



Issue Date: 14 July 2004

BALCA Case No.: 2003-INA-197
ETA Case No.: P2001-CA-09509789/ML

In the Matter of:

SOUTH HILLS COUNTRY HOME,
Employer,

on behalf of

RUTH VIPINOSA OCAMPO,
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 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

On June 9, 2000, the Employer filed an application for alien employment certification on behalf of the Alien, Ruth Vipinosa Ocampo, to fill the position of "Caregiver / Household Domestic Worker."¹ (AF 84). The job duties included caring for patients with Alzheimer's Disease, disabled patients, patients in wheelchairs, and blind and/or deaf patients. The position also required cleaning the home, preparing and serving meals, performing personal hygiene care for patients and inspecting health hazards, furniture and equipment. The duties of cleaning, laundry and food preparation were later deleted. Other special requirements were knowledge of food preparation and nutrition, fluency in English, and certification in CPR and First Aid. The Employer further required that the worker reside on the premises and be on-call twenty-four hours a day. The on-call requirement and knowledge of nutrition and food preparation were later deleted. (AF 84).

On June 27, 2000, the California Alien Labor Certification Office advised the Employer of defects in the ETA 750A and specifically proposed amendments. It advised the Employer to delete the live-in requirement or justify it as a business necessity; to amend the employer/employee contract in place between the Employer and the Alien to conform to the job offer; and to amend the wage offer to \$1,166.53 from \$900.00, to accurately reflect the rate paid to workers who are similarly employed in the Employer's area. (AF 122). It further advised the Employer to complete the "Date Started" item on the ETA 750B. (AF 123). It concluded by stating that the Alien does not appear to possess the education, training or experience required by the job offer. (AF 123).

On August 4, 2000, the California Alien Labor Certification Office additionally provided instructions on recruitment in a letter to the Employer's representative. (AF 116-118). The Employer then advertised the position in the Los Angeles Times on August 30, 31 and September 1, 2000, on a bulletin board in the care home from August

¹ The Department of Labor classified the occupation title as "Nurse Aide" and advertisements for the position thereafter used the term Nurse's Aide or Nurse's Assistant. (AF 84).

10, 2000, through August 20, 2000, and with CALJOBS from August 11, 2000, through September 10, 2000. (AF 48, 88, 108-112). In response to its recruitment efforts, the Employer only received one applicant referral from the Employment Development Department (“EDD”). (AF 106-107).

On November 13, 2002, the CO issued a Notice of Findings (“NOF”) proposing to deny certification on the ground that the Employer rejected a U.S. applicant for other than lawful, job-related reasons. (AF 77-82). The CO noted that the U.S. applicant was qualified for the position, but was rejected. The Employer was instructed to provide lawful, job-related reasons for this rejection. (AF 81). The CO also determined that the Alien was hired without the requisite qualifications, that the job opportunity involved an unlawful combination of duties, and that there was a question as to the bona fide nature of the job.

After requesting an extension of time, the Employer’s rebuttal was received by the CO on January 21, 2003. (AF 8-76). The Employer submitted copies of his business license, tax returns, and employment verification from the Alien’s former employers. The Employer stated that the U.S. applicant had no experience working in a care home, although the Employer acknowledged that she had the training to perform such duties.

The CO found the rebuttal to be unpersuasive regarding the above-stated deficiency and issued a Final Determination (“FD”) denying labor certification, dated February 13, 2003. (AF 6-7). The CO found that the Alien did not have the detailed level of experience that the Employer was requiring of U.S. applicants. The CO determined that the Alien was hired at a much lower standard than that required of U.S. workers. The CO also found that the U.S. applicant was fully qualified for the position and had been recommended by a former employer and had a nurse assistant certificate and a certificate as a home health aide. (AF 7).

On March 11, 2003, the Employer requested review and the matter was docketed in this Office on May 23, 2003. (AF 1-5). The Employer requested the opportunity to re-

advertise the position, deleting the unlawful combination of duties. The Employer made no further arguments with respect to the unlawful rejection of the U.S. applicant.

DISCUSSION

An employer who seeks to hire an alien for a job opening must demonstrate that it first made a good faith effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (October 27, 1988). Actions by employers that demonstrate lack of an effort to recruit U.S. workers, or that prevent qualified U.S. workers from pursuing their applications, constitute grounds for denial of labor certification.

When an employer files an application for labor certification, it is signifying that it has a *bona fide* job opportunity that is open to U.S. workers. *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*). Inherent in this presumption is the notion that the employer legitimately wishes to fill the position with a U.S. applicant and will expend good faith efforts to do so. *Id.*

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). If a U.S. applicant has applied for the position, the CO must consider the applicant able and qualified for the job opportunity if the applicant, by education, training, experience or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. 20 C.F.R. § 656.24(b)(2)(ii).

Here, the CO found the U.S. applicant to be fully qualified for the position. At the time of the application, she had completed an occupational training course entitled “Home Health Aide,” as well as courses in Alzheimer’s Disease, HIV and the Healthcare Worker, CMV Retinitis and Oxygen Machines. (AF 94-100). In addition to demonstrating her academic qualifications to the Employer during the application

process, she submitted a letter of reference from the Administrator of the British Home in California, Ltd., which stated “I can heartily endorse [this applicant] for a position as a C.N.A. [She] is loyal and dependable, and is considerate to the elderly residents that reside at this non-profit retirement facility.” (AF 91).

On the other hand, the Alien beneficiary of the application failed to meet virtually all of the requirements listed in the job description. As stated by the CO, “the evidence shows that Alien has no experience with ‘Alzheimer’s disease, diabetic, hypertension, cancer, stroke victims, Kidney disease, incontinent, wheel-chair bound, disabled, blind, deaf... assist with shower, bed bath, sponge bath...’” (AF 7). In short, the Employer could not substantiate its rejection of the U.S. applicant with job-related reasons. As the CO stated in the FD, “you require a much higher standard of qualification of U.S. workers than was required of the alien...” (AF 7). Because the Employer failed to satisfy its burden of proof by demonstrating that it rejected the U.S. applicant for lawful, job-related reasons, the application for alien employment certification is denied. 20 C.F.R. § 656.21(b)(6).²

ORDER

The CO'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

² In addition, as explained in the FD, the occupation at issue in this case appears on the Schedule B list of non-certifiable occupations. The Employer had the opportunity to waive the occupation’s non-certifiable status by posting a 30-day suppressed job order showing no availability of U.S. workers. However, it failed to accomplish the waiver as it posted the 30-day job order as unsuppressed. (AF 7). The Employer’s argument that the state agency runs all job orders as suppressed may be true; however, as this job order was run in 2000, before this policy took effect, this does not remedy the deficiency.

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.