



Issue Date: 14 January 2004

BALCA Case No. 2002-INA-293
ETA Case No. P2000-CA-0948781/LA

In the Matter of:

CAREGIVERS MANOR,
Employer,

on behalf of

RICARDO ELEAZAR SANTOS,
Alien.

Appearance: Michael D. Ullman, Esquire
Beverly Hills, California
For 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 Employer's request for review of the denial of alien labor certification for the position of "Manager, Board and Care."¹ The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

¹ 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 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

Employer, Caregivers Manor (“Employer”) filed the above-referenced application for labor certification on January 14, 1998, to enable the Alien, Ricardo Eleazar Santos, to fill the position of “Manager, Board and Care.” (AF 125). The job required no education and two years of experience in the job offered or in the related occupation of board and care administration. Listed as “Other Special Requirements” were the completion of a RCFE (Residential Care Facility for the Elderly) course, as well as CPR and First-Aid certification. The job duties included managing and overseeing operations at the residential facility. (AF 125).

The CO issued a Notice of Findings (“NOF”) on November 23, 2001, proposing to deny certification because he found the Other Special Requirements to be unduly restrictive, in violation of 20 C.F.R. § 656.21(b)(2).² (AF 113). The CO classified the position as a “Residence Supervisor” and pointed out that the Dictionary of Occupational Titles (“DOT”) did not list or imply the disputed requirements in its definition of the occupation. The CO stated that the RCFE requirement was not normally required for the successful performance of the duties of a residence supervisor of a board and care facility. With regard to the requirement of CPR and First-Aid certification, the CO noted that this requirement was also unduly restrictive and could easily be met after the hire of an otherwise qualified U.S. worker. Employer was advised that it could retain the modified requirements, so long as they were clearly offered in the context that they could be acquired after hire, instead of as a pre-condition to hire. Otherwise, Employer needed to document that its requirements were common for the occupation in the United States or document that the requirements were based on business necessity.

Employer submitted rebuttal on December 24, 2001. (AF 60-118). With regard to the requirements found to be unduly restrictive, Employer stated that California state law requires, among other things, the completion of an initial forty hour RCFE certification

²Other issues raised in the NOF were successfully rebutted and will not be detailed herein.

program in order to be a certified administrator of a resident care facility. Employer further contended that the requirement of CPR and First-Aid certification was also a normal and usual requirement for the job and was required by the state of California. Employer included a Fact Sheet issued by the state which indicated that “one should always look to ensure” that the facility has CPR/First Aid Training. (AF 103-109). Employer included pertinent sections of state of California regulations and other documentation in support of its position. (AF 85-100). Employer indicated, however, that if the CO still believed that the requirements were restrictive, it would amend the requirements to indicate that they must be reached within a very reasonable period of time upon hire. (AF 73). A proposed new advertisement was submitted with rebuttal. (AF 75).

On March 29, 2002, the CO issued a supplemental NOF. (AF 57-59). Therein, Employer was advised that it needed to choose whether it was proceeding on the basis that the requirements were not excessive or whether it was opting for the corrective action. Rebuttal could not be conditional. (AF 58-59).

On April 15, 2002, Employer submitted rebuttal. (AF 43-56). Therein, Employer stated that all of the requirements for the job were the true and minimum requirements for the position. Enclosed was a letter from Employer’s owner, stating it wished to continue with the requirements as the actual minimum requirements for the job. (AF 48).

The CO issued a Final Determination (“FD”) on May 28, 2002, denying certification. (AF 42). The CO found that the RCFE course was required of an administrator of a residential care facility in the state of California, but was neither common to the occupation of residence supervisor nor required of a residence supervisor. Therefore, the requirement remained unduly restrictive. With regard to the requirement that the applicant have CPR and First-aid certificates, the CO found that Employer had not shown that these certificates must be in a worker’s possession as a condition of employment. The CO noted that the certificates were obtainable in an eight hour course. Furthermore, the Fact Sheet included by Employer in rebuttal referred to CPR and First-

Aid training, not CPR and First-Aid certification. The CO found that the Rebuttal was not persuasive, the special requirements remained restrictive and as such, labor certification was denied.

On June 20, 2002, Employer filed a Request for Review and the matter was docketed in this Office on September 13, 2002. (AF 1-41).

DISCUSSION

Employer submitted a statement in support of its request for review dated October 15, 2002. Employer reiterated its argument that the state of California requires that an employee in this managerial position complete a RCFE course, in addition to CPR and First Aid Certificates. It is Employer's contention that the CO mistakenly found the position at issue to be that of a resident manager and not an administrator. Employer reiterated its willingness to amend its application and retest the labor market.

Twenty C.F.R. § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. An employer cannot use requirements that are not normal for the occupation or are not included in the DOT unless it establishes a business necessity for the requirement. The purpose of 20 C.F.R. § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Rajwinder Kaur Mann*, 1995-INA-328 (Feb. 6, 1997).

With regard to all three requirements found to be unduly restrictive, the CO's first NOF advised Employer that it could amend and re-advertise or it could justify the unduly restrictive requirements. Employer attempted both in its rebuttal, offering to amend and re-advertise if the rebuttal was not accepted by the CO. The CO issued a supplemental NOF, directing Employer to choose one; its offer to amend could not be conditional. Employer chose to stand by its requirements and labor certification was denied on the grounds that the requirements were unduly restrictive.

In the FD, the CO denied certification on the grounds that the disputed requirements were unduly restrictive. The CO conceded that an RCFE course is in fact required for an administrator of a residential care facility in the state of California. The CO asserted, however, that the position at issue is a residential supervisor and not an administrator of a residential care facility.

Employer's advertised position is for a manager of a residential care facility for the elderly. The CO's conclusion that this position is a residential supervisor, not an administrator, and therefore an RCFE course is not required, is a finding which Employer should be allowed to address. Throughout this matter, the CO gave the position a different title than that given by Employer, but did not question any of the job duties actually listed in the ETA 750A as unduly restrictive. Those duties included management and administrative duties which are encompassed within those duties described in the California state regulations for an RCFE administrator. Therefore, it is not entirely clear from the record why such duties for this Employer would not require RCFE certification.

The requirement of CPR and First-aid certification, however, does not appear to be a mandatory state requirement for the position and Employer's offer to cure this defect and re-advertise should not have been rejected by the CO because it was conditioned upon the CO's rejection of the rebuttal evidence. This Board has held that an offer to cure may be conditional. *Fernando A. Guerra, M.D.*, 1994-INA-217 (June 27, 1995). An offer to cure a defect may be conditioned on a finding that its rebuttal evidence is not persuasive because an employer cannot predict whether his rebuttal will be persuasive. *Sharon Babb*, 1992-INA-068 (Mar. 31, 1993). In this case, Employer offered a concrete proposal as to how it intended to amend its job offer and re-advertise and therefore, Employer should have been allowed to do so if the CO found Employer's rebuttal to be unpersuasive.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for further consideration of the RCFE course requirement and to allow the Employer to re-advertise the job opportunity.

For the panel:

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JOHN M. VITTON
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor 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, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.