**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: 08 September 2008**

**BALCA Case No.: 2008-INA-00008**
ETA Case No.: P-05158-56353

*In the Matter of:*

**AMY HARRIGAN,**
*Employer,*

*on behalf of*

**JOANNA SARAH POWDHAR,**
*Alien.*

Appearance: Martin V. Astrian, Esquire
Strasser, Asatrian Asatrian & Sym LLP
Clifton, New Jersey
*For the Employer and the Alien*

Certifying Officer: Barbara Shelly
Philadelphia Backlog Elimination Center[1]

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

## DECISION AND ORDER

**PER CURIAM.** This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of

[1] The Backlog Elimination Centers closed effective December 21, 2007. All further correspondence to the Certifying Officer about this application should be directed to the Chicago Processing Center.

the Code of Federal Regulations ("C.F.R.").[2] This 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. 20 C.F.R. § 656.27(c).

## STATEMENT OF THE CASE

On June 24, 2004, the Employer – a private household – filed an application for labor certification on behalf of the Alien to fill the position of Domestic Tutor. (AF 133).[3] In her application, the Employer described the duties for the position as follows:

> As a domestic, Ms. Powdhar cooks for the homeowner, also takes care of domestic chores such as kitchenwork, cleaning house, laundry, food shopping and helps keep the homeowners schedule. Ms. Powdhar's further tasks are caretaker for 2 young children. These duties include feeding of homeowner's 2 young children, caretaking and helps tutor the children. Ms. Powdhar also acts as a swimming instructor and athletic coach. The homeowner is currently pregnant with her third child and therefore also acts to to [sic] assist homeowner on every level to assist her during her pregnancy.

(AF 133). The Employer required a high school education, four years of training as a domestic and four years of experience in the job offered. (AF 133).

In the Notice of Findings (NOF), issued May 2, 2007, the CO found several defects in the application. First, the CO found that the job requirements were unduly restrictive in violation of Section 656.21(b)(2) since the job requirements of four years of domestic training and four years of experience in the job offered as Domestic/Tutor were in excess of the requirements listed in the *Dictionary of Occupational Titles* (*DOT*). The CO noted that the *DOT* lists a specific vocational preparation (SVP) for this job as "over

[2] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

[3] In this decision, AF is an abbreviation for Appeal File.

one month and up to and including three months" of combined experience, education and training. The CO stated that the Employer could rebut this finding of an unduly restrictive job requirement in one of two ways. The Employer could establish a business necessity for the job requirement. The CO instructed that to establish a business necessity, the Employer must show the job requirement bears a reasonable relationship to the occupational in the context of the Employer's business and is essential to perform, in a reasonable manner, the job duties described by the Employer. The CO also stated that the Employer must document that the job as currently described existed before the Alien was hired. The CO stated that a second method of rebuttal would be to reduce the requirements to the DOT standard.

The second defect noted in the NOF was that the documentation did not establish that the Alien had the four years of domestic training and four years of experience in the job offered prior to being hired. Therefore, in violation of Section 545.21(b)(5), the Employer had not documented that its requirements for the job opportunity represented the actual minimum requirements for the job opportunity. The CO stated that the Employer could rebut this finding by (1) documenting that the Alien had the required training and experience at the time of hire, (2) submitting evidence that it is not presently feasible due to business necessity to hire a worker with less than the qualifications presently required for the job opportunity and demonstrate that the job as currently described existed before the Alien was hired, or (3) amending or deleting the requirement.

A third defect noted in the NOF was that the Employer had not documented that the Alien had one year of full time experience performing the duties of the job offered in a domestic household as required by Section 656.21(a)(3)(iii). The CO stated this finding could be rebutted by submitting documentation with certain specific information. The requested information was detailed in the NOF.

Finally, the CO found that the wage offered of $9.00 per hour was below the prevailing wage of $13.34 per hour. The CO noted that offering a salary below the

prevailing rate of pay was in violation of Sections 656.20(c)(2), 656.20(g) 656.21(g)(4) and 656.40 of the regulations. This finding could be rebutted by either amending the application and increasing the salary offer to at least 100% of the prevailing wage, or by submitting alternative wage data. (AF 95-100).

The Employer submitted rebuttal on June 5, 2007 (AF 10). In its rebuttal, the Employer argued generally that the Alien was required as a business necessity to perform the job duties described by the Employer and, thus, the first finding was rebutted. The Employer also argued that the overwhelming evidence supported the fact that the Alien had the required experience at the time of hire. On rebuttal, Employer also stated that the position requirements have been reduced and evidence showed that the Alien had the combined education, training and experience prior to employment with the Employer. In rebuttal to the third deficiency, the Employer again stated that the job requirements arose from a business necessity. The Employer reduced some of the requirements and amended the application. Finally, the Employer agreed to raise the salary to $14.00 an hour to rebut the fourth deficiency. The Employer also submitted several articles on domestic workers in the United States. (AF 10-93).

The CO issued a Final Determination on August 22, 2007. (AF 7-9). In the Final Determination the CO found that the Employer's rebuttal evidence corrected the prevailing wage defect. However, the CO found that the Employer's rebuttal did not correct the other three deficiencies raised in the NOF. Specifically, the CO stated that the Employer stated that she would reduce some of the requirements; however, no amendments were made to the requirement on the Form 750A nor did the Employer's general statements establish a business necessity for the requirements which remained in excess of the SVP. In addition, the CO noted that the Employer stated that "overwhelming evidence supports the fact that Ms. Powdhar at the time of hire had the qualifications now required" and that "it is evidence that the job previously existed prior to the hiring of the alien." However, the CO stated the Employer did not submit any documentation to show that the Alien had the required training and experience prior to being hired, nor was any evidence submitted to show the job existed prior to the Alien

being hired. The CO also noted that the Employer failed to submit specific requested documentation regarding the Alien's previous experience as required by Section 656.21(a)(3)(iii)(A) and (B). Accordingly, labor certification was denied.

By letter dated September 26, 2007, the Employer requested BALCA review. (AF 1-6). In its request for review, the Employer argued that she had reduced the job requirements. The Employer also stated that the Alien had three months of training and experience combined and that the Alien had the one year past experience as a house worker. In support, the Employer submitted a statement in which it was contended generally that it is a business necessity to have the Alien work as a domestic in her home. In addition, the Employer submitted a statement from a prior employer dated September 24, 2007 regarding the Alien's previous experience as a housekeeper from June 2000 to September, 2003.

BALCA docketed the appeal on October 11, 2007, and issued a Notice of Docketing on October 24, 2007. By letter dated November 16, 2007, the Employer stated that she would rely on the original brief supported in the cover letter.

## DISCUSSION

The regulation at 20 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. One of the measures by which a job requirement is tested to determine whether it is unduly restrictive is inclusion of the requirement in the definition of the job in the *Dictionary of Occupational Titles* ("DOT"). 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).

The CO found the Employer's requirement of four years training and four years experience was in excess of the *DOT* SVP requirement for this job. The SVP was only "one to three months combined education, training and experience." The CO informed the Employer that it had the option to rebut the NOF by proving that the experience requirement arose from a business necessity. Upon consideration of the evidence before the CO, we find that the Employer failed to show that the job requirement was a business necessity for the Employer.

The issue of what constitutes business necessity was addressed by this Board in *Information Industries, Inc*., 1988-INA-82 (Feb. 9, 1989)(*en banc*). The Board established a two-prong test to determine the business necessity of an employer: 1) an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business; and 2) an employer must demonstrate that the job requirements are essential to perform, in a reasonable manner, the job duties as described by the employer. The evidence requested by the CO in the NOF in the instant case reflected this standard.

In rebuttal, the Employer stated generally that the job requirements arose from a business necessity. The Employer did not submit any documentation to verify its statements. According to the CO's requests in the NOF, "[r]ebuttal evidence must include documentary evidence," such as experience with prior employees, that clearly establishes the position cannot be performed by an individual who possess qualifications normally required for proficiency. (AF 96). The Employer failed to produce any documentation and, specifically, the Employer failed to produce the documentation requested by the CO in the NOF. *See Gencorp*., 1987-INA-659 (Jan. 13, 1989)(*en banc*) (if the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it). It is the Employer's burden to prove business necessity. *See Analyst International Corp*., 1995-INA-131 (May 28, 1996). A bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden. *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). Therefore, the Employer has not established a business necessity for the training and experience requirements in excess of those set forth in the *DOT*.

The Employer was also informed in the NOF that it could rebut the finding of an unduly restrictive experience requirement by amending the ETA Form 750 to reduce the requirements to the *DOT* standards. Again, the Employer stated generally that some of the requirements were being reduced and the application for labor certification was being amended. We note, however, while the application included amendments on the rate of pay section, (AF 133, box 12-A) there were no amendments on the application for labor certification in the training and experience requirements section. (AF 133, box 14).

In sum, the Employer did not prove that its training and experience requirements, which exceeded the standards set by the *DOT*, arose out of a business necessity, nor has the Employer proved that she amended these requirements. Accordingly, we find that the CO properly denied certification since the Employer did not rebut the finding that the job opportunity was unduly restrictive in violation of Section 656.21(b)(2).

Similarly, on rebuttal, the Employer submitted no documentation to prove that the Alien had the minimum job requirements to rebut the violation of Section 656.21(b)(5). Nor did the Employer submit the requested documentation pursuant to Section 656.21(a)(3)(iii)(A) and (B). Accordingly, we find that the CO properly denied certification on these two defects as well.

The Employer submitted with her request for reconsideration supplemental statements from herself and the Alien's previous employer. This new evidence, however, is beyond the authority of this Board to consider. The regulation at 20 C.F.R. § 656.27(c), concerning review on the record by the Board, states that the Board "shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made." The regulation also states that the Board will take into account "the request for review, and any Statements of Position or legal briefs submitted." However, 20 C.F.R. § 656.26(b)(4) states that the "request for review, statements briefs and other submissions of the parties […] shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." These regulations exclude the possibility of presenting new evidence before the Board; we will only examine that evidence on which the CO

reviewed and based the denial. *See Import S.H.K. Enterprises, Inc*., 1988-INA-52 (Feb. 21, 1989)(*en banc*). Thus, the statements that the Employer submitted with her request for reconsideration cannot be taken into consideration by this Board.

In summary, the Employer did not submit any documentation on rebuttal to cure the violations of Sections 656.21(a)(3)(iii)(A) and (B), 656.21(b)(2), or 656.21(b)(5). Thus, the Employer did not rebut the CO's findings under those regulations as set forth in the NOF. Therefore, we find that the CO properly denied labor 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 twenty days from the date of service a party petitions for review by the full Board. 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, DC 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 pages. Responses, if any, shall be filed within ten days of service of the petition,

and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.