



**Issue Date: 13 August 2004**

**BALCA Case No.: 2003-INA-154**  
ETA Case No.: P2001-CA-09509809

*In the Matter of:*

**A-R RESIDENTIAL CARE FOR THE ELDERLY,**  
*Employer,*

*on behalf of*

**MELPAZAR SANTOS,**  
*Alien.*

Certifying Officer: Martin Rios  
San Francisco, California

Appearances: Evelyn Sineneng-Smith, Immigration Consultant  
San Jose, California  
For the Employer and the Alien

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 Melpazar Santos (“the Alien”) filed by A-R Residential (“the Employer”) pursuant to § 212(a)(14) 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 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 the 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 August 14, 2000, the Employer filed an Application for alien labor certification on behalf of the Alien for the position of Caregiver/Household Domestic Worker. (AF 4-42). The duties for the position were patient care, including caring for personal hygiene needs, as well as cleaning the home, preparing and serving meals, and reporting unusual behavior to social workers. (AF 41). The applicant was required to have four years of high school education and three months of experience. The Employer also required knowledge of food nutrition, food preparation, food storage, and menu planning, as well as obtaining First Aid and CPR certification, and a Health Screening Report issued by the State of California Health and Welfare Agency. The Employer required that the worker live on the premises and be available on call twenty-four hours per day. Evidence of pre-application recruitment was enclosed showing that the Employer advertised the position weekly from November 1 through November 3, 2000 and from November 15 through November 17, 2000 in the San Francisco Chronicle. (AF 52-54, 57). In addition, the Employer advertised on the internet and through a job posting notice. (AF 55-56).

On November 7, 2002, the CO issued a Notice of Findings ("NOF") advising the Employer of his intent to deny the application. (AF 35-39). The CO pointed out that in the application, the Employer stated that the business has six rooms. The CO also noted that the Employer had petitioned for another live-in position. The CO questioned where the patients would stay with five bedrooms being designated for patients and one bedroom for the Alien.<sup>1</sup> The CO also questioned whether a current job opening existed, whether the Employer is licensed to operate a business, and whether the Employer can provide permanent, full-time employment to which a U.S. worker can be referred. (AF

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<sup>1</sup> In a December 8, 2002 memorandum to the CO, the Employer noted that the home had four bedrooms for patients and one bedroom for the Alien. (AF 86).

36). The CO required the Employer to submit documentation proving that it has the ability to provide permanent, full-time employment to a U.S. worker at the terms and conditions stated on the ETA 750A. The Employer was also required to include a copy of its business care home license and federal business income and tax returns.

The CO noted that the occupation listed in the Employer's application was coded Nurse Assistant, a job listed on the Schedule B list of non-certifiable occupations. The CO indicated that the Employer may apply for a Schedule B waiver and to include verification from the local job service that the job order had been "suppressed" on file with the local office for a period of thirty calendar days and that the Employer was not able to obtain a qualified U.S. worker. (AF 36-37). The CO also noted that the ad the Employer ran did not assure the applicants that they would be compensated in accordance with California state laws and regulations for being on call twenty-four hours a day. The CO required the Employer to submit a statement of his willingness to retest the labor market and a draft of the advertisement. (AF 37). Based on the application, it appeared to the CO that the Alien was hired without three months of experience in the job as outlined on the ETA 750A. The CO required the Employer either to submit an amendment to the ETA 750B signed by the Alien showing that the Alien possessed the requisite experience, training or education, to amend the ETA 750A to delete the requirement the Alien did not possess, or to document how it is not feasible to hire workers with the less training or experience than that required by the job offer. (AF 37-38).

The Employer submitted a rebuttal to the NOF on January 12, 2003. (AF 15-32). The Employer provided copies of his business home care license along with his business certificate. (AF 87-88). The Employer also provided copies of his state and federal income tax returns and his quarterly wage/withholding report. (AF 17-30, 89-120). The Employer submitted a floor plan showing that there are five bedrooms, four for the patients and one for the staff. The Employer submitted a Schedule B waiver request dated December 8, 2002. (AF 122). The Employer increased the wage to \$1,274.00 and submitted the Alien's employment contract reflecting this wage increase. (AF 43, 73).

The Employer also stated that when it submitted its application, it was in compliance with California state laws and regulations for compensation because he indicated that overtime was to be paid. (AF 123). The Employer submitted an updated statement of the Alien's background, including the amended ETA 750B. (AF 82-85). The Employer indicated his willingness to retest the market and to amend the ETA 750A to delete the restrictive requirements and provided a draft of the new advertisement. (AF 31, 44).

The CO issued a Final Determination ("FD") on January 24, 2003 denying certification. Specifically, on the issue of whether a current job opening actually exists for which a U.S. worker can be referred, the CO concluded that the evidence submitted by the Employer was unconvincing. The CO stated that the Employer's rebuttal statement does not support the promise that the Alien would be provided a private room. (AF 14). On the issue of the Schedule B waiver, the CO concluded that the occupation would not be afforded a waiver from the list of non-certifiable occupations because the job order the Employer ran did not qualify the petition for waiver from Schedule B. Additionally, the CO concluded that the Employer has not taken any action to rectify the situation in response to the NOF. (AF 14).

The CO also addressed the issue of the Alien's qualifications. The CO pointed out that the Alien only has experience as a volunteer caregiver and had no experience in the job. The CO pointed out that the Employer required U.S. workers to have work experience in the petitioned job. Thus, the Alien was hired without meeting the requisite qualifications while the U.S. workers were held to a higher standard than the standards applied to the Alien. As such, the CO pointed out that the ETA 750A did not state the actual minimum requirements needed to qualify for the job.

On February 26, 2003, the Employer submitted a request for review. (AF 1-2). Along with the request, the Employer sought to explain its current job opening and explained that the Alien will be transferred to another care home in order to provide the Alien with a private room. Additionally, the Employer explained that the job service agency ran its job offer suppressed, thereby qualifying its job order for waiver under

Schedule B. Finally, the Employer provided documents to support his position that the Alien has the requisite minimum experience to qualify for the job offer. The Employer requested an opportunity to retest the labor market as a result of the corrective measures he has taken. (AF 3).

## **DISCUSSION**

The issues are whether a bona fide job opportunity exists, whether the Employer failed to state the minimum requirements for the job offer and whether the Employer's request for Schedule B waiver was properly denied. Under 20 C.F.R. § 656.20(c)(8), employers are required to attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." *Pasadena Typewriter and Adding Machine Co., Inc. v. U. S. Dept. of Labor*, No. CV 83-5516-AABT, (C.D. CA 1987). This provision infuses the requirement of a *bona fide* job opportunity and places the burden on the employer to provide clear evidence that a valid employment relationship exists. The Employer must establish that a *bona fide* job opportunity is available to domestic workers and that the employer has, in good faith, sought to fill the position with a U.S. worker. *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*); *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*).

In the instant case, the CO found the Employer's evidence unconvincing. Specifically, the CO questioned whether the Employer was able to provide permanent, full-time employment at the terms and conditions advertised. The CO pointed to the Alien's contract which indicated that he would be provided a private room. The Employer had also petitioned for a second alien staff worker. This caused the CO to question where the patients would live, as the care home only had enough rooms to house four residents and one staff worker. In response to the CO's concern, the Employer indicated that the Alien would share a bedroom with another staff worker.<sup>2</sup> (AF 86). We agree with the CO's findings that the Employer has failed to establish that there is a *bona*

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<sup>2</sup> In his request for review, the Employer indicated that the Alien would be transferred to another care home in the vicinity of the one which the Employer advertised the job opening in order to provide the Alien with a private room. (AF 1-4, 8).

*fide* job opportunity available and that the Employer is able to fulfill the terms and conditions of the Alien's contract.

Under the regulations, “[t]he employer shall document that its requirements for the job opportunity, as described, represent the employer’s actual minimum requirements for the opportunity, and the employer has not hired workers with less training or experience for the job similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer’s job offer.” 20 C.F.R. § 656.21(b)(5). In the instant case, the CO concluded that the Employer held U.S. workers to a higher standard of qualification than was required of the Alien when the Alien was hired without the minimum three months of experience in the job as described in box 13 on the ETA 750A.

In rebuttal, the Employer submitted to the CO two certificates certifying the Alien’s prior work experience. (AF 10, 124). The first certificate indicated the Alien performed the duties of a caregiver from January 12, 1998 through July 9, 1998 for Tahanan Ni Maria, a care home in the Philippines. (AF 10). The second certificate indicated that the Alien was a volunteer caregiver at Tahanan Ni Maria for the same period of time and at the same wage. (AF 124).

The evidence of record is contradictory regarding the Alien’s qualifications. Viewing the certificates from Tahanan Ni Maria, it is unclear whether the Alien worked as a caregiver or as a volunteer caregiver. Each certificate describes different duties performed by the Alien, with the certificate listing the Alien as a caregiver, and with a verbatim recitation of the duties listed in box 13 of the ETA 750A. According to the Alien’s resume, however, he only has one month of experience as a caregiver. It is our determination that the evidence of record does not establish that the Alien has the requisite experience to qualify him for the job offer. *See, e.g., Apartment Management Company/Southern Diversified Properties, Inc.*, 1988-INA-215 (Feb. 2, 1989) (*en banc*).

The Employer petitioned for a Schedule B waiver of the job offer on the grounds that: (1) no one responded to the job posting; (2) the job offer was posted with the local job service office for thirty (30) days; and (3) the job service office ran the job order suppressed for thirty days. According to 20 C.F.R. § 656.11, certain occupations are listed on Schedule B as unsuitable for permanent labor certification because it has been determined that there are sufficient U.S. workers who are able, willing, qualified and available for these occupations and that the wages and working conditions of U.S. workers similarly employed will generally be adversely affected by employment of aliens in these Schedule B occupations. 20 C.F.R. § 656.23. The regulations do provide that a waiver from Schedule B may be filed pursuant to 20 C.F.R. § 656.23.

The occupation in the instant case, nurse assistant, is listed on the Schedule B list of non-certifiable occupations. The CO denied the Employer's request for a waiver because the job order submitted by the Employer was not suppressed when it was run by the job service office, thus disqualifying it from waiver consideration. The evidence of record supports the CO's conclusion. The Employer failed to provide documentary evidence that the job order was suppressed and on file with the local job service office for thirty calendar days and that he was unable to obtain a qualified U.S. worker. Therefore, denial of the Employer's request for a Schedule B waiver was appropriate.

## **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.