



**Issue Date: 02 September 2004**

**BALCA Case No.: 2003-INA-31**  
ETA Case No.: P2000-CA-09488833

*In the Matter of:*

**BRIGHT STAR HOME,**  
*Employer,*

*on behalf of*

**MARIA MENDIVIL,**  
*Alien.*

Appearance: Robert J. Gleckman, Esquire  
Los Angeles, 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 arose from an application for labor certification on behalf of Maria Mendivil (“the Alien”) filed by Bright Star Home (“the Employer”) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (“the Act”), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer (“CO”) of the United States Department of Labor, San Francisco, California, denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based 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 of the parties. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On October 21, 1997, the Employer, Bright Star Home, filed an application for labor certification to enable the Alien, Maria Mendivil, to fill the position of "Residential Care Supervisor," which was classified by the Job Service as "Residence Supervisor." The job duties for the position included supervision of workers caring for developmentally disabled adults. Responsibilities included arranging for transportation, maintaining daily records, and meeting with family and doctors. (AF 12). The only job requirement for the position was two years of experience in the job offered.

In a Notice of Findings ("NOF") issued on October 29, 2001, the CO proposed to deny certification because the Employer failed to document that there is a bona fide, permanent full-time job opening to which U.S. workers can be referred and because the requirements for the position were unduly restrictive. (AF 7-10).

The Employer submitted its rebuttal on November 15, 2001. (AF 5-6). The CO found the rebuttal unpersuasive and issued a Final Determination ("FD"), dated January 28, 2002, denying certification on the same grounds. (AF 3-4). On December 2, 2002, the Employer filed a Request for Review and the matter was docketed in this Office on December 12, 2002.<sup>1</sup>

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<sup>1</sup> Upon initial review of the file, we found that the FD made references to certain rebuttal attachments which were not contained in the AF. Accordingly, the Board contacted the CO, who was unable to identify any missing pages from the AF. Because the attachments were deemed necessary for adequate appellate review, the Board issued an Order dated March 16, 2004, whereby the Employer was ordered "to provide a copy of the original rebuttal, with attachments, within twenty-one (21) days of the date of this Order." Pursuant to that Order, the Employer's counsel submitted a cover letter, dated March 25, 2004, together with various documents. The Employer's counsel stated that "[t]hese were the only documents submitted with the original response to the Notice of Finding and there are no other documents available." (AF 89-90). The above-referred documents have been included in the AF, and have been marked and received as pages 89 through 94. (AF 89-94).

## **DISCUSSION**

As stated above, the CO questioned whether there was a bona fide job opportunity and stated that the Employer had included unduly restrictive requirements. In the NOF, the CO noted that it appeared that the Employer had not paid any wages. Further, the Employer's business license was for a home in Torrance, not Cerritos, where the position was located. The Employer was directed to submit a copy of his business license and business tax returns. In addition, the CO noted that the job duties went beyond the scope of those detailed for "Residence Supervisor," which was the appropriate job classification. The Employer was instructed either to delete the requirements, to justify them based on business necessity, or to submit documentation showing the requirements as usual in the occupation or industry. (AF 8-9).

The rebuttal consisted of letters by the Employer's counsel and Norlan Machado, both dated November 15, 2001, and an Annual License Fee Notice from the California Department of Social Services, dated May 3, 2000. (AF 5-6, 91). Also included was a portion of a document listing names of persons who apparently are employees of Machado Family Rest Home, together with what appear to be social security numbers and wage amounts. (AF 92-93). In counsel's cover letter, dated November 15, 2001, he stated that "[i]n regards to the issue as to whether the hospital does employ individuals and pays wages enclosed is the California Department of DE 3 – Quarterly Report of Earnings- indicating the names of the employees currently on the payroll of the facility." (AF 5).

The letter from Mr. Machado stated that he believed the job duty of supervision of other workers was necessary, as was the duty of making notes regarding doctors' visits. He indicated that the supervisor cannot just observe what occurs in the home, but must note these occurrences in the file. (AF 94).

In the FD, the CO found that the Employer had failed to submit any documentation to substantiate its assertions regarding the bona fide nature of the job and business necessity for the requirements. As outlined above, the Employer has set forth a requirement of two years of experience in the job offered. Accordingly, the job duties are engrafted within the job requirement. *See Bel Air Country Club*, 1988-INA-223 (Dec. 23, 1988)(*en banc*).

In the NOF, the CO provided the Employer with an opportunity either to amend the restrictive requirement by deleting the unduly restrictive duties or to justify that the restrictive job duties are based on business necessity. The Employer was required to submit documentation to support the rebuttal. The Employer did not choose to delete the restrictive requirement and duties. Instead, the Employer sought to rebut the finding by providing a written statement. (AF 94). Citing this Board's holding in *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), the Employer's counsel contends that the Employer's written assertion constitutes documentation that the CO must consider. The FD clearly indicates that the CO considered the Employer's written statement, but found it to be unpersuasive.

The letter submitted by Mr. Machado is inadequate to document that the listed restrictive duties are justified by business necessity. As held in *Gencorp*, *supra*, although the CO must consider the Employer's written statements, he is not required to accept them as credible or true, in lieu of independent documentation. In this case, Mr. Machado merely asserts that the requirements as stated on the ETA 750A are essential parts of the job description. Mr. Machado claims that the restrictive job duties are mandated by the California Department of Public Social Service and that the facility would be subject to a disciplinary proceeding and/or fine if the duties were not performed. However, the Employer did not present any corroborating independent documentation, such as citations to applicable State laws or regulations. Furthermore, assuming that various procedures are legally required of the facility, such as recording doctor visit information and a daily history of the activities of the charges, Mr.

Machado's written statement does not satisfactorily document that such duties are essential parts of the residential care supervisor position. Accordingly, we concur with the CO's determination that the Employer failed to adequately document that the stated requirements/duties are reasonable and usual in the occupation.

In view of the foregoing, 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.