



**Issue Date: 03 March 2004**

**BALCA Case No.:** 2002-INA-271  
**ETA Case No.:** P2000-CA-09501119

*In the Matter of:*

**SUNRISE BOARD AND CARE,**  
*Employer,*

*on behalf of*

**MELODY FRAYCO,**  
*Alien.*

Appearance: Land Wayland, Esquire  
City of Industry, California  
For Employer and the Alien

Certifying Officer: Martin Rios  
San Francisco, California

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 Melody Frayco (“the Alien”) filed by Sunrise Board and Care (“Employer”) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (“the Act”), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer (“CO”) denied the application and 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. 20 C.F.R. § 656.27(c).

## **STATEMENT OF THE CASE**

On September 16, 1999, Employer, Sunrise Board and Care, filed an application for labor certification on behalf of the Alien, Melody Frayco, for the position of “Nursing Assistant Supervisor,” which was classified by the Job Service as “Nurse Assistant.” The job duties for the position included caregiving tasks for patients, as well as supervising five other caregivers. The stated job requirement for the position was two years experience in the job offered or in the “Related Occupation” of “care of guests or living facilities.” (AF 22).

In a Notice of Findings (“NOF”) issued on April 5, 2002, the CO proposed to deny certification based on Employer’s insufficient recruitment effort and an unduly restrictive job requirement. (AF 17-20).

Employer submitted its rebuttal on April 29, 2002. (AF 7-16). The CO found the rebuttal unpersuasive and issued a Final Determination (“FD”), dated May 30, 2002, denying certification on the same grounds. (AF 5-6). On June 7, 2002, Employer filed a Request for Review and the matter was docketed in this Office on August 30, 2002. (AF 1-4).

## **DISCUSSION**

In the NOF, the CO stated that she would provide Employer an opportunity to correct deficiencies related to its recruitment effort (*i.e.*, advertisement), and regarding its unduly restrictive requirement (*i.e.*, two-year experience). (AF 17-20). The CO found that although the job advertisement required experience as a nurse assistant and experience supervising four to six people, these requirements were not listed on the ETA 750A. In addition, the two years experience requirement exceeded the Specific Vocational Preparation (“SVP”) requirement of three to six months experience for a nurse assistant. The CO indicated that to rebut, Employer must either amend the

restrictive requirement or justify it as business necessity or as usual in the occupation/industry. (AF 18-19).

The rebuttal consisted of statements by Employer's counsel and Janie Rosenberg, both dated April 29, 2002. (AF 7-16). The latter is elsewhere identified as the "Administrator" and/or "Owner" of Sunrise Board and Care. (AF 23, 27).

Employer's counsel's statement focused on the underlying history of this matter. He noted that when the case was originally filed with the EDD on December 9, 1997, the job offering for this Alien was for the position of "Nurse Assistant." However, the ETA 750A for the position of Nurse Assistant was cancelled on October 18, 1998 and the current ETA 750A was filed for the position of "Nurse Assistant Supervisor." Employer's counsel surmised that the deficiencies cited by the CO and her repeated references to "Nurse Assistant" suggested that she was unaware that this is a new case with a new position title, job description, and salary. Therefore, Employer's counsel asserted that the advertisement was proper and the requirements were not unduly restrictive. (AF 7-12).

The statement by Jill Rosenberg, Employer's Administrator/Owner, represented that the failure to correct Item 17 of the ETA 750A form was an oversight and that it should reflect that the number of employees the Alien will supervise is four to six, as stated in the advertisement. Furthermore, Ms. Rosenberg stated that the Nurse Assistant Supervisor spends approximately 20% of her time supervising nurse assistants and 80% of her time performing the work of a nurse assistant. She noted that the other nurse assistants generally know their jobs and do not require the full-time supervision of a nurse assistant supervisor and that because the nurse assistant supervisor is fully qualified and experienced as a nurse assistant, she is expected to perform nurse assistant duties, in addition to supervising the other nurse assistants. (AF 13-16).

In the FD, the CO determined that Employer failed to rebut the finding that the two year experience requirement was unduly restrictive. (AF 6). On the ETA 750A,

Employer required two years experience in the position or in the related field of “care of guests or living facilities.” (AF 22). However, the advertisement for the position indicated the requirement as two years experience as a nurse assistant. (AF 47). The CO found, and we agree, that the experience requirement as listed on the ETA 750A is broader in an apparent attempt to meet the Alien’s background, while the advertisement limits the alternative experience requirement.

As stated on the ETA 750B, Statement of Qualifications of Alien, the Alien’s experience prior to being hired by Employer consisted of three months employment as a caregiver at Adeline’s Guest Home, three and a half years employment as a cabin stewardess with Princess Cruises, and seven years employment as a palace caretaker for H.R.H. Prince Mohammed Bin Fahad. (AF 71-72). Furthermore, an attachment to the ETA 750B, signed by the Alien, stated the following:

My previous job with Adeline’s Guest Home ended in June, 1997. I started my work with the Sunrise Board and Care in July, 1997 and this job has continued [since] then. This is a full time position of 40+ hours per week. The job duties include performing complete personal care of patients including bathing, grooming, feeding and administering medication. It also includes record keeping and making reports regarding care given to individual patients, maintaining the cleanliness of the rooms in the facility, and moving patients as needed. In July, 1998 the job description was changed [to] that of Nursing Assistant Supervisor and that added the requirement that I supervise the caregiving efforts of 4-6 Nursing Assistants, as more fully described in the application form and the letter from the employer.

(AF 73).

Although the Alien’s duties as a caregiver are consistent with that of a Nurse Assistant, the Alien only performed such work for a few months prior to being hired by Employer. (AF 72). Furthermore, as of July 1998, when the Alien represented that the job had changed to “Nurse Assistant Supervisor,” the Alien had only worked as a caregiver and nurse assistant a total of fifteen months (April 1997 through June 1998). (AF 73). The Alien did not meet the requirement stated in the job advertisement: two years experience as a nurse assistant. Accordingly, Employer broadened the “related

occupation” experience requirement, as stated on the ETA 750A form, to two years experience in “care of guests or living facilities,” thereby tailoring the requirement to the Alien’s background. However, as found by the CO, Employer’s advertisement does not reflect this broad related experience alternative requirement; instead, the advertisement is limited to two years experience as a nursing assistant. Therefore, we agree with the CO’s finding that Employer failed to properly test the labor market.

In addition, we agree with the CO’s determination that Employer failed to document the two-year experience requirement. To the contrary, the evidence presented belies such a requirement. As outlined above, Employer hired the Alien for the position of Nurse Assistant with only three months experience as a caregiver. (AF 72). After working for Employer as a Nurse Assistant for only one year, the Alien became a Nursing Assistant Supervisor. (AF 73). Furthermore, Employer acknowledged that only 20% of the Alien’s work consists of supervisory duties, while 80% is spent doing nurse assistant work. (AF 13-14). Accordingly, the overwhelming majority of the Alien’s duties falls within the job title of “Nurse Assistant” [D.O.T. 355.674-014] which has a SVP rating of four. This comports with an experience/training requirement of only three to six months. As found by the CO, Employer has not documented why it required the additional period of experience to perform the additional supervisory duties, which were allegedly entailed in the “Nursing Assistant Supervisor” position.<sup>1</sup>

In view of the foregoing, we find that labor certification was properly denied.

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<sup>1</sup> As stated by the CO, there is no D.O.T. code for “Nurse Assistant Supervisor,” which is one of the reasons the CO suggested, in the NOF, that Employer submit documentation that the two-year requirement is usual in the occupation/industry. (AF 19). However, as outlined above, Employer failed to do so.

## **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 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, 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 typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.