 2002, based upon a finding that the Employer had failed to provide adequate documentation justifying its restrictive requirement as either normal to the occupation or based on business necessity. The CO noted that the Employer’s minimum requirements are either two years experience as a translator or two years experience as a hairstylist and determined that the Employer would consider U.S. applicants with just experience as a translator. Thus, the CO discredited the Employer’s statement that the lack of experience in hairstyling would result in incorrect, inaccurate and incomplete translation. The CO found that the Employer’s statement was unsubstantiated because there was no documentation submitted to show that a translator without hairdressing experience could not translate English hairdressing terminology into the German language. The CO observed that the position appeared tailored to the Alien’s background as a hairdresser, as she has no translator experience. (AF 8-9).

The Employer filed a Request for Review by letter dated January 23, 2003, and the matter was docketed in this Office on April 12, 2003. (AF 1-7). The Employer did not file a brief.

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. Abnormal requirements would preclude the referral of otherwise qualified U.S. workers. Twenty C.F.R. § 656.21(b)(2)(ii) states that the job to be performed cannot describe a combination of duties that is not normal to any of the occupations mentioned. The job duties must be those as defined in the *Dictionary of Occupational Titles* (“DOT”) and not go beyond any single DOT job description. If the job opportunity involves a combination of duties, the employer must document that it has normally employed persons for that combination of duties and/or workers customarily perform the combination of duties in the area of intended employment, and/or the combination job opportunity is based on business necessity. *Robert L. Lippert Theatres*, 1988-INA-27 (Mar. 3, 1989)(*en banc*).

To determine whether a particular job requirement falls within the applicable DOT code, the CO must determine the job title which best describes the job and then determine whether the job requirements specified by the employer fall within those defined in the DOT. *LDS Hospital*, 1987-INA-558 (Apr. 11, 1989)(*en banc*). 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). Pursuant to the Board’s holding in *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*), 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.

In the instant case, the Employer was initially advised that its job opportunity entailed a combination of duties for the positions of translator and cosmetologist. The Employer indicated a willingness to eliminate this combination by deleting the cosmetologist occupation. However, the Employer continued to maintain that experience in cosmetology was a necessity in order to perform the job.

To justify this requirement, the Employer simply stated that without two years experience as a hairstylist, the English materials on hair dressing would not be

understood because of the language, terminology, and expressions unique to the hairstyling business. The Employer submitted no further documentation to substantiate its assertions. Although a written assertion constitutes documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Compare Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*) and *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001)(*en banc*). As was noted by the Board in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), "a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof." Although the Employer has contended that there is language and terminology which is unique to the hair styling profession which only someone with prior experience as a hair stylist could translate accurately, no examples of such terminology have been presented in support of this contention.

Moreover, in the instant case, as was noted by the CO, the Employer appears to have tailored the position to the Alien's background because she has no experience as a translator, but has experience as a hairdresser. The Board in *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA-68 (Feb. 2, 1998)(*en banc*), held that:

where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable.

The Employer failed to provide documentation to show that the requirement of "hairstyling, hairdressing and hair designing" experience is common for the occupation of translator or justified by business necessity. We conclude that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

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.