

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 15 September 2003

BALCA Case No.: 2002-INA-131
ETA Case No.: P1998-CA-09412662/ML

In the Matter of:

BUENA'S GUEST HOME,
Employer,

on behalf of

PRISCILLA M. RODRIGUEZ,
Alien.

Appearance: Evelyn Sineneng-Smith
San Jose, CA

Certifying Officer: Martin Rios
San Francisco, CA

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 Priscilla M. Rodriguez ("Alien") filed by Buena's Guest Home ("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 the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and Employer requested review pursuant to 20 C.F.R. §656.26.

Under section 212(a)(5), an alien seeking to enter the United States for the purpose of

performing skilled or unskilled labor may receive a visa if the Secretary of Labor (“Secretary”) has determined and certified to the Secretary of State and Attorney General that: 1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; 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.

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 26, 1996, Employer, Buena's Guest Home, filed an application for labor certification to enable the Alien, Priscilla M. Rodriguez, to fill the position of “Uncertified Nurse Assistant,” which was classified by the Job Service simply as “Nurse Assistant” (AF 91). The job duties for the position, as stated on the application, are as follows:

Clean house (9 ½) rms; assist (6) mentally-ill ages 18-59 yrs. Residents with behavioral problems, retarded, self-destructive, violent, aggressive, verbally-abusive and other mental ailments. Assist with shower, bed bath, sponge bath, tub bath, ambulating, exercising; shaving, assist with medications, provide hair care, mouth care, bowel care, skin care, personal hygiene (clean the body of dirt, feces, urine); vacuum, wash dishes, wash-iron-dry clothes and linens; handwash soft clothes;

straighten rooms, clean up mess and make beds; prepare and serve meals, snacks. Inspect all hazards, furniture and equipments. Watch signs of physical, emotional health, depression, fear, anger, cuts, bruises and sores. May wake up at night for toilet needs, empty commodes. Report any unusual, uncommon behavior to licensee, social worker, doctor, psychologist.

(AF 91, Item 13). The stated experience requirement for the position is 3 months in the job offered (AF 91, Item 14). Furthermore, the "Other Special Requirements" are set forth as follows: "If hired: must speak, read, and write English; must know food nutrition, food preparation, storage, and menu planning; must be willing to obtain CPR, First Aid, and Health Screening Report; must be willing to obtain fingerprints to be submitted to the Department of Justice; Must have legal right to work; live on premises (AF 91, Item 15).

In a Notice of Findings ("NOF") issued on April 12, 2001, the CO proposed to deny certification on the following grounds: (1) Employer failed to document that it has a current job opening and that it is an ongoing business which can provide permanent, full-time employment to which U.S. workers can be referred; (2) the job requirements are unduly restrictive because the job opportunity involves a combination of duties; and, (3) the 3-month experience requirement is unduly restrictive and does not represent Employer's actual minimum requirement, since the Alien lacked such experience when she was hired (AF 86-90). Employer submitted its rebuttal to the foregoing NOF on or about May 16, 2001 (AF 70-85). Although the CO did not find Employer's initial rebuttal persuasive regarding any of the foregoing deficiencies, instead of simply denying certification, the CO issued a Supplementary NOF, dated July 19, 2001, in which he reiterated the foregoing deficiencies, explained the bases for his rejection of Employer's rebuttal, and provided Employer an additional opportunity to cure the deficiencies (AF 66-68). Employer submitted its second rebuttal on or about September 17, 2001 (AF 38-65). The CO found the additional rebuttal unpersuasive and issued a Final Determination, dated November 20, 2001, denying certification on the above grounds (AF 35-37). On or about December 28, 2001, Employer filed a "Request for Review, explanations, and documentation" (AF 1-34). On March 28, 2002, the Board issued a "Notice of Docketing and Order Requiring Statement of Position or Legal Brief." On or about April 22, 2002, Employer responded

thereto.

DISCUSSION

Under Section 656.21(b)(2)(ii), a combination of duties is presumed to be an unduly restrictive requirement. In order to overcome this presumption, “the employer must document that it has normally employed persons for that combination of duties and/or workers customarily perform the combination of duties in the area of intended employment, and/or the combination job opportunity is based on business necessity. 20 C.F.R. §656.21(b)(2)(ii).

In the initial NOF, the CO found that Employer had violated the provisions of §656.21(b)(2)(ii), stating, in pertinent part:

Finding: The combination at issue is general houseworker (“[c]lean house (9 ½) rms;...”)/ launderer/cook (prepare and serve meals...)/nurse assistant.

Corrective Action: You, the employer, may A) revise the job duties to eliminate the combination of duties or B) seek to justify the combination of duties as either a business necessity or common in the labor force.

A) To revise the job duties:

You may revise the job duties to eliminate the situation where there is a combination of duties...

B1) To justify the combination of duties because of business necessity:

The requirements cannot be merely for your convenience and personal preference. You 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.

B2) To justify the combination as normal or customary:

If you normally employ persons to perform this combination of duties, then documentation showing these duties must be provided, or if you state the combination of duties is customary in the area of intended employment, documentation of this must be provided.

You must document that [it] is necessary to have one worker to perform the combination of duties, in the contest of your business, including a showing of such level of impracticality as to make the employment of two or more workers infeasible. You must show that reasonable alternatives such as part-time workers, new equipment and business reorganization are infeasible; an assertion of convenience or practicality is not enough to establish business necessity of a combination of duties.

(AF 87-88).

In its rebuttal to the foregoing NOF, the Employer stated, in pertinent part:

The combination at issue, which is “general houseworker/lauderer/cook/nurse assistant” is necessary because the mentally-ill residents live in the care home just like they did in their private homes. They need someone to take care of them and also take care of their housekeeping needs. The mentally-ill residents no longer have the energy to vacuum, clean the house and to cook (prepare and serve) their own meals. A second worker is not necessary because the general houseworker duties comprise only 20% of the total number of hours of employment. A part-time worker cannot provide each of these duties separately because we will not be able to monitor completely the way a part-time worker will prepare the meals for the mentally-ill residents who are very helpless, and who cannot check their own meals. They also cannot do their own laundry because of their mental state.

Furthermore, the combination of duties is pursuant to the provisions of Title 22, the Bible of the residential care home industry. (Please find enclosed copy of the relevant section of Title 22).¹

¹ We note that the document cited by Employer does not address the issue of whether it is customary for a combination of duties to be required in one job. It simply states that all personnel shall have training and/or related experience in various different skills “*in the job assigned to them*” and “*as appropriate for the job assigned*” (Emphasis added). (AF 76-77).

(AF 75).

In the Supplementary NOF, the CO found the foregoing rebuttal unpersuasive, stating:

On rebuttal, you essentially agreed with the finding but argue that houseworker duties only take up 20% of the worker's time. First of all, your rebuttal does not address the other three occupations listed in the combination; we presume by your silence that you agree they are duties making up a non-compliant combination from different occupations.

(AF 67).

Although Employer was given another opportunity to provide rebuttal regarding the combination of duties issue, Employer's second statement on rebuttal was almost identical to its first (AF 51; *Compare* AF 75). Furthermore, the attached documentation was, again, irrelevant. On this occasion, Employer included partial sections of provisions which related to "Administrator-Qualifications and Duties" and "Personnel Requirements-General." (AF 52). The Administrator provision, on its face, has little relationship to the job opportunity of Nurse Assistant. The general personnel requirements are virtually identical to those previously provided (AF 52; *Compare* AF 76). As noted above, even though knowledge and skills in various areas are listed, including principles of good nutrition, housekeeping, and necessary resident care, there is no suggestion that one person is required to perform a combination of all the duties. To the contrary, all personnel must be trained or experienced *in the job assigned to them* (AF 52).

In the Final Determination, the CO, again, found Employer's rebuttal unpersuasive, and concluded that the "duties you describe are a restrictive combination of duties and non-compliant with regulations." (AF 36). We agree.

The combination of duties, which includes general housekeeping, laundering, cooking, as well

as those of a nurse assistant, is unduly restrictive under §656.21(b)(2)(ii). Furthermore, as stated above, Employer has failed to adequately document that it normally employed persons for that combination of duties; or, that workers customarily perform the combination of duties in the area of intended employment; or, that the combination job opportunity is based on business necessity, not mere convenience. To the contrary, Employer's "rebuttal" is essentially a mere assertion of convenience, which does not adequately address possible alternatives and, is not supported by relevant documentation. 20 C.F.R. §656.21(b)(2)(ii). *See, e.g., Robert L. Lippert Theatres*, 1988-INA-433 (May 30, 1990)(*en banc*).² Accordingly, we find that labor certification was properly denied.

ORDER

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

Entered at the direction of the panel:

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:

² In view of our finding regarding the combination of duties issue, we need not address the other deficiencies cited by the CO.

Chief Docket Clerk
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Board of Alien Labor Certification Appeals
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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.