U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 13 July 2004

BALCA Case No.: 2003-INA-180
ETA Case No.: P2002-NJ-02487591

In the Matter of:

ROSE CELIA ROSATO,
Employer,

on behalf of

MARISTELA MARTINS GUIMARAES,
Alien.

Certifying Officer: Delores Dehaan
New York, New York

Appearances: Cassandra C. Lamarre, Esquire
Newark, New Jersey
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien employment certification. Permanent alien employment certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 30, 2001, the Employer, Rose Celia Rosato, filed an application for alien employment certification on behalf of the Alien, Maristela Martin Guimares, to fill the position of "Household Cook." (AF 16). The job duties included menu planning and cooking Italian and Brazilian dishes.

On January 10, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny certification because it was unclear whether the position had been and was clearly open to any qualified U.S. worker pursuant to 20 C.F.R. § 656.20(c)(8). (AF 19-23). The CO found that (1) the Employer supplied insufficient information to determine whether the position of Domestic Cook actually existed in her household or whether the job had been created solely for the purpose of qualifying the Alien as a skilled worker under current immigration law; and (2) the Employer's requirement of two years of specialized experience preparing Italian and Brazilian style food was unduly restrictive. (AF 21). The CO advised the Employer that she could rebut the findings by submitting (1) documentation regarding certain areas of the job duties and requirements to establish that the position actually existed, and (2) evidence that the cooking specialization requirement arose from a business necessity. (AF 20-21).

The Employer submitted rebuttal to the NOF on February 14, 2003. (AF 24-30). The Employer provided a copy of her tax return for 2000 (AF 24-25). The Employer also enclosed copies of the advertisement notices posted at her residence. (AF 26-28). The Employer argued that the worker was necessary, as the family was too busy to cook. The Employer outlined the family's work and school schedule. The Employer noted that the family enjoyed Brazilian and Italian cooking and a cook who was not trained in this style would be incapable of preparing this type of food. The Employer noted that no one in the family would be able to train the cook in Brazilian or Italian style cooking. (AF 29-30).

The CO found the rebuttal to be unpersuasive regarding business necessity for the experience requirement and issued a Final Determination ("FD") denying labor

certification, dated March 14, 2003. (AF 31-32). The CO noted that the Employer's preference for Brazilian and Italian food did not justify the experience requirement, as the Employer had not demonstrated that a cook with two years of experience could not follow a recipe to prepare Brazilian and Italian dishes. (AF 31).

The Employer filed a timely Request for Review on April 23, 2003. (AF 40-41). The Employer once again argued that the experience cooking Italian and Brazilian food was necessary because the Employer preferred this type of food and a cook without this experience would be incapable of preparing it. (AF 41). The Employer also included a statement from the Alien. The matter was docketed in this Office on May 16, 2003. On June 11, 2003, the Employer filed a Statement of Position, including a letter from a client praising the meals prepared by the Alien, and a letter from a cook and restaurant owner, stating that a cook without experience cooking a certain type of food is incapable of preparing it without training.

DISCUSSION

This case raises only one issue: whether the Employer failed to establish that the Italian and Brazilian cooking requirements were justified by business necessity pursuant to 20 C.F.R. § 656.21(b)(2).

An employer is prohibited from using unduly restrictive job requirements in the recruitment process. 20 C.F.R. § 656.21(b)(2). Cooking specialization requirements for domestic cooks are unduly restrictive within the meaning of the regulation at 20 C.F.R. § 656.21(b)(2), and therefore must be justified by business necessity, pursuant to the test established in *Information Industries*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). *Martin Kaplan*, 2000-INA-23 (July 2, 2001) (*en banc*).

To establish business necessity under 20 C.F.R. § 656.21(b)(2)(i), 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. *Information Industries*, 1988-INA-82 (Feb. 9, 1989) (*en banc*).

In the NOF, the CO informed the Employer that to establish that the cooking specialization requirement arose from a business necessity, she had to submit evidence that an applicant with two years of cooking experience could not readily adapt to cooking Italian and Brazilian food, evidence that an applicant without this experience would be incapable of preparing Italian and Brazilian food, and documentation as to why the Employer or a member of the Employer's family could not providing training or instruction in cooking Italian and Brazilian food. (AF 19-20).

In her rebuttal, Employer stated:

> I can only say that in my experience and from talking to other people and friends that it is very hard for a cook who studied or cooked a certain kind of food to just pick up other recipes. Some professional cooks try to follow recipes and the flavor accustomed to are [sic] different. Try to imagine a Chinese cook or a French cook, these cooks would have a lot of trouble following a[n] Italian recipe or even a Brazilian one. It would take a lot of time cooking these foods over and over again and being corrected as to the tastes to adapt. I don't have the time to be training anyone over and over again.…How can a Chinese or [F]rench cook try to follow…a recipe, not understanding the seasonings, try over and over again by ruining food until it comes out right. A person with no experience is incapable of preparing Italian and Brazilian food….I cant [sic] imagine that either my children, my husband or myself could stand there and provide training to any cook. Our li[f]e style is to [sic] busy and I haven't yet mastered all the Italian and Brazilian foods. My children are too small, my husband cant [sic] cook.

(AF 29). The Employer provided no other evidence that the cooking specialization requirement arose from a business necessity.

The CO found that the rebuttal did not demonstrate that Italian and Brazilian cooking experience was necessary. We agree. It may well be true that neither the Employer nor her husband can take the time to train a cook to prepare those cuisines, but the NOF also required the Employer to show that such training was necessary. The Employer did not do so; as the CO indicated, she submitted nothing to document that the

cooking specialization requirement was anything other than the Employer's personal preference. An employer's bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). The Employer's rebuttal that preparing Italian and Brazilian cuisine requires detailed knowledge implies, but does not prove, that an otherwise experienced cook could not adapt to cook those types of cuisine within a reasonable period of taking the job. *Martin Kaplan*, 2000-INA-23 (July 2, 2001) (*en banc*). We find that the CO properly denied certification under 20 C.F.R. § 656.21(b)(2).

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.