U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002

Date Issued: September 14, 1999

Case No.: 1999-INA-0139

In the Matter of:

TLC Residential Home Care,
Employer,

on behalf of

Erlinda Garrovillas,
Alien.

Appearance: Richard I. Kinjo, Esq.
Certifying Officer: Rebecca Marsh Day, Region IX

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

This case arises from an application filed by TLC Residential Home Care on August 7, 1995, seeking labor certification for Erlinda Garrovillas, Alien, for the position of Live-in Nurse, Practical (AF 65). The duties of the job were described as follows:

> To directly oversee a guest home for mentally ill. Assists in bathing, feeding and personal hygiene. Plan and prepare meals. Monitor medications. Change linens. Accompany to and from doctor's appointments, church services and recreational activities. Due to mental and emotional problems of the residents, we require the person to live in for complete supervision and responsibility of their daily activities, conditions and needs.

Employer required that applicants have completed high school and have two years of experience in the job offered or two years of experience as a nurse. In addition, Employer required that applicants live on the premises and have CPR and First Aid Certification.

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on March 20, 1998 (AF 61-63). The CO stated that job service records indicate that Employer's business is closed and has no employees and that the license submitted for the facility expired over four years ago. The CO stated that there are questions as to whether Employer has a current job opening, operates an on-going business and/or can provide permanent full-time employment to which U.S. workers can be referred. The CO instructed Employer to document its ability to provide permanent full-time employment to a U.S. worker at the terms and conditions stated in the application. In addition, Employer was instructed to provide a copy of its business license and copies of its State and Federal business income tax returns.

Employer, by counsel, submitted rebuttal on April 27, 1998, stating that rebuttal consisted of a letter from Emerits Garrovillas, owner, a copy of the EDD Assessment Notice of October 24, 1995, a copy of Employer's response dated November 20, 1995, along with copies of 1995 and 1992-1993 facility licenses, a copy of Employer's current Annual License Fee Notice and copies of Federal and State tax returns for 1993-1997 (AF 7-60). In her letter, Ms. Garrovillas stated that the facility is not closed and has not been closed and continues to be on-going. The only other documents submitted were 1) an Annual License Fee Notice from the Department of Social Services dated 6/4/97 which stated that the annual license fee must be received by 9/1/97, which

---

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

is 30 days prior to the expiration of Employer's current license 2) Employer's and Ms. Garrovillas' Federal income tax returns for 1993-1997 which reflected a net business income before taxes of $215.00 in 1997, $2,490.00 in 1996, $6718.00 in 1995, $4964.00 in 1994 and $172 in 1993 (AF 15, 23, 36, 48, 57) and 3) state tax returns.

The CO issued a Final Determination denying certification on October 29, 1998 (AF 5-6). The CO stated that the license Employer submitted for the facility is dated June 1997 and does not cover 1995 when the labor certification application was filed. Therefore, the CO reasoned that Employer had not documented that it could legally offer employment at the time the application was filed. The CO also stated that in each of the tax years 1994-1997, Employer did not pay a wage comparable to the one offered and there were not enough profits to pay the wage specified in the application for the offered job on a full-time basis. The CO concluded that Employer had not submitted adequate evidence to establish that it is offering a viable permanent full-time job to which U.S. workers could be referred.

Employer, by counsel, filed a request for administrative-judicial review on December 2, 1998 (AF 1-4).

DISCUSSION

The issues are whether TLC Residential Home Care is an employer as that word is defined in the regulations, offering permanent full-time employment to a qualified worker and whether it had sufficient income to pay the Alien's wages.

The regulations at 20 C.F.R. § 656.3 define "employer", in part, as a person, association, firm, or corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker. Employment means permanent full-time work by an employee for an employer other than oneself. The petitioner bears the burden of proving the existence of an employer and that the position offered is permanent and full-time. If employer does not carry its burden of proof then certification may be denied. *Gerata Systems America, Inc.*, 88-INA-344 (Dec. 16, 1988).

Employer stated in its appeal request that facility licenses for 1992-1993 and 1995 are being submitted with its appeal to prove that Employer's facility was open for business at the time the application for labor certification was filed. However, the licenses are not in the file and could not be considered by this Board if they were. It is well settled that evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *The Fifteenth Street Garage*, 90-INA-52 (Nov. 21, 1990); *Physician's Inc.*, 87-INA-716 (July 12, 1988).

Even if Employer was legally in business in 1995 when it filed the labor certification application, its tax returns do not reflect adequate income to pay the advertised salary of approximately $12,500 per year. Employer's business income before taxes was $6718.00 in 1995, its income declined to $2, 490.00 in 1996 and to $215.00 in 1997. The inability of Employer to prove that it has sufficient funds to pay the Alien's salary justifies the denial of

certification. *White Harest Mission*, 90-INA-195 (Apr. 9, 1991): *Pastucha Art*, 93-INA-305 (April 6, 1995).

Ms. Garrovillas argues on appeal that she works at a full-time job and would use a portion of her income to pay the Alien's wages. However, Ms. Garrovillas did not file the labor certification application on behalf of the Alien. She would not be the Alien's employer as that term is defined in the regulations and she would not have an obligation to pay the Alien's wages. Therefore, her income is irrelevant to the issues before this Board. Moreover, the unlikeliness of Ms. Garrovillas contributing her income to pay the Alien's wages is reflected in the fact that in 1995 she had an after tax income of barely more than the Alien's annual wages.

We conclude on the basis of this record that Employer failed to demonstrate that it has sufficient funds to pay the Alien's wages and therefore, failed to carry its burden of proving that the offered job is permanent and full-time. In view of this determination the issue of whether TLC Residential Home Care is an "Employer" need not be decided.

ORDER

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

For the Panel:

_____

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF 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 a 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 for such review 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 the 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 a petition, the Board may order briefs.