

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 July 2003

BALCA Case No. 2002-INA-119
ETA Case No. P2000-CA-09483095/JS

In the Matter of:

HEALTHCARE PROFESSIONAL RESOURCES,
Employer,

on behalf of

REYNALDO DE LA CRUZ,
Alien.

Certifying Officer: Martin Rios
San Francisco, CA

Appearance: Frank C. Luckenbacher
For Employer

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

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Reynaldo de la Cruz (“Alien”) filed by Healthcare Professional Resources (“Employer”) pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the “Act”) and Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). The Certifying Officer (“CO”) of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based 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 of the parties.

STATEMENT OF THE CASE

On April 15, 1996, Employer filed an application for labor certification on behalf of the Alien for the position of Referral Clerk, Temporary Help Agency. (AF 65-66). On September 28, 2001, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on the grounds that the form ETA 750-B was incomplete, the Employer failed to offer the prevailing wage, and there was a restrictive requirement. (AF 60-64). The CO noted that the form ETA 750-B did not provide an address for the Alien's last employer. To cure the deficiency, the Employer was advised to provide the name and address of the Alien's employer for the three years preceding the submission of the application.

The CO also noted that Employer's offer of twelve dollars an hour was below the prevailing wage of sixteen dollars and fifty-three cents an hour. The CO asserted that the state agency had advised the Employer that its wage offer was below the prevailing wage offer for a Director, Nurses Registry. The Employer was given the opportunity to amend the wage offer, but Employer chose to challenge the classification instead. The state agency accepted Employer's argument and changed the job classification to Referral Clerk, Temporary Help Agency and found the respective prevailing wage rate to be sixteen dollars and fifty-three cents an hour. The Employer did not challenge the new job classification, but it challenged the prevailing wage finding. However, the state agency found no reason to change the prevailing rate finding and kept the prevailing hourly wage at sixteen dollars and fifty-three cents. Consequently, the Employer's failure to amend its offer to within five percent of the prevailing wage made the labor certification application deficient. The CO provided two alternatives to remedy the deficiency, to amend the wage offer to within five percent of the prevailing wage, or to contest the wage finding in accordance with *PPX Enterprises, Inc.*, 1988-INA-25.

In the CO's last deficiency finding, the CO noted that Employer's requirement of two years experience was excessive and restrictive. The CO reminded the Employer that it had argued against the state agency's classification of Director, Nurses Registry, on the ground that the position offered was significantly less responsible. The state agency in accepting the Employer's argument changed the job classification to Referral Clerk, Temporary Help Agency. Based on this change the two years of experience required by the Employer was found to be excessive and restrictive.¹ The CO advised

¹ The Director, Nurses Registry position has a Specific Vocational Preparation Level (SVP) of 6, indicating no more than two years combined education and experience required. The Referral Clerk, Temporary Help Agency has an SVP of 3, indicating no more than three

the Employer that it could remedy the deficiency by either deleting the restrictive requirement, or justifying the requirement under business necessity.

In a correspondence dated October 16, 2001, the Employer provided the address for the Alien's previous employer in order to cure the deficiency found in the form ETA 750-B. (AF 57).

In its Rebuttal, also dated October 16, 2001, (AF 53-54) the Employer amended its wage offer to reflect an hourly rate of sixteen dollars and fifty three cents an hour, and indicated a willingness to test the labor market under the new wage offer. In regards to the two years experience requirement, the Employer argued that the requirement was due to a business necessity. Employer asserted that the position demands the applicant to deal with nurses, hospital department heads and other key health care providers, in order to place those individuals in temporary job openings. Since the communications are at times in emergency situations, the communications need to be precise. To insure control in such circumstances, the Employer argued that a two-year experience requirement bears a reasonable relationship to the occupation. Therefore, the requirement was based on a business necessity.

On November 14, 2001, The CO issued a Final Determination (FD) denying certification. (AF 45-46). The CO found that the Employer in its Rebuttal failed to show that the requirement of two years experience was based on a business necessity as required by the NOF. The CO noted that the Employer's current argument goes against the fact that the Employer previously presented arguments against the classification of the job as a skilled occupation. The CO indicated that the Employer first argued against the state agency's classification of the position as Personnel Recruiter, then argued against the classification of Director, Nurses Registry. Finally, the Employer did not argue against the classification of Referral Clerk, Temporary Help Agency, although it argued against the prevailing wage determination. The CO found that the Employer's assertion that "it would seem" that the occupation requires two years of experience was only a subjective opinion and was not persuasive.

On December 18, 2001, Employer filed its Request for Review (AF 1- 7) reasserting that the two-year requirement was reasonable as a business necessity. The Employer also dissected the communications from the state agency and the CO, to indicate that the prevailing wage determination of sixteen dollars and fifty-three cents did not seem to be consistent with an experience requirement

months experience required.

of three months. Additionally, the Employer indicated that the job classification was not quite on target, and that it took three attempts by the state agency to reach the final job classification. Furthermore, the Employer asserted that it never argued that the job opportunity was a significantly less responsible position than that of a Director, Nursing Registry. The Employer had instead argued that the position was not managerial, and consequently was not responsible for regulations and did not require a license. The Employer concluded that the two-year requirement is based on a business necessity due to the tremendous responsibility of the position, in addition to the caliber of personnel the position deals with. Consequently, it bears a reasonable relationship to the occupation in the context of Employer's business.

On April 2, 2002, the Employer submitted its brief. The Employer reasserted its concern with the difficulty of reaching the last job classification for the position. The Employer detailed the steps taken by the state agency to reach the classification, and indicated dissatisfaction with the process and final job classification. The Employer highlighted that it supplied the state agency a survey for guidance to the right classification for the job. However, the Employer did not receive a response to the survey. The state agency only responded by reclassifying the position. The Employer added that it never indicated an unwillingness to amend the requirements upon the state agency reaching a job classification that resembled the job duties. The Employer summarized its brief by indicating that the CO erred in denying the application by not reaching the proper job classification.

DISCUSSION

In accordance with 20 C.F.R. § 656.21(b)(2) the Employer must document that the job requirements are those normally required for the job in the United States and are those defined for the job in the Dictionary of Occupational Titles (D.O.T.). Should an employer fail to establish that the job's requirements are normal and in accord with the D.O.T., then the Employer must establish that they arise from a business necessity.

To establish business necessity under 20 C.F.R. § 656.21(b)(2), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer. *Information Industries*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige & Associates, Inc.*, 1991-INA-72 (Feb. 3, 1993).

The CO in the NOF found that Employer's requirement of two years of experience was unduly restrictive because it exceeded the requirement for the position as specified by the D.O.T.² Although the Employer made additional arguments about the business necessity for the two year experience requirement in its request for review and brief on appeal, BALCA has held, *en banc*, that "under the regulatory scheme of 20 C.F.R. Part 656, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be granted." *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*); *Chams, Inc.*, 1997-INA-20, 232 and 541 (Feb. 15, 2000) (*en banc*). Thus, our review is limited to the two paragraphs of argument contained in the Employer's October 16, 2001 rebuttal letter.

In those two paragraphs, the Employer made self-serving and unsupported statements asserting that because the health care professionals it found jobs for worked in acute care facilities,

² The certifying officer must determine the job title which best describes the job offered and whether the job requirements specified by the employer fall within those defined in the Dictionary of Occupational Titles. *LDS Hospital*, 1987-INA-558 (April 11, 1989) (*en banc*). The job in this case was classified by the CO as Referral Clerk, Temporary Help Agency. The state agency had suggested two other classifications which the Employer objected to, but the Employer did not object to the last classification, except in its brief. However, 20 C.F.R § 656.25(e) provides that an employer's rebuttal evidence must rebut all of the findings in the Notice of Findings and that all findings not rebutted shall be deemed admitted. On this basis, the Board has held that a CO's finding which is not addressed in the rebuttal is deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). Since the Employer did not challenge the classification of the position in the Rebuttal, the Employer lost the opportunity to do so.

Even assuming *arguendo* that the Employer had timely challenged the classification, we would find that the Referral Clerk, Temporary Help Agency job classification was correct. Employer's argument is that there is not an identical match between the job as described by the Employer and the D.O.T.'s definition of Referral Clerk, Temporary Help Agency. However, the D.O.T. is merely a guideline and should not be applied mechanically. *Promex Corporation*, 1989-INA-331 (Sept. 12, 1990). The D.O.T. should not be applied in a pigeonhole fashion where there must be a complete matching of duties between the job offered and the D.O.T. classification in order for a job to be appropriately classified. Merely because the duties of the job offered require some, but not all, of the duties included in a particular D.O.T. classification does not nullify the applicability of that classification. *Trilectron Industries, Inc.*, 1990-IN-188 (Dec. 19, 1991). As the classification of Referral Clerk, Temporary Help Agency sufficiently resembles Employer's job description, had the Employer timely objected to the job classification, we would have found that the CO's classification was proper. Therefore, since the Employer's experience requirement exceeds the SVP, as per the D.O.T., the requirement is unduly restrictive and a showing of business necessity is required. *Gantum Collections Inc.*, 1988-INA-519 (Oct. 27, 1989).

it was necessary to have two years of experience to locate jobs for those individuals. The Employer never specifically indicated why two years of experience was essential for performing the job.³ The Employer's tacit argument is that the life and death situations found in acute care facilities, are somehow automatically transferred to finding jobs and placing the acute health care providers. This leap in logic was not justified by the Employer and we are unconvinced of its validity.

Unsupported conclusions are insufficient to demonstrate that certain job requirements are normal for a position, or are supported by a business necessity. *Tri-P's Corp.*, 1988-INA-686 (Feb. 17, 1989) (*en banc*). Denial of certification has been affirmed where the employer has made only generalized assertions, *Winner Team Construction, Inc.*, 1989-INA-172 (Feb. 1, 1990). Consequently, we hold that Employer's unsupported and conclusory assertions did not establish that the two-year experience requirement bears a reasonable relationship to the occupation, or that it is essential to performing the described job duties in a reasonable manner as required by *Information Industries*, 1988-INA-82 (Feb. 9, 1989) (*en banc*).

As the record is sufficient to support the CO's denial of alien labor certification and for the above stated reasons, the following order will issue.

³ Since the Employer is seeking the benefit of a special provision of the Immigration and Nationality Act under which an alien is to be certified to fill a job instead of a U.S. worker, it is the Employer's responsibility to document that the two years experience requirement is essential to properly fulfill the duties of the position. The Employer in its correspondence with the state agency and the CO insisted in switching the responsibility of proving its case to the CO and the state agency. However, the burden of proof, in the twofold sense of production and persuasion, is on the employer, where it belongs. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*). The Employer bears the burden in labor certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). The Employer in this case did not meet its burden, as he limited his effort to making unsupported statements.

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

SO ORDERED.

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 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.