

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 15 August 2003**

BALCA Case Nos.: **2002-INA-185**  
**2002-INA-186**  
**2002-INA-187**  
**2002-INA-188**  
**2002-INA-189**  
**2002-INA-190**

ETA Case Nos.: **P2000-CA-09498389/ML**  
**P2000-CA-09498393/ML**  
**P2000-CA-09498392/ML**  
**P2000-CA-09498394/ML**  
**P2000-CA-09498391/ML**  
**P2000-CA-09498390/ML**

*In the Matter of:*

**FACUNLA FAMILY HOME,**  
*Employer,*

*on behalf of*

**JONATHAN CABRERA, ARMIE DADAP, ROCELYN DEL ROSARIO, JOSIE  
ELILIO, VIOLA CADUNOG, MARIFE ELILIO**  
*Aliens.*

Certifying Officer: Martin Rios  
San Francisco, California.

Appearances: Carmelita Facunla  
Employer

Before: Burke, Chapman and Vittone  
Administrative Law Judges

## DECISION AND ORDER

**PER CURIAM.** Facunla Family Home (“Employer”) filed six applications for labor certification<sup>1</sup> on behalf of six Aliens in the Spring of 1998.<sup>2</sup> Employer sought to employ all six Aliens for the same position, “Mental Retardation Aide.” (AF 12-13). Minimum requirements for the position were listed as six months experience in the job offered. In January of 2002, the Certifying Officer (“CO”) denied certification for all six applications. Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11. We affirm the CO's finding that Employer failed to establish that the job requirements listed are the actual minimum requirements for the job.<sup>3</sup>

A Notice of Findings (NOF) was issued by the CO in January 2002, proposing to deny labor certification. (AF 8). The CO challenged whether the experience requirement was Employer's actual minimum requirement, given that it did not appear that the Aliens had such experience when hired. Specifically, THE CO noted that “at the time alien[s were] hired, [they] did not meet the requirement and you trained [them] or provided the necessary learning opportunities after [they were] hired.” (AF 8). As corrective action for this deficiency, the CO directed Employer to either:

- (A) remove the restrictive requirement, from the ETA 750A; or
- (B) show why it is not feasible to hire anyone with less than the requirement; or

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<sup>1</sup> 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 the Code 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).

<sup>2</sup> In this decision, “AF” refers specifically to Jonathan Cabrera Appeal File as representative of the Appeal File of all of the appeals. A virtually identical application was filed for all six Aliens and the issues raised and dealt with by the CO (*i.e.*, NOF, FD, etc.) in each case are identical.

<sup>3</sup> The CO raised another issue concerning the adequacy of the advertisement. Because we are affirming the CO on the actual minimum requirements issue, we do not reach the alternative issue.

(C) show that the alien obtained the required experience or training elsewhere . . .  
To show alien had required background: You must submit an amendment to ETA  
750B form signed by alien showing background in items at issue.

(AF 8-9).

In response to this ground for denial, Employer merely asserted that the aliens were not currently residing in the U.S. and were “working in similar jobs in the Phillippines in order to meet the minimum requirements of the jobs in my facility.” (AF 6).

In April 2002, the CO issued a Final Determination denying certification based on a finding that “because [Aliens’] experience was gained at your facilities” in the Phillippines, “. . . [t]he ETA 750A does not state your true job requirements since you hired alien without them and were willing to train.” (AF 4)

## **DISCUSSION**

Pursuant to 20 C.F.R. § 656.21(b)(5), an employer is required to document that the stated requirements for the job opportunity are the minimum necessary for the performance of the job and that the employer has not hired or that it is not feasible to hire workers with less training and/or experience. In the instant case, Employer set its requirements for the job at six months experience as a Mental Retardation Aide. In denying labor certification, the CO cited the Aliens' lack of this specific experience in finding Employer's requirements excessive for the job. Employer asserted that the Aliens had prior experience at its own facilities in the Phillippines. The regulatory violation is not negated by the fact that the Aliens gained their experience in a different facility, when that facility is owned by the employer. In such a case, the employer still hired the alien without the requirement now being required of U.S. applicants. *See generally Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 1990-INA-200 (May 23, 1991); *Obro Ltd.*, 1990-INA-51 (Feb. 21, 1991) Thus, the CO properly denied certification.

## **ORDER**

The Certifying Officer's denial of labor certification in the above-captioned matters 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, 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 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.