

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 October 2004

BALCA Case No.: 2003-INA-241
ETA Case No.: P2003-NY-02489966

In the Matter of:

JANE S. SOUDAVAR,
Employer,

on behalf of

ETHEL GRACE DABI,
Alien.

Certifying Officer: Delores DeHaan
New York, New York

Appearances: Steven Elias, Esquire
New York, New York
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Ethel Dabi (“the Alien”) filed by Jane Soudavar (“the Employer”) pursuant to § 212 (a)(14) 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”) of the United States Department of Labor, New York, New York, denied the application, and the 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 the Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties.

STATEMENT OF THE CASE

On April 16, 2001, the Employer filed an application for alien employment certification on behalf of the Alien for the position of Domestic Cook. The duties for the position were described as planning, preparing, and serving meals for a household. The Employer noted that Oriental, Italian, American, and Mediterranean cuisine was usually served. (AF 1-4, 19). The Employer required six years of grade school education and two years of experience in the job offered.

On February 1, 2003, the CO issued a Notice of Findings ("NOF") advising the Employer of her intent to deny the application. (AF 36-40). The CO questioned the existence of a *bona fide* job opportunity and concluded that the Employer's application contained insufficient information to determine whether the position of Domestic Cook actually exists in her household or whether the job was created solely for the purpose of qualifying the Alien as a skilled worker. The CO required the Employer to explain why the position of Domestic Cook should be considered a *bona fide* job opportunity. The Employer was required to respond and provide documentation for several enumerated questions. The Employer was required to document business necessity for a cook with two years of experience in performing the job duties of Oriental, Italian, and Mediterranean style cooking. The Employer was informed that requiring applicants to have experience in a particular type of ethnic/religious food is her personal preference and not a normal job requirement.

In Rebuttal, the Employer submitted documentation which included a letter from Dr. Lawrence E. Cutler indicating the Employer's need for a specialized diet. The Employer also enclosed copies of cancelled checks that were paid to persons previously performing the duties required of a domestic cook in her household as well as checks

paid to the Alien to show the ability to pay the salary in question.¹ The Employer also submitted a copy of her broker's statement for the year 2001 and referenced her previously submitted tax return which the Employer contends was improperly reviewed. In addition, the Employer submitted an amended ETA 750A and B. (AF 41-65). In response to the CO's request to produce evidence proving business necessity for the experience requirement, the Employer submitted tax documents, a posting of the advertised job, and a letter from Dr. Lawrence E. Cutler, MD, dated February 17, 2003, documenting the need for the Employer to be on a diet consisting of organic foods and a macrobiotic diet with foods that are high in fiber, vitamin A and vitamin C.

The CO issued a Final Determination ("FD") on March 17, 2003. (AF 66-67). The CO noted that the Employer failed to answer the specific questions listed in the NOF and concluded that the evidence submitted was insufficient to prove business necessity. The CO accepted part of the Employer's rebuttal, but concluded that the Employer failed to rebut the finding of an unduly restrictive job requirement regarding the experience requirement. (AF 66).

On April 8, 2003, the Employer submitted a request for review, and the matter was docketed in this Office on June 21, 2003.

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 performance of the job in the United States, as defined for the job in the DOT. Although "cooking specializations are sometimes part of the job," cooking specialization requirements for domestic cooks are unduly restrictive job requirements within the meaning of the regulations at 20 C.F.R. § 656.21(b)(2). *Martin Kaplan*, 2000-INA-23 (July 2, 2001) (*en banc*). Therefore, these requirements must be justified by business necessity under the test found in *Information*

¹ These items were not included in the evidence of record submitted to this Office.

Industries, Inc., 1988-INA-82 (Feb. 9, 1989) (*en banc*). Pursuant to the Board's holding in *Information Industries*, in order to establish business necessity, an employer must show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business and that the requirement is essential to performing, in a reasonable manner, the job duties as described. The burden of proof in the labor certification process is on the employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (March 1 1996); 20 C.F.R. § 656.2(b).

The CO identified specific points for the Employer to address with respect to documenting business necessity for its restrictive cooking specialization requirement. The CO directed the Employer to supply evidence: (1) to support that an applicant with two years of cooking experience could not readily adapt to an Oriental, Italian and Mediterranean style of cooking; and (2) to show that an applicant with no prior experience in Oriental, Italian and Mediterranean cooking is incapable of preparing Oriental, Italian and Mediterranean style food.

The Employer submitted rebuttal documenting the medical need for her to be on a specialized diet. According to Dr. Cutler, the diet prescribed to the Employer is recommended as part of her treatment for cancer. This letter does not prove business necessity for the requirement of experience cooking Oriental, Italian, and Mediterranean cuisine. This letter merely shows that the Employer should eat certain types of food. It does not prove that a domestic cook must have two years of experience to prepare this or other types of food. It also does not prove that an otherwise experienced domestic cook could not adapt to certain types of cuisine within a reasonable period after taking the job. *See, e.g., Kaplan, supra*. As such, the Employer has not adequately documented business necessity for her unduly restrictive requirement of two years of experience cooking Oriental, Italian, and Mediterranean cuisine. Accordingly, 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.