



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

Issue Date: 30 November 2004

BALCA Case No.: 2003-INA-242
ETA Case No.: P2002-PA-03372841

In the Matter of:

JN DISTRIBUTOR,
Employer,

on behalf of

TARAS KALITA,
Alien.

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Appearances: James Orlow, Esquire
Philadelphia, Pennsylvania
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 filed on behalf of Taras Kalita (“the Alien”) by JN Distributor (“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, Philadelphia, Pennsylvania, denied the application, and the Employer and the Alien 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 February 27, 2001, the Employer through its Owner, Mr. Jacob Naydovich, filed an Application for alien employment certification on behalf of the Alien for the position of Wholesaler I. The duties for the position were described as managing the sales and distribution of cigarettes and tobacco products, candies, and other related merchandise to retailers. The Employer required fluency in English, Russian, Polish, and Ukrainian. (AF 48). The ETA 750A identified the nature of the Employer's business activity as wholesale and retail food distribution. The applicant was required to have two years of experience in the job offered or two years of experience in sales in a related field.

On September 12, 2002, after reviewing the application, the CO issued a Notice of Findings ("NOF") advising the Employer of his intent to deny the application. (AF 31-33). The CO noted that the job opportunity contains a foreign language requirement that has not been supported by evidence of business necessity as required by 20 C.F.R. § 656.21(b)(2). The CO advised the Employer that he could rebut the finding by submitting evidence that the requirement for Russian, Polish and Ukrainian language ability arises from a business necessity rather than convenience. Evidence proving business necessity includes: (1) showing that a significant share of the employer's business is conducted in the foreign languages; (2) showing that the absence of the foreign languages would put the business at a competitive disadvantage; (3) showing that the employee's duties require him or her to communicate or read in the foreign languages; or (4) showing that the need for foreign languages skills cannot be met by other methods, such as using translation services or the language skills of another employee. Additionally, the CO required that the Employer provide answers to the following questions: (1) the total number of clients/work force/suppliers served, and the percentage of those people who cannot communicate in English; (2) the percentage of

business that is dependent upon the languages; (3) the percentage of time the worker would use the languages; (4) how he has dealt with non-English speaking clients/workforce/suppliers in the past and/or is currently handling this segment of business; and (5) evidence that his company had a market research study and business expansion plan in place at the time of filing his application if he is claiming that the foreign languages requirement is part of a business expansion plan. (AF 32).

By letter dated September 27, 2002, the Employer's counsel submitted the Employer's rebuttal which consisted of a letter dated September 23, 2002. (AF 27-30). The Employer explained that his business supplies convenience foods, cigarettes, tobacco products and packaged candies and other related merchandise to approximately 2,000 customers in retail establishments, primarily gasoline service stations and garages. Of these customers and their employees, approximately 30% are Eastern European and speak Russian, Polish or Ukranian. (AF 29-30).

The Employer further explained that whenever there are problems with orders, an employee at the customer's site will call his office to speak with one of his employees who speaks and understands their language, rather than attempt to correct the problem with the delivery driver. Providing a person who speaks and understands his customer's languages enables the Employer to compete with competitors who provide foreign language services. The Employer added that in the past, foreign languages speakers employed by him would use the languages 70% of the time while working in his office in other capacities. With the growth of his customer base, it became more efficient to centralize the foreign language duties into a single position.

The CO issued a Final Determination ("FD") denying certification on April 24, 2003, as a result of the Employer's failure to establish that his foreign language requirement arises from a business necessity. (AF 25). Specifically, the CO found that there was not a reasonable relationship between the occupation of Wholesaler I in the context of the Employer's business and the requirement for Russian, Polish and Ukranian language ability. The CO pointed out that the Employer failed to produce evidence to

support his contention that 30% of his customers and their employees speak Russian, Polish and Ukrainian. Also, the Employer failed to produce evidence indicating the percentage of his customers who do not speak English.

The CO also found that the Employer failed to show that Russian, Polish and Ukrainian language ability is essential to perform, in a reasonable manner, the job duties as described by the Employer. Specifically, the CO noted that the Employer professed that 30% of his customers are foreigners who speak Russian, Polish and Ukrainian and that the person hired to perform the foreign languages service would use the required languages 70% of the time. However, the Employer failed to produce documentation, such as records maintained in the respective foreign languages, to support this contention.

On May 12, 2003, the Employer submitted a request for reconsideration. (AF 2-3). Along with this request, the Employer submitted eleven invoices with translation in the required languages as evidence of the necessity of his foreign languages requirement. (AF 4-22). The CO denied the Employer's request and forwarded the AF to the Board of Alien Labor Certification Appeals for review. (AF 1).

DISCUSSION

The Board shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made. 20 C.F.R. §§ 656.26(b)(4), 656.27(c); *University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988); *Physician's Inc.*, 1987-INA-716 (July 12, 1988). Therefore, the documents submitted with the Employer's May 12, 2003 request cannot be considered.

The CO denied certification in this case solely on the ground that the Employer failed to show that the requirement of fluency in Russian, Polish and Ukrainian arose from business necessity. Under 20 C.F.R. § 656.21(b)(2), job requirements cannot include a requirement for a language other than English unless such requirement is documented as arising out of business necessity. This Board has held that in order to establish business

necessity, an employer must demonstrate (1) that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and (2) that the requirements are essential to perform, in a reasonable manner, the job duties described by the employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*).

Under the first prong of the *Information Industries* business necessity test, the employer must show that a significant portion of its business is performed in a foreign language or with foreign speaking clients or employees in order to establish a reasonable relationship between the occupation and the job requirement. *Coker's Pedigreed Seed Co.*, 1988-INA-55 (April 19, 1988) (*en banc*); *Construction and Investment Corp., dba Efficient Air*, 1988-INA-55 (April 24, 1989) (*en banc*). Under the second prong, an employer must show that the employee's duties require communication or reading in a foreign language in order to establish that the requirements are essential to perform, in a reasonable manner, the job duties described by the employer. *See Sysco Intermountain Food Services*, 1988-INA-138 (May 31, 1988) (*en banc*); *Felician College*, 1987-INA-553 (May 12, 1989) (*en banc*); *Coker's Pedigreed Seed Co.*, *supra*.

In the instant case, the Employer has failed to establish that the Russian, Polish and Ukrainian foreign languages requirement bears a reasonable relationship to the position of Wholesaler I. In his rebuttal to the NOF, the Employer's response indicated that the need for a foreign language speaker is necessary when there are problems with customer orders. The Employer failed, however, to document how often problems with customer orders occur. The Employer also failed to document what percentage of the problems with customer orders occur with customers who require a foreign language speaker. As such, we find that the Employer has failed to satisfy the first prong of the *Information Industries* test.

The Employer also failed to establish that the Russian, Polish and Ukrainian foreign language requirements are essential to perform, in a reasonable manner, the job duties as described by the Employer. In his rebuttal, the Employer's response indicated that having a foreign language speaker is essential to the financial strength of his business

because it allows for problems with clients' orders to be resolved immediately. The Employer also indicated that having a foreign language speaker allows for his business to successfully compete with other competitors. The Employer failed to provide documentation for either of these assertions. As such, the Employer failed to satisfy the second prong of the *Information Industries* test.

The Employer has failed to document that its requirement for a Russian, Polish and Ukranian foreign language speaker arises out of business necessity. As such, the CO properly denied certification.

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.

