



Issue Date: 04 August 2004

BALCA Case No.: 2003-INA-210
ETA Case No.: P2000-CA-09508119

In the Matter of:

ERACHEL,
Employer,

on behalf of

GEMMA ESTOCADO FORMENTO,
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 matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien employment certification. Permanent alien employment certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). We base our decision 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. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

Erachel (“the Employer”) operates a residential care home in Chula Vista, California. On August 30, 2000, the Employer filed an application for alien employment certification on behalf of Gemma Estocado Formento (“the Alien”) to fill the position of Caregiver/Household Domestic Worker. (AF 61). The duties for the position involved handling nursing and general housekeeping tasks.

The CO issued a Notice of Findings (“NOF”) on June 26, 2002, proposing to deny certification for three reasons: (1) the Employer’s job description was an unduly restrictive combination of duties in violation of 20 C.F.R. § 656.21(b)(2)(ii); (2) the requisite contract for a live-in employee was incomplete; and (3) the Employer had not shown that the Alien had been paid wages while employed in the position. (AF 20-21). The Employer was directed to document that U.S. workers customarily performed the combination of duties in the area of intended employment, or that the combination of duties resulted from business necessity. (AF 19).

The Employer’s rebuttal, dated July 10, 2002, was received by the CO on July 31, 2002. (AF 23-51). The Employer argued that this combination of duties is usual or customary in the occupation. The Employer submitted a copy of California regulations regarding caregivers at residential facilities, as well as advertisements for similar positions. The Employer also included wage reports and a copy of the employment contract.

The CO found the rebuttal to be unpersuasive regarding the unduly restrictive combination of duties and issued a Final Determination (“FD”) denying labor certification, dated August 27, 2002. The CO noted that the Employer had failed to establish that the requirement was usual in the occupation and had not established business necessity for the requirement. The CO argued that the Employer had not demonstrated that both housework and patient care needed to be performed by the same

person. Further, the CO found that the Employer's apparent preference for a single employee performing these duties did not constitute business necessity.

The Employer filed its Request for Review on September 20, 2002, and the matter was docketed in this Office on June 10, 2003.

DISCUSSION

In the ETA 750A, the Employer listed the job duties as cleaning the house, washing clothes and dishes, and performing many aspects of patient care, including caring for personal hygiene needs, for elderly patients. Special requirements of living on the premises and being on-call twenty-four hours per day were also listed. (AF 61).

If an employer's description of a job opportunity requires duties appearing under a single *Dictionary of Occupational Titles* ("DOT") job heading, then the petitioned position does not require a combination of duties; conversely, a petitioned description that lists duties that do not appear in any single DOT job description will be deemed to require a combination of duties and is presumed to be unduly restrictive. *Robert L. Lippert Theatres*, 1988-INA-433 (May 30, 1990) (*en banc*); *H. Stern Jewelers, Inc.*, 1988-INA-421 (May 23, 1990). Based on the listed requirements of cleaning the house, bathing clients and assisting them with their medications, the CO correctly found that the Employer's description of the job opportunity did not appear in any one DOT job description, but instead combined the listed duties of a Nurse Assistant with those of General Houseworker. The DOT entry for Nurse Assistant enumerates a number of duties involving administering to the personal needs of patients, including dusting and cleaning patients' rooms. It does not require the type of comprehensive housecleaning described in the DOT's description of General Houseworker and the Employer's job listing. The CO correctly concluded that the job opportunity offered by the Employer involved a combination of the job duties of Nursing Assistant and General Houseworker.

Where the job opportunity involves a combination of duties, it will be considered unduly restrictive unless the employer establishes that (1) it has normally employed persons for that combination of duties; (2) workers customarily perform the combination of duties in the area of intended employment; or (3) the combination job opportunity is based on a business necessity. 20 C.F.R. § 656.21(b)(2)(ii); *Lucky Horse Fashion, Inc.*, 1997-INA-182 (Aug. 22, 2000) (*en banc*). An employer's failure to establish that the combination of duties is either customary or arises from business necessity is grounds for denial of labor certification. See *Wang Westland Indus. Corp.*, 1988-INA-27 (Mar. 3, 1989) (*en banc*).

If an employer asserts that the combination is customary in the area of intended employment, it must provide evidence to support the assertion. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). The Employer failed to document that it had normally employed persons to perform the combined duties of a Nurse Assistant and a Houseworker, and thus failed to justify the combination on this ground.

The Employer contended that California's regulatory requirements for residential care facility personnel establish that care providers customarily perform the combination of duties stated in its advertisement of the job opportunity. See Title 22, Cal. Code Regs. tit. 22, §§ 87565, 87577, 87578. (AF 23-29). Those regulations provide

(c) All personnel shall be given on the job training or have related experience...[which] shall provide knowledge and skill in the following, *as appropriate for the job assigned* and as evidenced by safe and effective job performance: (1) Principles of good nutrition, good food preparation and storage, and menu planning. (2) Housekeeping and sanitation principles. (3) Skill and knowledge required to provide necessary resident care and supervision, including the ability to communicate with residents.

Title 22, Cal. Code Regs. tit. 22, § 87565(a) (*emphasis added*). The Employer's description of job duties requires a single person to administer medication to residents and handle all housekeeping duties. In contrast, the regulations require only that a residential care facility worker be proficient in feeding, cleaning up after, and communicating with the residents "as appropriate for the job assigned." The regulations

do not require any one employee to be proficient in all of the listed areas, nor do they establish that the combination of duties is customary in residential care facilities.

The Employer also provided newspaper advertisements of purportedly similar positions in a further effort to show that the combined duties were customary in its industry. As the CO noted in the FD, at least some of the advertisements solicited applicants for live-in childcare providers in private homes. (AF 3). Such positions are inapposite to the position of a nurse assistant caring for multiple resident patients in the Employer's facility. Moreover, those advertisements that did show positions for live-in caregivers did not require the combination of duties that the Employer required. Thus, the CO properly concluded that the Employer failed to establish that the combined duties of a Nurse Assistant and General Houseworker are customarily performed in residential care facilities.

For a combination of duties to be based on business necessity under 20 C.F.R. § 656.21(b)(2)(ii), an employer must document that it is necessary to have one worker to perform the combination of duties, in the context of the employer's business, including a showing of such a level of impracticability as to make the employment of two workers infeasible. *Robert Lippert Theatres*, 1988-INA-433 (May 30, 1990) (*en banc*). In its rebuttal, the Employer provided four unsupported reasons that a part-time worker would be unable to perform the alien's job: 1) consistency of care; 2) communication; 3) the clients' status as dependent adults; and 4) the presence of non-verbal clients. (AF 23). The Employer supplied no evidence to show how having housework performed by a part-time worker would have an adverse effect on consistency of care, the communication between workers, or on the clients.

The Employer's description of the job opportunity also stated that another nurse assistant helped the Alien perform the household duties and care of the residents and that the Alien spent only 20% of her time on the general household duties. (AF 23). This information fails to establish why it is necessary for either nurse assistant to perform the combination of duties.

An employer's assertion of convenience or practicality, with no consideration of possible alternatives, is not enough to establish the business necessity of a combination of duties. *Robert Lippert Theatres, supra*. In light of the significant amount of time nursing assistants devote to housework at the facility, and without any evidence to show how a part-time worker would adversely affect its quality of care, we find that the Employer has failed to demonstrate a business necessity for combining the duties of Nurse Assistant and General Houseworker, and that such a combination of duties is unduly restrictive under 20 C.F.R. § 656.21(b)(2)(ii).

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.