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: 26 May 2004

BALCA Case No.: **2002-INA-274**
ETA Case No.: P2000-CA-09489626/JS

In the Matter of:

ANTHONY T. LEE, M.D.,
Employer,

on behalf of

BRIGIDA CABRAL,
Alien.

Appearance: Marat L. Kleiner, Esquire
Glendale, 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 arose from an application for labor certification on behalf of Brigida Cabral ("the Alien") filed by Anthony T. Lee, M.D. ("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") 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 January 13, 1998, the Employer, Anthony T. Lee, M.D., filed an application for labor certification on behalf of the Alien, Brigida Cabral, for the position of "Case Coordinator," which was classified by the Job Service as "Social Worker Medical." (AF 73). The job duties for the position included conducting case conferences, coordinating patient care during pregnancy and teaching perinatal classes, among other tasks. The job position also required training and supervising Comprehensive Perinatal Health Workers (CPHW). The primary stated job requirement was two years experience in the job offered; in addition, the Employer required references and verification of work history. (AF 73).

In a Notice of Findings ("NOF") issued on March 12, 2002, the CO proposed to deny certification on the grounds that the Alien did not appear to be legally eligible to perform the job because the Alien did not possess a required license, in violation of 20 C.F.R. § 656.20(c)(7). (AF 68-70). In the NOF, the CO determined that due to the inclusion of the duties of training and supervising other perinatal health workers, the job position required a registered nurse. However, the Employer did not require a licensed nurse and the Alien did not appear to be legally eligible to perform the duties of the position, as she did not possess the requisite nursing license. (AF 69-70).

To rebut, the CO directed the Employer to show that the Alien would be eligible to obtain a license and to show what duties would be temporarily performed by the Alien until such license was received. In the alternative, the Employer could demonstrate that the duties of the position did not require a license; the Employer was directed to submit documentation from the California Board of Registered Nurses indicating that the position did not require a registered nurse. (AF 69-70).

The Employer submitted its rebuttal on April 5, 2002. (AF 22-67). The Employer's rebuttal consisted of a letter, dated April 5, 2002, which was co-signed by the Employer and his counsel, and various exhibits. The Employer stated that it had

contacted the California Board of Registered Nurses, but was advised that it would not be the appropriate agency to discuss the position requirements. The Employer was referred to Jody Nguyen, Perinatal Services Coordinator of the County of Orange Health Care Agency (COHCA). The Employer enclosed a letter from the COHCA, certifying that a registered nurse is not required to "provide perinatal services, including client orientation, initial combined assessment, case coordination, individualized care plan development, intervention (individual or group) and reassessment." (AF 67). The Employer also provided a copy of a California statute, Title 22 § 51179.6, indicating that case coordination supervision refers to the supervision of patient care, not the supervision of other case coordinators or health care workers. (AF 40).

The CO found the rebuttal insufficient and issued a Final Determination ("FD"), dated April 30, 2002, denying certification (AF 20-21). In the FD, the CO found that the Employer demonstrated that the Alien, as a nonlicensed health care worker, could perform all aspects of the position except the teaching, training and supervision of other health care workers, which must be provided by a supervising physician. Therefore, the Alien was ineligible to perform the job duties as stated and certification was denied, per 20 C.F.R. § 656.20(c)(7).

On May 28, 2002, the Employer filed a "Request for Review and/or Reconsideration of Denial of Certification," which was denied by the CO on June 21, 2002. (AF 1-19). The matter was docketed in this Office on August 30, 2002. On appeal, the Employer argued that the CO's denial was based solely upon the Employer's failure to document that the Alien could legally train and supervise other health care workers; however, none of the U.S. applicants were rejected based on their inability to perform this duty. In addition, in rebuttal, the Employer had offered to cure the defect and readvertise. (AF 28). Therefore, the Employer contended that the CO should have issued a Supplemental NOF, rather than an FD, in order to allow the Employer a further opportunity to cure the defect and to readvertise without the supervision requirement. (AF 1-5).

DISCUSSION

Twenty C.F.R. § 656.20(c)(7) requires that an employer's job opportunity conform to federal, state or local law. Upon review, the Employer's argument, that because no U.S. workers were rejected for their inability to perform the duties in question there was no deficiency, is without merit. U.S. applicants who were otherwise fully qualified for the position offered would not have applied because they lacked the stated experience in training and supervising Comprehensive Perinatal Health Workers, as posted and advertised by the Employer. (AF 90-93). Therefore, the mere fact that the Employer did not expressly reject U.S. workers on that basis is inconsequential.

The CO questioned whether the duties of this job could be performed by a worker who was not a licensed health care practitioner. The Employer, in rebuttal, submitted documentation including California statutes and a letter from the Perinatal Services Coordinator of the COHCA. The Employer attempted to show that an unlicensed worker could perform the duties of the job. The CO found that the Employer was successful as to all duties of the job except the training and supervision of other health care workers, which must be performed by a licensed worker. As such, the CO found that the Alien could not legally perform the duties of the job, in violation of 20 C.F.R. § 656.20(c)(7).

The CO's determination is supported by the Employer's evidence. The letter from the COHCA did not specifically address whether an unlicensed worker could train and supervise other health care workers. (AF 67). The letter did note that all perinatal services must be performed under the direct supervision of a physician. The excerpt from Title 22 § 51179 does not address whether an unlicensed worker may supervise other workers, but only mentions the duties of the job, which do not include supervision or training. (AF 39-43). Nowhere in the documentation submitted by the Employer does it confirm the Employer's assertion that an unlicensed worker can perform the duties of supervision and training of other health care workers. The CO's determination that this job cannot legally be performed by the Alien is correct.

The Employer also argued, in rebuttal, that he offered to delete the requirement and readvertise. (AF 28). The CO did not address the Employer's offer and instead denied certification. The Employer claims this was in error. In support of its argument, the Employer cites several cases in which the CO failed to address or accept an employer's offer to readvertise and the Board remanded the case to the CO. *See, e.g., Mash International Trading Co., Inc.*, 1990-INA-170 (June 5, 1991); *Sharon Babb*, 1992-INA-68 (Mar. 31, 1993); *A. Smile, Inc.*, 1989-INA-1 (Mar. 6, 1990); *Mr. and Mrs. Robert H. Blubber*, 1994-INA-244 (July 19, 1995). However, in the cited cases, the CO, in the NOF, gave the employer the option of deleting an unduly restrictive job requirement and rerecruiting. The instant case is distinguishable because the CO did not deny the application on the basis of an unduly restrictive job requirement. Rather, the CO questioned the Alien's ability to legally perform the duties of the job without a nursing license. Consequently, the CO did not offer rerecruitment as an option to cure the cited deficiency. The Employer's offer to readvertise would not cure the deficiency because it would change the position offered.

The Employer has not demonstrated that the Alien would be eligible to receive the appropriate license or that the license is not required to perform the job as described. These were the two remedies offered by the CO in the NOF and the Employer failed to satisfy either option. As such, 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.