



**Issue Date: 07 July 2004**

**BALCA Case No.: 2003-INA-90**  
ETA Case No.: P2000-CA-09507642

*In the Matter of:*

**ELENA'S CARE HOME,**  
*Employer,*

*on behalf of*

**DORINDA BAUTISTA,**  
*Alien.*

Appearance: Evelyn Sineneng-Smith, Immigration Consultant  
San Jose, California  
For the 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 Dorinda Bautista ("the Alien") filed by Elena's Care Home ("the 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") 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 June 7, 1999, the Employer, Elena's Care Home, filed an application for labor certification to enable the Alien, Dorinda Bautista, to fill the position of "Household Domestic Worker/Caregiver," which the Job Service classified as "Nurse Assistant." The job duties for the position included cleaning the home, preparing and serving meals, doing laundry, as well as most aspects of patient care, including personal hygiene, for six developmentally disabled patients. The stated job requirements for the position were four years of high school education and three months of experience in the job offered. The Employer also required the worker to live on the premises and be on call twenty-four hours per day. (AF 113).

In a Notice of Findings ("NOF") issued on June 18, 2002, the CO proposed to deny certification on the following grounds: 1) the job opportunity is not clearly open to any qualified U.S. workers as required in 20 C.F.R. § 656.20(c)(8); 2) the split shift requirement is unduly restrictive under 20 C.F.R. § 656.24(b)(3); and 3) the live-in requirement is unduly restrictive under 20 C.F.R. § 656.21(b)(2)(iii). (AF 106-111). The CO specifically questioned the relationship between the Alien and the owner of the company, as they had the same last name. The CO questioned whether the Alien had any ownership interest in the company or was related to someone with ownership interest in the company.

On July 18, 2002, the Employer filed its rebuttal. (AF 38-105). The Employer stated that the Alien had no ownership interest in the company and is merely an employee. The Employer claimed that if labor certification is denied, it would be forced to hire a U.S. worker and that this fact demonstrates that the job is clearly open to U.S. workers.

The CO found the rebuttal unpersuasive and issued a Final Determination ("FD"), dated November 27, 2002, denying certification on the above grounds. (AF 34-37). The CO noted that it was still not clear whether the Alien had an ownership interest in the

company because the issue of a familial relationship had not been addressed. Further, the CO noted that the Alien had been paid a wage much higher than the wage offered. The Employer's offer to readvertise did not cure the deficiencies noted and therefore, was inadequate. (AF 35-37).

On December 30, 2002, the Employer filed a Request for Review, together with various supporting documents. (AF 2-33). The CO treated the foregoing submission as a Request for Reconsideration, and denied reconsideration of December 31, 2002. The matter was docketed in this Office on February 14, 2003 and the Employer filed a brief on April 1, 2003.

## **DISCUSSION**

Twenty C.F.R. § 656.20(c)(8) requires an employer to establish that “[t]he job opportunity has been and is clearly open to any qualified U.S. worker.” Although the term “bona fide job opportunity” does not appear in the regulations, it has been incorporated therein by judicial and administrative interpretations. *See, e.g., Pasadena Typewriter and Adding Machine Co., Inc. and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AABT (C.D. Cal 1987); *Amger Corporation*, 1987-INA-545 (Oct. 15, 1987)(*en banc*). Accordingly, the employer has the burden of providing clear evidence that a valid employment relationship exists and that a bona fide job opportunity is available for qualified U.S. workers.

In the NOF, the CO stated that the Alien and the owner of the business had the same last name. Therefore, it appeared that the Alien was related to someone with an ownership interest in the company. The Employer was instructed to show the extent of the ownership interest, if any, by the Alien and how the job was clearly open to a U.S. worker. (AF 107). The rebuttal consisted of a memo, signed by the Employer's owner, Myrna Bautista, which also cited the Employer's payroll returns and a Schedule C. (AF 39-40). The memo stated that the Alien had no ownership interest in the company. The Employer noted that the job was clearly open to U.S. workers because if labor

certification was denied, the Alien would have to be terminated and a U.S. worker hired to replace her. In addition, the Employer noted that because they only required three months of experience, many U.S. workers were qualified for the job.

In the FD, the CO stated that the Employer did not address whether the Alien was related to the Employer. The CO noted that although the offered wage was \$1267 per month, the Alien had been paid \$3000 per month in 2000 and 2001. Therefore, the CO concluded that the Alien might have a special relationship with the Employer. The CO argued that if there is such a relationship between the Employer and the Alien, it seems unlikely that the Employer would displace the Alien to hire a U.S. worker. (AF 36-37).

Upon review, we find that the Employer's rebuttal failed to address the CO's reasonable request for relevant information regarding a possible familial relationship between the Alien and the Employer and the Alien's resulting influence on the Employer's hiring decisions. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Such a familial relationship between the Alien and the Employer, while not *per se* requiring denial of certification, would be one of the factors to be considered in determining whether or not there is a bona fide job opportunity and increases the level of scrutiny to be paid to the application. *See, e.g., Young Seal of America*, 1988-INA-121 (May 17, 1989)(*en banc*); *cf. Paris Bakery Corporation*, 1988-INA-337 (Jan. 4, 1990).

Furthermore, we also find the Employer's rebuttal argument unpersuasive. The Employer's acknowledgement that if labor certification is denied, it will be compelled to terminate the Alien and hire a U.S. worker does not constitute evidence that the job offer is clearly open to U.S. workers. Moreover, the Alien's inflated earnings, which greatly exceed the stated rate of pay, also tend to undermine the Employer's assertion that the job opportunity is a bona fide one, which is clearly open to qualified U.S. workers. (AF 91-93, 113).

Finally, we decline to consider any new evidence or argument submitted by the Employer with its request for review because such evidence and argument should have

been raised prior to the issuance of the FD, and is not part of the record on appeal. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989)(*en banc*).<sup>1</sup>

In view of the foregoing, labor certification was properly denied.<sup>2</sup>

### **ORDER**

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

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**

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<sup>1</sup> Assuming that the Employer's post-FD submission was properly before us, it would not adequately cure this deficiency. The new evidence confirms that the Alien is the sister of Roberto and Myrna Bautista, owners of the business, and that she lives on the premises owned by her brother and leased to the Employer. Notwithstanding the Employer's efforts to explain the Alien's inflated wages and despite the assertion that the Alien is simply an employee, based on the totality of the circumstances, we find that the Employer has failed to demonstrate that this is a bona fide job opportunity. (AF 9-10).

<sup>2</sup> Accordingly, it is unnecessary to address the other grounds upon which the CO denied certification.

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.