U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 07 September 2004

BALCA Case No.: 2003-INA-247
ETA Case No.: P2000-CA-09509728/ML

In the Matter of:

CHRISTOPHER FRIES OF BRETANO HOUSE,
Employer,

on behalf of

MARILYN CAVA,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Evelyn Sineneng-Smith, Immigration Consultant
San Francisco, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Christopher Fries of Brentano House ("the Employer") filed an application for labor certification[1] on behalf of Marilyn Cava ("the Alien") on May 30, 2000. (AF 55).[2] The Employer seeks to employ the Alien as a nurse assistant. This decision is based on the record upon which the Certifying Officer ("CO") denied

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision, AF is an abbreviation for Appeal File.

certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

In the application, the Employer described the duties of the position as all aspects of patient care, including caring for personal hygiene needs, as well as cleaning the home and reporting unusual behavior to social workers. Other special requirements included First Aid and CPR certification, in addition to living on the premises and being on call twenty-four hours per day. The Employer required a high school education and three months of experience in the job offered. (AF 55).

In the Notice of Findings ("NOF"), issued November 27, 2002, the CO noted that no documentation had been submitted to establish that an on-going business was present which would provide permanent full-time employment to which U.S. workers could be referred. In addition, the CO noted that this occupation is on the Schedule B list of non-certifiable occupations. The CO stated that the Employer could petition for a Schedule B waiver. The CO stated that waiver documentation should include documentary verification from the local job service office that the Employer had a "suppressed" job order on file with the local office for a period of thirty calendar days and that the Employer was not able to obtain a qualified U.S. worker. (AF 49-52).

The CO also determined that the advertisement did not assure applicants that they would be compensated "in accordance with CA state law and regulations" for being on call twenty-four hours a day. The CO stated that if the Employer chose to retest the job market, he should submit a statement indicating that fact and a draft of the advertisement. The CO also found that the Alien was hired without three months of experience in all the job duties listed in box 13 of the ETA 750A. Finally, the CO found that the job description combined duties of multiple occupations and required the Employer either to delete the duties causing the combination or to submit documentation justifying the combination as a business necessity. (AF 49-52).

In its rebuttal, dated January 16, 2003, the Employer submitted documentation to establish that it had an operating business with a full-time opening. (AF 16-28). The Employer petitioned for a Schedule B waiver and reiterated its earlier recruitment report. In addition, the Employer stated that they had been informed by the Sacramento EDD that every request for labor certification is automatically processed for "suppressed CALJOBS order." (AF 29). On the inadequate recruitment effort issue, the Employer stated that he was willing to retest the labor market and to add the words "employer will compensate according to CA state laws and regulations" to the advertisement. A draft advertisement was included with those words inserted. In addition, the Employer deleted some requirements from the job offer and requested that the ETA 750A be amended accordingly. (AF 30). Two statements verifying the Alien's employment from January to June 1998 and July 2001 to September 2002 were submitted. These statements listed various duties performed by the Alien in the care of the elderly individuals. (AF 31-34). The Employer also submitted a memorandum arguing that the combination of duties is a business necessity because of the need for consistency in care by a known caregiver or nurse assistant with vulnerable dependent adults. (AF 35-36).

The CO issued the Final Determination ("FD") on February 13, 2003, denying certification. (AF 12-13). The CO found that the Employer's statement that the Job Service verbally informed the Employer that all job orders are run suppressed was not sufficient documentation. The CO noted that while it might be true that the Job Service runs all job orders suppressed now, the job order ran from September 22, 2000 to October 22, 2000 and was unsuppressed and therefore, there was no way to account for responses from available U.S. workers. Because the job order did not qualify the Employer for a Schedule B waiver, the CO found that the position was not waived from the list of non-certifiable occupations. In addition, the CO stated that the additional statements on the Alien's background did not establish that the Alien had experience with all the specific job duties listed in the application for labor certification. Thus, the CO found that the Alien was hired without the necessary qualifications and the Employer required a higher

standard of qualifications from the U.S. workers than was required of the Alien. (AF 12-13).

On March 12, 2003, the Employer requested review and the matter was docketed in this Office on July 29, 2003. (AF 7). The Employer again argued that every request for labor certification is automatically processed for "suppressed CALJOBS order." The Employer stated that "[w]e unfortunately have no access to the details of this information but we have full trust and confidence in the Department." The Employer requested to re-advertise the job offer and to retest the labor market. The Employer submitted revised employment verifications which included the same text of duties performed as listed in the application for labor certification to establish that the Alien's work for the two employers from January to June 1998 and July 2001 to September 2002 did provide experience in the specific job duties listed on the ETA 750A. (AF 10-11).

DISCUSSION

Twenty C.F.R. § 656.25(e) provides that the employer's rebuttal evidence must rebut all of the findings of the NOF, and that all findings not rebutted shall be deemed admitted. The employer must provide directly relevant and reasonably obtainable documentation that is requested by the CO. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*).

The NOF specifically directed the Employer to submit documentary verification from the local job service office that the Employer had a "suppressed" job order on file with the local office for a period of thirty calendar days and the Employer was not able to obtain a qualified U.S. worker in order to qualify for the waiver regarding this Schedule B non-certifiable occupation. The Employer only submitted a statement that verbal information indicated that all job offers were automatically processed for "suppressed CALJOBS order." The Employer did not state why a written confirmation that their job order was suppressed was not included, and did not indicate any reason why he failed to submit written documentation from the local job office verifying that the job order was

suppressed and was on file for thirty calendar days. It is well settled that an employer's failure to provide documentation reasonably requested by the CO will result in a denial of labor certification. *Gencorp*, *supra.*

In the light of the foregoing, the CO properly found that the Employer has not submitted the necessary documentation for waiver of this position from the Schedule B list of non-certifiable occupations. Therefore, the CO properly denied certification.

In addition, evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant,* 1990-INA-480 (Jan. 7, 1992). Therefore, the additional employment verification statements submitted for the first time subsequent to the request for review will not be considered. Similarly, the Employer's offer to retest the labor market on the Schedule B waiver question on March 7, 2003 will not be considered.

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.