



**Issue Date: 30 June 2004**

**BALCA Case No.: 2003-INA-203**  
ETA Case No.: P2001-CA-09509921/GH

*In the Matter of:*

**GREEN ACRES GROUP HOME,**  
*Employer,*

*on behalf of*

**REYNALDO NAVA,**  
*Alien.*

Appearances: 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 arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Household Domestic Worker/Caregiver.<sup>1</sup> The CO denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

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<sup>1</sup> Permanent alien labor 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."). Unless otherwise noted, all regulations cited in this decision are in Title 20. 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**

On August 22, 2000, the Employer, Green Acres Group Home, filed an application for labor certification to enable the Alien, Reynaldo Nava, to fill the position of Household Domestic Worker/Caregiver. (AF 209). The position was classified as “Nurse Assistant” by the Employment and Training Administration. The hours for the position were 8 a.m. to 5 p.m., with overtime “as needed.” Also listed under Other Special Requirements were the requirements that the applicant live on the premises and be on call twenty-four hours per day.

On November 8, 2002, the CO issued a Notice of Findings (“NOF”), proposing to deny certification because there did not appear to be a bona fide job opportunity clearly open to U.S. workers and the Employer had tested the wrong labor market. (AF 204-207). The CO noted that this Employer had filed at least sixteen applications for permanent alien labor certification for full-time caregivers. Three had been certified, two had been withdrawn by the Employer and eleven were still pending. Given that the Employer stated that it had a twelve room residential care home with six residents, the CO questioned whether the Employer could have fourteen bona fide job opportunities for caregivers, for whom the Employer would provide room and board. The CO observed that if all the workers were hired, the cost to the Employer would exceed \$200,000 per year. (AF 205).

To correct this finding, the Employer was directed to respond to several questions, including how many employees it had on its payroll, how many employees lived on the premises, how its twelve rooms were distributed among staff and residents, how many individuals it had sponsored for permanent labor certification and whether the Employer did business under more than one name. The Employer was also requested to submit copies of tax returns for 2000, 2001 and 2002, its business license, bank statements, names of all employees from 2000, 2001 and 2002 and a floor plan of its premises. With regard to the issue of an inadequate test of the labor market, the Employer was directed that if it demonstrated that a bona fide job opportunity existed, it would be required to

conduct another test of the labor market. The Employer was advised to indicate that it was willing to retest the labor market. (AF 205-206).

The Employer submitted rebuttal which was received on January 21, 2003. (AF 23-203). Included were numerous documents including its business license, tax returns, bank statements, quarterly wage and withholding reports, a list of employees, and a floor plan. The Employer explained that it had nine employees, six of whom lived on the premises. The home had three bedrooms housing two clients in each room, and four bedrooms for six staff members. Two of these bedrooms were doubles and two bedrooms were private. The beneficiary of the application would have a private room. The Employer stated that it had four group homes and utilized Green Acres Group Home as the training ground for employees for its other facilities. The other three facilities were "DBAs" and the Employer termed them "single proprietorships." The Employer indicated its willingness to re-advertise the position in the appropriate newspaper.

A Final Determination ("FD") was issued on March 4, 2003, denying certification. (AF 19-22). The CO found that the Employer's rebuttal failed to support that the job as described on the ETA 750A existed and was clearly open to any qualified U.S. worker. The CO found that the Employer's rebuttal provided evidence that the job opportunity did not exist at the Green Acres Group Home. The Employer's application did not state that the employee would work at any location other than the one listed on the ETA 750A, nor did it state that it had any affiliated entities. While the Employer stated in rebuttal that the employee would be transferred from the Green Acres Group Home to other facilities, this was not mentioned in the ETA 750A. Furthermore, the Employer had submitted documentation that it was a non-profit entity listed as a "Children's Group Home," and its business license indicated it was a facility licensed to serve children from birth to seventeen years, however, nothing on the application indicated that the caregiver would work with children. Finally, the CO also found that the Employer had failed to provide any documentation to support its claim that the other residential care homes were related to the instant home, particularly given that the rebuttal classified these entities as "single proprietorships." The owners submitted their

personal tax returns showing income from three residential care facilities, but this did not establish that the other facilities had any relationship with the instant Employer. Without clear documentation that the three other facilities were part of the instant Employer and not separate entities, the CO found that they could not be considered in evaluating whether the Employer required the services of an employee to perform the duties stated on the ETA 750A. As the Employer failed to document that the job opportunity existed at the time and was open to U.S. workers, the application was denied. (AF 20-22).

On April 7, 2003, the Employer filed a Request for Review and the matter was docketed in this Office on May 23, 2003. (AF 1-18). In its request for review, the Employer argued that there is a bona fide job opening because once certification is granted, the Alien will be transferred to the location stated on the ETA 750A. The Employer explained that the Alien was currently working at another site because of a temporary need at another home owned by owner's daughter. The Employer attached the business/care home licenses for several homes, claiming that they showed a connection between the homes. The Employer noted that the owner's daughter would have ownership interest in these homes if the owner died. Finally, the Employer requested that, in lieu of a denial, it be allowed to re-advertise and retest the labor market. The Employer included a new advertisement, which indicated that the patients to be cared for were children under the age of eighteen. (AF 14).

## **DISCUSSION**

Twenty C.F.R. § 656.20(c)(8) requires that the employer offer a *bona fide* job opportunity. *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*). Whether a job opportunity is *bona fide* is gauged by a "totality of the circumstances" test. *Id.* The license issued by the State of California Department of Social Services allows Green Acres Group Home to operate a group home for children under the age of eighteen. (AF 9). The position being advertised was described as caregiver for adults aged eighteen to fifty-nine years. The advertised position is not the one which actually exists with the instant Employer at the address listed in the ETA 750A. The Employer

concedes that the position does not exist, inasmuch as in its Request for Review, it has offered to change the job description. That offer is not timely made. Furthermore, the fact that the employee would not even work at the location listed in the application is additional evidence dictating a finding that the position, as described in the ETA 750A, does not exist. Therefore, the Employer has failed to demonstrate that a bona fide job opportunity exists. As such, labor certification was properly denied.

## **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.