



**Issue Date: 23 August 2004**

**BALCA Case No.:** 2003-INA-168  
**ETA Case No.:** P2000-CA-09509691/ML

*In the Matter of:*

**ROLAN'S RESIDENTIAL CARE,**  
*Employer,*

*on behalf of*

**MYRA MORALES,**  
*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 arises from Rolan's Residential Care's ("the Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. 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 June 15, 2000, the Employer filed an application for labor certification on behalf of the Alien to fill the position of “Household Domestic Worker/Caregiver.” The Employer required four years of high school education and three months of experience. The position required that the caregiver live at the Employer’s facility, a residential home for developmentally disabled patients. (AF 42).

On November 7, 2002, the CO issued a Notice of Findings (“NOF”) proposing to deny labor certification. (AF 36-40). The CO found that the position which the Employer sought to fill was accurately characterized as “Nurse Assistant” and was therefore on the list of non-certifiable occupations. Accordingly, the CO instructed that the Employer could submit a Schedule B waiver with supporting documentation from the local job service office showing that the Employer “had a ‘suppressed’ job order on file.”<sup>1</sup> Finally, the NOF indicated that the Alien lacked the minimum requirements for the position because she did not have three months of experience in each of the job duties described in the application.<sup>2</sup> The CO instructed the Employer either to submit an amended ETA 750A or an amended ETA 750B, or to document the infeasibility of hiring workers with less experience than that required by the job offer.

The Employer filed a rebuttal on January 15, 2003. (AF 8-35). The Employer stated that it had complied with the waiver requirements of 20 C.F.R. § 656.23(d)(2), explaining that an employee of the EDD informed the Employer that all requests for labor certifications were processed as “suppressed” job orders. In addition, the Employer provided the name and phone number of the EDD employee with whom the Employer spoke. To rebut the CO’s contention that the Alien was not qualified in the important job duties, the Employer submitted two “employment verification” forms. (AF 12-13). The

---

<sup>1</sup> In the FD, the CO defined a suppressed job order as one “with accounting for respondents.” (AF 7).

<sup>2</sup> Although the CO listed several other deficiencies in the Employer’s application, those deficiencies were not grounds for the FD denying certification.

forms listed the duties performed by the Alien in previous jobs, including monitoring vital signs, feeding, grooming, bathing, and sponge bathing.

The CO issued a Final Determination (“FD”) denying labor certification on February 5, 2003, finding that the Employer’s job order did not qualify the petition for waiver from Schedule B. (AF 9). The CO stated that while the job service currently runs all job orders as “suppressed,” at the time the Employer’s job order was listed, it was not standard practice to do so. Thus, the CO concluded that the Employer’s job order was run unsuppressed. The CO defined “unsuppressed” as “without any way to account for responses from available U.S. workers.” Finally, the CO found that the Employer did not demonstrate that the Alien had the necessary qualifications for the position, noting that there was no proof that the Alien had experience with the following duties:

“ . . . assist developmentally-disabled residents with behavioral problems, self-destructive, violent, aggressive, verbally-abusive, handicapped, wheelchair bound, disabled and other ailments . . . ambulating, exercising, shaving; assist with medications; provide hair care, mouth care, bowel care, skin care, personal hygiene (clean the body of dirt, feces, urine); . . . straighten rooms; change diapers; clean up mess; . . . [h]elp those with walkers, canes and wheel chair bound residents with their needs . . . [m]ay wake up at night for toilet needs, empty commodes . . . [i]nspect all health hazards, furnitures and equipments (sic) . . . watch for signs of depression, . . . reposition residents, report any unusual, uncommon behavior to licensee, social worker, psychologist.”

(AF 7).

On March 6, 2003, the Employer requested review of the denial on the grounds that the local job service informed the Employer that its job order was run suppressed and that the Employer otherwise met the requirements for a Schedule B waiver. (AF 1-5). The Employer requested an opportunity to retest the labor market and to re-advertise the job offer. (AF 2). Additionally, the Employer asserted that the Alien met the minimum qualifications required by the job opportunity, as documented in previously submitted employment verification forms. (AF 3). The Employer also sought to amend the ETA 750A.

On May 12, 2003, the Employer submitted an additional statement, indicating that its request was based on additional evidence submitted to the CO on March 6, 2003 and on its prior offers to retest the labor market. The Employer made those offers on January 15, 2003 and February 20, 2003.

## **DISCUSSION**

As an initial matter, we note that the Employer's request for review contained additional evidence not previously submitted to the CO. Since it was not part of the record on which denial of certification was based, it cannot be considered by the Board. 20 C.F.R. § 656.26(b)(4).

### ***Minimum Requirements***

An employer must establish that the alien possesses the stated minimum requirements for the position. *Charley Brown's*, 1990-INA-345 (Sept. 17, 1991); *Pennsylvania Home Health Services*, 1987-INA-696 (Apr. 7, 1988). As part of its labor certification application, an employer must document that the requirements for the job opportunity represent the actual minimum requirements of the job. The Employer must also show either that it has not hired workers with less training or experience for similar jobs 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).

The CO denied certification in part because he found that the Alien lacked three months of experience in every aspect of the job as described on the ETA 750A. The CO found that the Alien lacked sufficient experience caring for developmentally disabled residents with certain behavioral traits. The Alien's statement of qualifications did not indicate that she had experience caring for developmentally disabled residents. The Employer has indicated that the patients are severely mentally retarded and some have behavioral problems. In rebuttal, the Employer noted that all the patients cannot use the restroom by themselves, some residents are physically abusive, and all need twenty-four hour supervision. (AF 29-30). The Alien has experience as a caregiver, assisting in

patient care and medical treatment. However, the Alien does not have the required three months of experience working with developmentally disabled patients. The Employer required this experience, as the Employer required three months of experience in the job duties, which included working with developmentally disabled patients. (AF 42). The Employer also listed this in the advertisement for the position. (AF 52-54). Clearly, the Employer was requiring three months of experience working with developmentally disabled patients.

The Employer, in rebuttal, presented employment verifications from the Alien's previous employers. These verifications stated that the Alien had experience "taking vital signs, charting, weighing, feeding, grooming, bathing and sponge baths, making beds, and answering calls." (AF 12-13). These verifications did not indicate that the Alien had worked with developmentally disabled patients. The Employer has not presented evidence of the Alien's experience with developmentally disabled patients. If the Employer did not require experience working with these patients, the Employer could have amended the ETA 750A to delete this requirement. The Employer chose not to do so and instead, attempted to document the Alien's qualifications. The Employer has failed to show that the Alien possessed such qualifications when hired and as such, could not rebut the CO's finding.

Based on the foregoing, we find that the CO's denial of certification on the grounds that the Alien lacked the minimum requirements for the job was proper. It is therefore unnecessary to address the CO's other grounds for denial of certification.

## **ORDER**

The CO's final determination denying labor certification is **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 twenty 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW  
Suite 400 North  
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.