

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 August 2003

BALCA Case No.: 2002-INA-246
ETA Case No.: P2000-CA-09495059/LA

In the Matter of:

MAILE ALOHA,
Employer,

on behalf of

NORMA PERPOSE DACUMOS,
Alien.

Appearance: Moby P. Torres, Esquire
La Jolla, California
For the Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Health Aide.¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R.

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 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 record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

§656.26.

STATEMENT OF THE CASE

On January 14, 1996, Employer, Maile Aloha, filed an application for labor certification to enable the Alien, Norma Perpose Dacumos, to fill the position of "Health Aide." (AF 70). A high school education and two years of experience in the job offered were required. The job duties were described as follows:

Presents medications to patients using specified procedures. Observes patients' reaction and records and/or reports to administrator of unusual reactions. Plans nutritious and dietary needs/menus for patients. Inspects meals prior to serving for conformance to prescribed diets based on patient's physical condition. Gives direct patient care such as bathing, dressing and feeding patients. Cleans patients' rooms.

The hours were listed as being from 9:00 a.m. to 5:00 p.m.

On January 23, 2002, the CO issued a Notice of Findings, ("NOF"), proposing to deny certification. (AF 62). The CO determined that the position at issue was properly coded as a Nurse Assistant, which, as described in the Dictionary of Occupational Titles ("DOT"), had a Specific Vocational Preparation ("SVP") level of 5, indicating that the normal amount of training/experience would be six months to one year. Therefore, Employer's requirement of two years of experience was unduly restrictive. Employer was advised it could delete the requirement and amend the application, or it could justify the requirement based on business necessity.

Employer was further advised that the position advertised contained a combination of duties, given that it listed duties which did not appear in any single DOT job description. Specifically, the position required the planning of nutrition, dietary needs and menus, and inspecting meals, duties not normally required of nurse assistants. Employer was advised it had not documented that it normally

employed persons to perform this combination of duties, and/or that workers customarily performed this combination of duties in the area of intended employment, or that the combination of duties resulted from business necessity. In order to rebut this finding, Employer was directed to revise the job duties to eliminate the combination of duties, justify the combination of duties because of business necessity, document that Employer has normally employed persons to perform the combination of duties, or provide evidence that this combination of duties is customary in the area of intended employment. (AF 63-65).

The NOF also pointed out that Employer's advertisement lacked specificity. (AF 65). Employer was requiring a live-in employee, yet the advertisements and posted notice of the job opportunity failed to include this requirement. The labor market therefore needed to be retested. Furthermore, the posted notice contained mixed messages, indicating that interested candidates should send their resumes to Sacramento, California, while a subsequent paragraph advised them to apply directly to Employer. The new posting needed to direct applicants directly to Employer. (AF 65-66).

The CO also found a contract deficiency, inasmuch as the Employment Agreement executed by Employer and the beneficiary was not in compliance with the regulations. An amended contract had to be submitted. (AF 66-67). Finally, Employer was requested to clarify the number of bedrooms it had in its facility, and whether there was a private room for the Alien or whether the Alien shared a room. (AF 67-68).

By cover letter dated February 21, 2002, Employer submitted rebuttal. (AF 45). Employer contended that its requirement of two years of experience bore a reasonable relationship to the position given the nature of its business (board and care) and was essential to perform, in a reasonable manner, the job duties. The offered position required "planning nutritious and dietary needs and menus for patients, and inspecting of meals prior to serving for conformance to prescribed diet based on patients' physical condition." According to Employer, these tasks resembled those of a dietitian/nutritionist. The SVP level for such a position, according to the DOT, was 7. Employer

conceded that the Alien did not have the educational requirements for such a position, but she did have two years of experience.

On the issue of the combination of duties, Employer contended that it was not economically strong to make it feasible to segregate the duties and employ two individuals. It attached a tax return for 2001 to support this argument. Employer stated that the amount of time to be spent in one or both of the combined duties did not financially justify the hiring of two individuals. With regard to the omission of the live-in requirement, Employer contended that since it was a restrictive requirement, its absence actually enlarged the pool of prospective qualified applicants. Therefore, the failure to list it in the advertisement was harmless error and retesting of the labor market was not required. Since the posting of the job notice, Employer stated it had had only one employee who saw the notice, but was not interested in applying for the position. Employer confirmed that the employee would have a private room. An Employment Contract was included, containing the requirements of the NOF, as was a letter wherein Employer indicated its "Alternative Offer to Cure." (AF 55). Therein, Employer indicated it agreed to amend or delete all the unacceptable requirements and retest the labor market.

On March 25, 2002, the CO issued a Supplemental NOF. (AF 29). The CO pointed out that the January 23, 2002 NOF had cited several deficiencies and had provided Employer with options and clear instructions on how to remedy each of the particular findings cited. Employer failed to follow the recommended corrective actions and submitted two separate rebuttals, one appearing to be justification of those items found to violate the regulations, the other appearing to delete/amend the job offer for the same deficiencies. The CO advised Employer that this was unacceptable, and a review and determination could not be made. Employer was directed to choose one rebuttal and provide that for consideration.

In response to the March 25, 2002, Supplemental NOF, Employer submitted a letter dated April 5, 2002, requesting that the CO "consider the three-page letter along with its attachments as our reply to the initial Notice of Findings dated January 18, 2002." (AF 15).

A Final Determination was issued on May 28, 2002, denying certification. (AF 5). The CO determined that Employer had failed (1) to justify the two years of experience for the occupation of nurse assistant; (2) to justify the combination of duties, as it had failed to show that reasonable alternatives such as a part-time worker were not feasible; and (3) to state a willingness to retest the labor market on the issue of the failure to list the live-in requirement in its advertisement. With regard to the latter issue, the CO pointed out that the NOF clearly advised Employer that its advertisements had to be made with particularity and that the only remedy to this finding was to retest the labor market to include the live-in requirement, which Employer refused to do.

On July 1, 2002, Employer requested review of the denial of labor certification by the Board of Alien Labor Certification Appeals (“BALCA” or “Board”). (AF 3). On July 8, 2002, the CO advised that Employer’s Request for Reconsideration had been denied and the matter was being forwarded to the Board. (AF 1).

DISCUSSION

In its request for review, Employer contends that the CO committed error in denying the labor certification application despite the alternative offer to cure. It is Employer’s position that the CO should have accepted the offer to cure and that this matter should be remanded to the CO for a new recruitment. Employer concedes, in effect, that its rebuttal, attempting to justify its requirements found to be restrictive, was insufficient.

Issuing an FD may be inappropriate if the employer’s rebuttal contains an offer to cure a defect and re-advertise. Where an employer cannot predict whether its rebuttal evidence will be persuasive, its offer to cure a defect may be conditioned on a finding that this rebuttal evidence is not persuasive. *A. Smile, Inc.*, 1989-INA-1 (Mar. 6, 1990).

In the instant case, Employer has offered to “cure” all the deficiencies found by the CO. As its offer to cure the combination of duties, Employer has attached a “Sample Advertisement.” The

newly submitted advertisement, however, continues to list the preparation of meals per menu plans, including any special dietary needs, as a job requirement. (AF 57). As the CO advised Employer in the NOF, this is not one of the duties of a nurse assistant, DOT Section 355.674-014, and therefore, results in a combination of duties.

As the CO correctly found, the duties at issue herein are a combination of duties, and Employer's attempt to justify the combination failed to do so. Employer's attempt to cure this deficiency also fails, given that it does not eliminate the combination of duties.

Where an Employer is advised that its requirement is restrictive, and offers to readvertise but without dropping the restrictive requirement, certification is properly denied. *GPF Systems, Inc.*, 1994-INA-301 (June 30, 1995). Such is the case here. Employer's offer to readvertise continues to include a combination of duties. Thus labor certification was properly denied and the remaining issues need not be addressed.

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 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for 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 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten 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.