U.S. Department of Labor

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Issue Date: 15 September 2003

BALCA Case No.: **2002-INA-142**
ETA Case No.: P2000-CA-09492560/ML

In the Matter of:

SOUTH HILLS COUNTRY HOME II,
Employer,

on behalf of

VICTORIA MIRAS,
Alien.

Appearance: Evelyn Sineneng-Smith
San Jose, California

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. South Hills Country Home, II ("Employer") has filed an application for labor certification on behalf of Victoria Miras ("Alien").[1] Employer sought to employ the Alien to fill the position of nurse assistant. (AF 61) A high school education and three months of experience were required.[2]

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[1] 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 th e Cod e of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the records upon which the CO denied certification and Employers' request for review, as contained in the respective appeal files and any written arguments. 20 C.F.R. §656.27(c).

[2] The job duties listed can be found in AF 61.

The CO issued a Notice of Findings ("NOF") on July 11, 2001, proposing to deny certification on the grounds that Employer's license to operate a residential facility for the elderly was over four years old.[3] (AF 55) This caused the CO to question whether Employer had a current job opening, operated an on-going business and / or could provide permanent full-time employment to which U.S. workers could be referred. (AF 56) The CO also questioned whether a nurse assistant position existed, given that the Dictionary of Occupational Titles ("DOT") states that such a worker "is under direction of nursing and medical staff" but the instant position was supervised by the "owner / licensee." The CO instructed Employer to document its ability to provide permanent, full-time employment to a U.S. worker at the terms stated on its ETA-750A. Part of the documentation required was a copy of Employer's business license, state and federal income and business tax returns, and information on which nursing and medical staff were directing the position.

The CO also advised Employer that (1) nurse aides are listed on Schedule B, and therefore Employer needed to petition for a Schedule B waiver; and (2) the position described a combination of duties, including general houseworker / launderer / cook, and Employer needed to revise the job duties to eliminate the combination of duties or seek to justify the combination of duties as either a business necessity or common in the labor force. (AF 56-57) Finally, the CO found that Alien did not meet the requirements of the job as set forth in the ETA 750 Part A, as she lacked three months of experience as a nurse assistant. Rebuttal on this issue required an amendment to the ETA 750 Part B which reflected that the Alien met the qualifications, or Employer could amend the required qualifications and indicate its willingness to retest the labor market. (AF 58)

Employer submitted rebuttal, which was received on September 19, 2001. (AF 20) It consisted of copies of a request for a Schedule B waiver, tax returns, and a memo regarding the combination of duties, as well as a stated willingness to re-advertise and delete the duties found objectionable by the CO. Employer provided affidavits attesting to the employment of Alien in the

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[3]Those issues resolved prior to the issuance of the Final Determination will not be addressed herein.

home of a woman with Alzheimer's disease in 1995, and as a live-in domestic worker/care giver for a family with children from 1991 to 1997. (AF 47, 49)

A Final Determination was issued on November 16, 2001. (AF 18) Therein, the CO denied certification, finding that Employer had failed to provide a new license or tax returns, having resubmitted those reviewed prior to issuance of the NOF. Furthermore, the CO found that the rebuttal failed to (1) address the issue of a nurse aide being supervised by medical/nursing staff; (2) correct the combination of duties issue; and (3) establish that Alien had the requisite experience. In the latter respect, the evidence of work as a "care giver" was determined not to be the equivalent to work as a nurse assistant. Since Employer had not provided for qualifications in a related occupation, to accept Alien's experience as qualifying would mean lowering the standard of qualification for Alien but not for U.S. applicants. Therefore the requirement was excessive and non-compliant with the regulations. (AF 19)

On December 20, 2002, Employer requested review of the denial of certification by the Board of Alien Labor Certification Appeals ("Board" or "BALCA"). (AF 1) On May 6, 2002 the Board received a statement of position from Employer's representative indicating that the ground for appeal is that "additional evidence supporting the employer's explanation on business/job offer, combination of duties, and documentation of alien's work experiences were submitted to the Certifying Officer on 12/20/2001" and that Employer had indicated its willingness on July 26, 2001 to re-advertise.

DISCUSSION

Untimely submission of rebuttal evidence

Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. §656.27(c). *See also* 20 C.F.R.§656.26(b)(4); *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Where an argument made after the Final Determination is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument either. *Huron Aviation*, 1988-INA-431 (July 27, 1989). With its

request for review, Employer’s owner has submitted documents not previously provided, including proof of current license renewal and an explanation as to the alleged two types of nurse assistants, and other documents the CO did not have the opportunity to review. (AF 9) Employer’s documentation, which was not provided to the CO, will not be considered by this Board.

Failure to provide current license in rebuttal documentation

Where the CO questions whether there is a current existing business operated by an employer and requests specific documentation establishing same, the employer's submission of a copy of an expired business license does not prove existence of an ongoing business. *Doctors Medical Group of California,* 1994-INA-207 (May 8, 1995). In the instant case, the CO questioned whether the Employer was, in fact, able to provide permanent, full time employment at the terms and rates and conditions stated on the ETA 750A. The CO observed that Employer's license to operate a residential facility was over four years old and reasonably requested a copy of a current license. Employer did not provide one until its request for review, which is an untimely rebuttal. Given that the status of the license is the primary rationale the CO proffered for questioning whether an ongoing business existed, the failure to provide a current license with the rebuttal documentation provides grounds for denial of labor certification.

Evidence regarding proper supervision of nurse assistant

Employer advertised for a nurse assistant, specifying that the position is uncertified. Employer was then advised that the DOT description of that position of nurse assistant lists the requirement that the position is performed under “direction of nursing and medical staff.” When requested to provide rebuttal evidence that there was such a position available with it, Employer provided none. In *Mega Nursing Services, Inc.*, 1993-INA-105 (July 13 1994) (*dec.on recon.*), the panel stated, “where the CO reasonably determines that the job duties match a DOT description which requires licensing, the [e]mployer bears the burden of proof on rebuttal that a license is not required.” In the instant case, the absence of nursing and medical staff to supervise the nurse assistant made the CO question in the

NOF whether such a position actually exists in Employer's business. In the Final Determination, the CO found that Employer had not responded to this finding at all, and speculated that employment of a nurse assistant by Employer without supervising medical staff might be unlawful.

Review of Employer's rebuttal confirms that Employer did not respond to this aspect of the NOF. The CO seems to be raising a concern that this might not be a *bona fide* job opportunity without a supervising medical staff. The record before us for review, however, does not provide a concrete basis for finding that employment of a nurse assistant without a supervising medical staff would be illegal. Thus, despite Employer's failure to respond to the supervision issue, we decline to affirm the CO on this issue as it is based solely on speculation.

Combination of duties

Under 20 C.F.R. § 656.21(b)(2)(ii), a combination of duties is presumed to be an unduly restrictive requirement. The presumption may be overcome if the employer demonstrates that:

(1) it normally employs workers to perform that combination of duties;
(2) workers customarily perform that combination of duties in the area of intended employment; or
(3) the combination of duties is based on a business necessity.

The Board announced the standard of business necessity for a combination of duties in *Robert L. Lippert Theatres*, 1988-INA-433 (May 30, 1990) (*en banc*):

> An employer must document that it is necessary to have one worker to perform the combination of duties, in the context of the employer's business, including a showing of such a level of impracticability as to make the employment of two workers infeasible. Implicit in this holding is a showing by the employer that reasonable alternatives such as part-time workers, new equipment and company reorganization are infeasible. A showing that the duties are essential to perform each other also helps to show business necessity, although such a showing is not necessary.

An assertion of convenience or practicality is not enough to establish the business necessity of a combination of duties. *Robert L. Lippert Theatres*, *supra*; *Jaclyn, Inc.*, 1990-INA-210, 1991-INA-342 (Oct. 31, 1991).

In the instant case, Employer argued that general household worker/launderer/cook duties were necessary for the nurse assistant position "because the frail elderly residents live in the care home just like they did in their private homes. They need someone to take care of them and also take care of their housekeeping needs." Employer argued that the residents do not have the energy to perform these functions themselves. Employer argued that a second worker is not necessary because the general household duties only comprised 20% of the hours of employment, and that it could not hire part-time workers because "we will not be able to monitor completely the way a part-time worker will prepare the meals for the frail elderly residents who are very helpless, and who cannot check their own meals." Finally, Employer argued that a combination of duties "is pursuant to the provisions of Title 22 [of the California Administrative Code], the Bible of the residential care home industry." (AF 42) The provision referenced by Employer is attached to the rebuttal, and evidently intended to provide support for the combination of duties in Section 87565. (AF 43)

In the Final Determination, the CO noted that Employer had stated in rebuttal that general houseworker duties would constitute 20% of the job and that Employer had not offered to remove those duties. (AF 19) The CO found unconvincing Employer's assertion that such duties are essential to the care of frail elderly patients, and Employer's reference to the California Administrative Code, which describes the duties of operators rather than nurse aides.

We concur with the CO that Employer's rebuttal does not justify the combination of duties requirement. Employer's argument that the residents cannot perform the housekeeping duties is a non-sequitur. The argument that Employer cannot adequately monitor the quality of meals prepared by a part-time worker does not make much sense. The California Administrative Code cited does not on its face state that nurse assistants must perform housekeeping duties – in fact, it seems to suggest that

an employer should provide additional staff to perform such duties. Thus, we affirm the CO's denial of labor certification on this ground.

Alien's experience

A job opportunity's requirements may be found not to be the actual minimum requirements where the alien did not possess the necessary experience prior to being hired by the employer. *Super Seal Manufacturing Co.*, 1988-INA-417 (Apr. 12, 1989) (*en banc*). In the instant case, the CO questioned whether the Alien had the three-month in the job offered experience when hired. Employer presented evidence that the Alien had worked as a caregiver. In the Final Determination the CO noted that the ETA 750 did not provide for experience in related occupations. We concur with the CO that the Alien was hired with a less rigorous set of experience than is now being required of U.S. applicants, and affirm the denial of labor certification on this ground.

ORDER

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

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

J. Burke, Concurring

I concur with the affirmance of the Certifying Officer's denial of labor certification.

I would also, however, sustain the Certifying Officer's ruling that a *bona fide* position of nurse assistant is not available since such a position does not exist in accord with the Dictionary of

Occupational Titles ("DOT"), as there is no such position being performed under a Director of Nursing and Medical Staff as required by the DOT.

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.