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: 06 July 2004

BALCA Case No.: 2003-INA-213
ETA Case No.: P2001-CA-09510224/ML

In the Matter of:

ACTIVE LIFESTYLE FOR OLDER ADULTS, INC.,
Employer,

on behalf of

CORAZON JIMENEZ SORIANO,
Alien.

Appearances: Gina Reyes, Esquire
Glendale, 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 arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Administrator, Health Care Facility.[1] The CO denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

[1] Permanent 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 Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision 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. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On August 7, 2000, the Employer, Active Lifestyle For Older Adults, Inc., filed an application for labor certification to enable the Alien, Corazon Jimenez Soriano, to fill the position of Administrator, Health Care Facility. (AF 28). A Bachelor of Science degree in the field of nursing was required. The job duties were directing the administration of a health care facility, coordinating activities of the staff, administering fiscal operations, and establishing rates for health care services. The requirement of one year of experience in a clinical setting was initially required, but later deleted. (AF 30).

On December 5, 2002, the CO issued a Notice of Findings ("NOF") proposing to deny certification. (AF 22-26). The CO found that the recruitment efforts had been inadequate because the advertisement placed by the Employer required a year of experience, although that requirement had been deleted. The Employer was directed to indicate its willingness to re-advertise. The requirement of a nursing degree was found to be unduly restrictive and tailored to the Alien's background because the primary function of the position was business administration. The CO advised the Employer to establish that the requirement was based on business necessity or to submit documentation that the requirement was usual in the occupation/industry. Alternatively, the Employer could amend the restrictive requirement and indicate its willingness to re-advertise. Finally, the CO questioned the rejection of several U.S. applicants. Applicant #1 had a resume which showed a combination of education, training and/or experience enabling him to perform the usual requirements of the occupation. Applicants #2 and #3 were referred to the Employer on November 6, 2002, but the evidence was insufficient to establish that the Employer contacted these applicants in a timely manner. (AF 22-24).

The Employer submitted rebuttal on January 9, 2003. (AF 18-21). The Employer indicated its willingness to delete the experience requirement and to retest the labor market. The Employer claimed that it needed an administrator with a Bachelor's Degree in Nursing because this degree enabled the employee to understand and tend to patients'/participants' medical needs and conditions. According to the Employer, the

medical staff "consists of all professionals, which also now includes an Administrator with a Bachelor's Degree in Nursing." With regard to the U.S. applicants, the Employer stated that the three U.S. applicants did not have a Bachelor of Science degree in nursing and therefore were rejected.

A Supplemental NOF ("SNOF") was issued on February 4, 2003. (AF 15-17). The CO found that the issue of inadequate recruitment had been cured by the Employer's stated willingness to re-advertise. The CO pointed out that the Employer had stated in Box 23(d) of the ETA 750A that it would be able to place the Alien on the payroll on or before the date of the Alien's proposed entrance into the United States. However, the rebuttal indicated that it now had an Administrator with a Bachelor's Degree in Nursing. This raised the question of whether the Employer had a current job opening to which U.S. workers could be referred. The Employer was directed to submit rebuttal documenting its ability to provide permanent, full-time employment to a U.S. worker. Finally, the Employer was advised that its rebuttal appeared to be changing the nature of the job, inasmuch as the Employer claimed that it needed an individual with a nursing degree so that the employee would understand and tend to its patients/participants "medical needs and conditions." This, however, was not part of the job description listed in the ETA 750A. The Employer was advised that the corrective actions stated in the original NOF remained in effect with regard to the findings which had not been rebutted, including the issue of the rejection of the U.S. workers. (AF 16-17).

On March 5, 2003, the Employer submitted rebuttal to the SNOF. (AF 10-14). The Employer stated that the Alien was currently employed on an H-1B visa, and her employment would terminate on September 30, 2003. The Employer reiterated its reasons for rejecting the three U.S. applicants and stated that the position of Administrator must comply with Title 22 of the California Code of Regulations, a copy of which was included. The Employer claimed that a nursing degree was essential so that the administrator would have "knowledge of supervision and care appropriate to the participants."

A Final Determination ("FD") was issued on April 11, 2003. (AF 8-9). The CO denied certification, finding that the rebuttal to the SNOF did not correct the deficiencies raised in the NOF. The Employer had failed to establish the business necessity of a nursing degree, as it only established the Employer's preference with no evidence that the degree was the only means to acquire the necessary knowledge about patients' needs. The CO found the fact that the Alien was currently employed in the position at issue made it clear that the requirement was tailored to her background. The CO also found that the rejection of the three U.S. applicants was not for lawful, job-related reasons, given that they showed qualifications as adult day care administrators.

On May 8, 2003, Employer filed a Request for Review and the matter was docketed in this Office on June 10, 2003. (AF 1-7). The Employer filed a brief on July 9, 2003. The Employer contends that it established business necessity for the requirement of a degree in nursing, arguing that it is necessary to comply with Title 22 of the California Code of Regulations, a copy of which is included with the request for review. The Employer states that it could not trust the major responsibilities of this position to anyone without this degree. The Employer contends that while the DOT requires, at a minimum, a Bachelor of Science degree in a field related to the program, the particular duties of this position necessitated a nursing degree. The Employer contends that it fully explained the requirement as business necessity. With regard to the rejection of U.S. workers, the Employer reiterated that they were properly rejected for lacking the necessary degree in nursing.

DISCUSSION

With the Employer's Request for Review is a document which was not previously submitted, as well as argument not previously made. The Board's review of the denial of certification is based solely on the record upon which the denial was based, the request for review, and legal briefs. The Board does not consider additional evidence submitted in conjunction with a request for review. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989)(*en banc*). Furthermore, where an argument made after the FD is

tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

Twenty C.F.R. § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. An employer cannot use requirements that are not normal for the occupation or are not included in the DOT unless it establishes business necessity for the requirement. The purpose of 20 C.F.R. § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Rajwinder Kaur Mann*, 1995-INA-328 (Feb. 6, 1997).

An employer can establish business necessity by showing that (1) the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*). A general statement by the employer, standing alone, is insufficient to establish business necessity. *Aquarius Enterprises*, 1987-INA-579 (Mar. 24, 1988)(*en banc*)**.**

There is no evidence herein that a nursing degree is essential to perform the job at hand. Nowhere in the regulations upon which the Employer relies does it state that an administrator shall have a degree in nursing. The Employer has conceded that the DOT provides for a degree in a field related to the program.

The Employer has failed to establish a business necessity for the requirement of a degree in nursing. This requirement appears to be one which is the Employer's preference and impermissibly tailored to the Alien's qualifications. As such, labor certification was properly denied and the remaining issue need not be addressed.

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.