U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 17 June 2004

BALCA Case No.: 2003-INA-17
ETA Case No.: P2000-09508559/ML

In the Matter of:

EMERALD TERRACE CONVALESCENT HOSPITAL,
Employer,

on behalf of

HAZEL ESPINO CANTOS,
Alien.

Appearance: Jack Golan, 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 Hazel Espino Cantos ("the Alien") filed by Emerald Terrace Convalescent Hospital ("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 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 March 16, 2000, the Employer, Emerald Terrace Convalescent Hospital, filed an application for labor certification to enable the Alien, Hazel Espino Cantos, to fill the position of "Licensed Vocational Nurse," which was listed by the Job Service as "Nurse Licensed Practical," DOT Code 079.374-014. The Employer required two years of experience in the job offered or in "any related nursing position" and a valid vocational license. (AF 16).

In a Notice of Findings ("NOF") issued on July 15, 2002, the CO proposed to deny certification on the ground that the stated requirements were not the actual minimum requirements for the job opportunity because they violated the provisions of 20 C.F.R. § 656.21(b)(5). On August 14, 2002, the Employer filed its rebuttal. (AF 5-11). The CO found the rebuttal unpersuasive and issued a Final Determination ("FD"), dated September 9, 2002, denying certification on the same basis. (AF 3-4). On October 2, 2002, the Employer requested review of the FD and the matter was docketed in this Office on October 29, 2002. (AF 1-2). Pursuant to the Notice of Docketing and Order Requiring Statement of Position or Legal Brief, dated November 5, 2002, the Employer filed an Appeal Brief, together with 11 exhibits, dated November 11, 2002.

DISCUSSION

Twenty C.F.R. § 656.21(c)(5) provides that an employer must document that its requirements for the job opportunity represent its actual minimum requirements, and that it has not hired workers with less training or experience for jobs similar to that involved in the job opportunity, or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

In the NOF, the CO found that the Alien was hired without an LVN license. The Employer was instructed either to submit an amended ETA 750B showing that the Alien did possess the required qualifications or to amend the ETA 750A to delete the requirement or to document how it was not feasible to hire workers with less training than that required. (AF 13).

The Employer's rebuttal consisted of a cover letter from the Employer's attorney, dated August 14, 2002, a letter from Elena Legaspi, the Employer's owner, dated August 8, 2002, an amendment to the ETA 750B #15, signed by the Alien, a record from the National Council Licensure Examination for Practical Nurses, establishing that the Alien passed the licensure examination for practical nurses in July 1998 and copies of the Alien's license showing she is a Licensed Vocational Nurse. (AF 5-11).

In rebuttal, the Employer argued that the Alien did have the required license at the time the application was filed. The Employer stated that the Alien was originally hired as a Nurse Assistant, which is a lower position not requiring a license. The Alien obtained the LVN license in July 1998. The Employer noted that it would not be feasible to hire a worker without an LVN license because the worker cannot legally perform the duties of the job without an LVN license. (AF 7).

In the FD, the CO found the Employer's rebuttal inadequate, stating that the Employer failed to submit documentation showing how it is not feasible to hire workers with less training or experience. (AF 4).

The Employer failed to document why it would not be feasible to hire a worker with less training or experience who did not have an LVN license. We reject the Employer's statement that the position of Nurse Assistant and Licensed Vocational Nurse are not similar simply because the former is a lower position. (AF 7). We do not find the Employer's mere assertion adequate to establish sufficient dissimilarities between the two positions. *See Delitizer Corp. of Newton*, 1988-INA-482 (May 9, 1990)(*en banc*).

Furthermore, we note that although the positions are not identical, there are clearly overlapping duties.

The Employer has acknowledged that the positions are similar by accepting experience in "any related nursing position" as qualifying experience. (AF 16). The Employer stated that the Alien was hired as an unlicensed Nurse Assistant; the Employer allowed the Alien time to work in that capacity and obtain an LVN license and then, the Employer offered the Alien the similar position of Licensed Vocational Nurse. The Employer hired the Alien in January 1997 for the position of Nurse Assistant, a position which did not require an LVN license. (AF 7, 42). The Alien obtained an LVN license in July 1998, and in July 1998, the Alien's position changed from Nurse Assistant to Licensed Vocational Nurse. (AF 7-8). Pursuant to 20 C.F.R. § 656.21(c)(5), the CO directed the Employer to document why it would not be feasible to hire workers without the LVN license and thereby afford U.S. applicants the same opportunity it provided the Alien. The Employer failed to provide such documentation.

An employer must provide relevant and reasonably obtainable sought by the CO and failure to do so constitutes grounds for affirming the denial of certification. *See, e.g., Gencorp.*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). In view of the foregoing, we find that 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