

**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: 29 April 2011**

**BALCA Case No.: 2011-TLN-00017**

ETA Case No.: C-11031-53708

*In the Matter of:*

**MICHELLE PEREZ,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: William J. Sanchez, Esquire  
Miami, Florida  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Matthew Bernt, Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: **WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the CO") denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload,

or intermittent basis, as defined by the Department of Homeland Security. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b).

### **STATEMENT OF THE CASE**

On January 28, 2011, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Michelle Perez (“the Employer”). AF 206-216.<sup>1</sup> The Employer requested certification on an intermittent or other temporary need basis for an elderly health aid from February 1, 2011 to February 1, 2012 at a wage of \$9.50 per hour. AF 206, 210. In describing the temporary need for the home health aide, the Employer stated:

My Father is elderly and sick, and has recently undergone surgery. Many of the things that he used to do by himself, he can no longer do. I need someone who can cook for him while observing a strict dietary menu appropriate for individuals with diabetes, administer medications, maintain his daily hygiene including bathing, washing and ironing clothing, cleaning his room and bathroom, and dressing him, and observing patient while assisting him through his recovery. His recovery should be about 12 months as estimated by his physician.

AF 206. The Employer listed the minimum job requirements as a high school diploma or a GED and 12 months of experience within the occupation of elderly care. AF 209. Additionally, the Employer required experience cooking diabetic foods and noted that knowledge of the Tagalog language is preferable. *Id.* The Employer also provided the following description of the job duties to be performed:

Prepare and cook three meals per day which consist of breakfast, lunch, and dinner for an elderly individual who just had surgery. Observe strict dietary menu. Abide by the nutritional standards for elderly residents, such as low salt, low sugar, and fully balanced proportional menu per meal. Knowledge in the nutritional value of each food group in order to serve patients according to their specific dietary needs that they maintain a healthy diet. Familiarity in the cooking and preparation of meals for diabetic patients. Request food supplies, kitchen equipment, and appliances, based on estimates of future needs. Maintain a clean and orderly kitchen. Observe and monitor patient. Interact with patient by reading to or talking with him. Administer prescribed oral medications under written direction of a physician or as directed by a home care nurse. Dresses patient and assists them to bathe and all other aspects of hygiene. Clean the bathroom, including tub and surrounding areas. Takes patient on walks or other physical activities to help with rehabilitation of patient after surgery. Washes and irons clothing. Keep patient’s quarters clean and tidy. At times may clean other parts of the home.

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<sup>1</sup> Citations to the 216-page appeal file will be abbreviated “AF” followed by the page number.

AF 208. With its application, the Employer included a recruitment report, showing that there had been 29 applicants for this position. AF 214. The Employer also included a letter identifying the foreign worker that it seeks to hire for the position. AF 216.

On February 4, 2011, the CO issued a *Request for Further Information* (“RFI”), notifying the Employer that it was unable to render a final determination for the Employer’s application because the Employer failed to satisfy all the requirements of the H-2B program. AF 200-205. Among the five deficiencies identified in the RFI, the CO found that the Employer did not submit a complete and accurate recruitment report. AF 204. Specifically, the CO found that the Employer failed to explain the lawful job-related reasons for not hiring three U.S. applicants who applied or were referred to the position. *Id.* The CO noted that the Employer’s stated reason for rejecting these three U.S. applicants was that they were not willing to travel or perform duties in regard to travel, but that the Employer never included any travel requirements on the application. *Id.* Additionally, the CO found that the Employer rejected 15 applicants for “not possessing skills necessary to perform duties required,” but the Employer failed to identify the specific skills that the applicants were lacking. *Id.* Finally, the CO also noted that the Employer failed to sign and date the recruitment report. *Id.* The CO requested the Employer to provide a recruitment report complying with the regulatory requirements and to explain in detail, the job related reasons for not hiring the workers. AF 204-205.

The Employer responded to the RFI on February 15, 2011 and submitted the requested documentation. AF 32-100. The Employer submitted a revised recruitment report that was signed and dated. AF 60. The Employer stated that three U.S. applicants were not hired because they are not willing to travel, and that traveling is necessary in order to obtain supplies needed to provide services. AF 61-66. One of these applicants lives 15.1 miles from the worksite, one lives 10.9 miles from the worksite, and one lives 11.8 miles from the worksite. AF 62, 65, 68. The Employer also noted that one of the applicants does not own a motor vehicle, and therefore will be unable to travel. AF 67. The Employer did not provide a summary of the skills that each of these three U.S. applicants possessed. AF 60-69.

For the remaining applicants, the Employer stated that these applicants lacked some of the skills required for the position, and directed the CO’s attention to the Florida State Workforce Agency (“SWA”) printout of each of the applicant’s job skills, as compared to the 24 required skills for the position. AF 70-167. The 24 skills identified include the following:

[A]dminister enemas, irrigations, or douches to patients; administer medications or treatments; assist patient in walking or exercising; assist patient with dressing, undressing, grooming, or bathing; change linen; clean rooms or work areas; collect specimens from patients; cook meals; entertain patients; feed patients; instruct patients in methods to improve functional activities; lift or transport ill or injured patients; maintain dental or medical records; observe patient condition; position patient for therapy; prepare patients for tests, therapy, or treatments; provide in home patient care; purchase food or beverages; purchase housekeeping or cleaning supplies or equipment; set up patient care equipment; take vital signs; use massage therapy procedures; weigh patients; work with persons with mental disabilities or illnesses.

AF 71-72. The Employer rejected two applicants because their “experience in the medical field is different than that required for the position” and because they have performed duties more related to medical support than that of a home health aide. AF 112-115. Two other U.S. applicants who submitted resumes to the Employer were rejected because they did not have any experience in preparing diabetic foods. AF 116-119. It is unclear whether the Employer contacted either of these two applicants.

The Employer rejected two U.S. applicants because their desired salary was \$12.00 per hour. AF 140-144, 159-163. One of these U.S. applicants possesses 19 of the 24 skills identified by the Employer, and the other possesses 20 of the 24 skills identified. AF 143-144, 162-163. It is unclear whether the Employer contacted either of these applicants to inquire whether they were interested in the position at the offered wage of \$9.50 per hour. The Employer rejected three U.S. applicants who were contacted by the Employer on November 24, 2010, but never returned the Employer’s phone call. AF 125, 137, 164.

The CO denied certification on March 22, 2011. AF 26-31. The CO determined that the Employer failed to submit a complete and accurate recruitment report in violation of the H-2B pre-filing requirements. AF 28. The CO noted that Employer rejected four U.S. workers based on their desired wage or occupation, but the Employer’s recruitment report did not indicate whether the Employer contacted these workers to determine if they were interested in the position. AF 30. Additionally, the CO found that two workers sought an hourly wage higher than \$9.50 per hour, but the Employer’s recruitment report does not indicate if the Employer contacted these applicants to determine if they were interested in the offered wage. *Id.* The CO identified nine workers that do possess health care experience, undermining the Employer’s assertion that these candidates do not have the skills to perform the duties required of the position. *Id.* The Employer’s reason for rejecting two of these applicants was that they did not have experience in preparing diabetic food. However, the CO pointed out that the Employer failed to explain how it made this determination, or even whether it contacted these two

applicants. *Id.* Finally, the CO found that the Employer's rejection of three other U.S. applicants on the basis of their unwillingness to travel or failure to own a vehicle was unlawful, because the Employer did not indicate on its application that travel is a requirement for the position. *Id.* The CO determined that the Employer unlawfully rejected eighteen U.S. workers. AF 31.

On April 1, 2011, the Employer appealed the denial, arguing that its prevailing wage request and its advertisements indicate that travel is a requirement, and that the Employer did not include this information on the ETA Form 9142 because it was deemed redundant. AF 1-2. Additionally, the Employer argued that there was no need for it to contact individuals that did not possess the skills listed in the job order or the applicants who requested a higher wage or were looking for a position in a different occupation. AF 2.

## **DISCUSSION**

The CO may only grant an employer's petition to admit nonimmigrant workers on H-2B visas for temporary nonagricultural employment in the U.S. if there are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time the employer files its petition. 20 C.F.R. § 655.5(a)(1). Accordingly, an employer must recruit U.S. workers in good faith. *See Final Rule, Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes*, 73 Fed. Reg. 78030, 78036 (Dec. 19, 2008). In order to ensure good faith recruitment of U.S. workers, an employer must submit a copy of its recruitment report with its application. 20 C.F.R. § 655.20(a). The H-2B regulations at 20 C.F.R. § 655.15(j)(2) provide that the recruitment report must:

- (i) Identify each recruitment source by name;
- (ii) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker, including any applicable laid-off workers;
- (iii) If applicable, explain the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position.

The revised recruitment report that the Employer submitted to the CO with its RFI response demonstrates that 29 U.S. workers were rejected by the Employer. Several U.S. workers had experience in the health care field or as a home care worker. Two U.S. workers possessed 19 or 20 of the 24 skills identified in the job order, but were rejected because they had indicated to the Florida SWA that they

desired a higher wage than the one offered by the Employer.<sup>2</sup> There is no indication that the Employer contacted or interviewed either of these applicants. Additionally, two other U.S. workers were rejected based on the Employer's assumption that they had no experience cooking diabetic food. It appears, however, that the Employer made this determination based solely on the face of the applicants' resumes, and never contacted either of these applicants to determine whether they had experience cooking diabetic food.

The Employer's argument that it does not have a responsibility to contact U.S. workers who are qualified for the position but seek a higher wage is antithetical to an employer's duty to recruit U.S. workers in good faith. The duty to recruit in good faith necessitates that the Employer contact all potentially qualified applicants to determine whether they possess the minimum requirements for the job and if they are interested in the job at the wage offered. In this case, the Employer presumed that several potentially qualified applicants were either not interested in the position or lacked certain skills without making any effort to verify these presumptions. As the Employer did not contact any of these potentially qualified U.S. workers, the Employer has failed to establish a lawful job-related reason for not hiring any of these U.S. applicants.

Accordingly, the CO properly denied certification.

## **ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

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**WILLIAM S. COLWELL**

Associate Chief Administrative Law Judge

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<sup>2</sup> I note that some of the "required skills" listed in the Employer's job order with the SWA do not match the job duties listed on the Employer's application, raising the issue of whether the Employer is offering terms of employment less favorable than those offered to the H-2B worker in violation of 20 C.F.R. § 655.22(a).