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Issue Date: 12 April 2004

BALCA Case Nos.: 2003-INA-49, 2003-INA-50, 2003-INA-52
ETA Case Nos.: P1999-CA-09442468, P1999-CA-09442467, P1999-CA-09422151

In the Matters of:

FACUNLA FAMILY HOME,
Employer,

on behalf of

MA. ANNABELLE SANTIAGO,
MARY JANE PAHAYAC,

and

DORIS JOSEPH,
Aliens.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Carmelita Facunla, Owner
Fremont, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by Facunla Family Home ("Employer") on behalf of three aliens for the positions of

¹ 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 20 C.F.R. Part 656.

Residence Supervisor. (AF 34-35).² The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification and Employer’s request for review, as contained in the Appeal File (“AF”), and any written argument of the parties. 20 C.F.R. § 656.27(c). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

STATEMENT OF THE CASE

On September 25, 1996, Employer filed an application for labor certification on behalf of the Alien for the position of Residence Supervisor. The supervisor is responsible for clients’ medical appointments, activities, programming, maintenance of the facility, and maintenance of client records and files. The job required six months experience in the position offered or in the related occupations of Board and Care Facility Caretaker or Client Activity Counselor. Employer also required four years of high school. (AF 34).

On October 16, 2000, the CO issued a Notice of Findings (“NOF”), citing deficiencies in recruitment and an unduly restrictive job requirement.³ (AF 29-32). The CO noted that the job advertisement included the requirement of “willing to provide direct care and counseling to mentally retarded clients and willing to attend seminars and workshops on how to deal with mentally retarded clients.” (AF 30). However, this requirement did not appear on the ETA 750A. The CO stated that this requirement would have a deterrent effect on otherwise interested U.S. applicants. The CO instructed Employer to rerecruit for an accurate test of the labor market.

² In this Decision, “AF” refers specifically to the Doris Joseph Appeal File as representative of the Appeal File in all three cases. A virtually identical application was filed for all three applicants and the issues raised and dealt with by the CO (*ie.*, NOF, FD, etc.) in each case are identical.

³ Because we affirm the CO’s determination on the recruitment issue, we do not reach the second issue, the unduly restrictive job requirement.

On November 15, 2000, Employer filed her rebuttal, stating that she chose not to rerecruit. (AF 15-28). Employer stated that she included the duties of caring for and counseling mentally retarded clients in the advertisement so that applicants would know “what is expected from the worker before he or she gets into something they are not fully aware of.” (AF 15). Employer stated that as a Level Three facility, these duties are required of the supervisor. Employer included documentation regarding training required for workers in facilities such as this one. (AF 17-28).

The AF contains a Second NOF, dated January 24, 2001, which is identical to the original NOF. (AF 11-14). On February 28, 2001, Employer responded to this Second NOF with a letter again stating that she refused to rerecruit. (AF 9-10). Employer stated that her advertisement was approved by the EDD and that she believed the market had been fully tested. Employer stated that none of the U.S. workers who responded to the advertisement were compatible with the facility. (AF 9).

On March 9, 2001, the CO issued a Final Determination (“FD”) denying certification based on Employer’s failure to adequately recruit and the unduly restrictive job requirement. (AF 7-8). The CO found that the advertisement did not adequately reflect the job described on the ETA 750A and Employer had refused to rerecruit or to amend the ETA 750A to reflect these duties. As such, the CO denied certification. (AF 8).

On March 20, 2001, Employer filed a Request for Review and the matter was docketed in this Office on January 14, 2003.⁴ (AF 1-6).

DISCUSSION

The CO denied the application due to his determination that the job advertisement did not accurately state the job to be performed. Specifically, the advertisement

⁴ There was an issue as to the timeliness of Employer’s appeal; however, Employer documented that it had filed a timely request for review and the matter was subsequently forwarded to this Office. (AF 1-4).

contained the requirement “willing to provide direct care and counseling to mentally retarded clients and willing to attend seminars and workshops on how to deal with mentally retarded clients.” (AF 41). This requirement was not listed on the ETA 750A and the CO believed that it would have a deterrent effect on qualified U.S. workers. Employer noted that this is a potential duty of the position and wanted to advise applicants of this requirement.

When the advertisement inaccurately states the requirements for the position, labor certification is properly denied. *Goodhew Ambulance Service, Inc.*, 1993-INA-287 (Aug. 16, 1994); *Bio-Medic Health Service, Inc.*, 1994-INA-42 (Nov. 17, 1994). It is clear that Employer’s advertisement listed an additional requirement or duty of the position that was not reflected on the ETA 750A. Employer’s justification that this was an actual requirement of the position is not questioned; rather, Employer’s failure to include the requirement is at issue. If the worker would be required to attend workshops and provide counseling to residents of the Facunla Family Home, this requirement should be included on the ETA 750A. If it is omitted, it appears that Employer is offering the Alien a different position than the one advertised.

Employer could have remedied the deficiency by amending the ETA 750A or by rerecruiting. (AF 12-13). Employer chose to do neither and instead stated that the requirement was imposed by the state under Level Three Facility requirements. (AF 9-10; 15-28). The CO is not questioning the requirement, only Employer’s failure to accurately describe the position. By failing to amend the ETA 750A, Employer essentially recruited for a position that was different than the one for which she is petitioning. As such, Employer has not corrected the deficiency in recruitment and 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.