U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

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Issue Date: 08 July 2004

BALCA Case No.: 2003-INA-147
ETA Case No.: P2001-CA-09510219

In the Matter of:

EXCEL CARE CLINIC, INC.,
Employer,

on behalf of

CHARITO BENEDICTO,
Alien.

Appearance: Gina Reyes, Esquire
Carson, California
For the Employer and 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 Charito Benedicto ("the Alien") filed by Excel Care Clinic, Inc. ("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 Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). 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 June 19, 2000, the Employer filed an application for labor certification on behalf of the Alien for the position of Medical Assistant. (AF 17-18).

On November 21, 2002, the CO issued a Notice of Findings ("NOF") indicating intent to deny the application on the ground that the requirement of a Bachelor of Science degree seemed to be unduly restrictive. (AF 12-14). The CO noted that the Employer's requirement of a Bachelor of Science degree with a major in Medical Technology for the position of medical assistant was not a normal requirement for the position. Additionally, the CO found that the normal educational requirement for the position of medical assistant is vocational training or an Associate's degree. To remedy the deficiency, the Employer was advised to delete the restrictive requirement, to document that the requirement is common for the occupation, or to justify the requirement on the basis of "business necessity."

In its Rebuttal dated December 26, 2002, the Employer asserted that the requirement of a Bachelor of Science degree with a major in Medical Technology was a business necessity to benefit its patients and the Employer itself. (AF 4-5). The Employer asserted that it provided the best care possible with a highly trained professional staff. Additionally, the Employer noted that since the hiring of the Alien, laboratory reports and doctors' notes had been interpreted and transcribed in an expeditious manner. The Employer asserted that it has been essential for the position that the applicant has a Bachelor's degree in Medical Technology and it is one of the reasons that the Employer has been able to expand its business.

On January 9, 2003, the CO issued a Final Determination ("FD") denying certification. The CO noted that the Employer, while asserting that the educational

requirement was a business necessity, failed to provide supporting documentation of the business necessity. The Employer also failed to show that the educational requirement was normal for the occupation. Therefore, the CO found that the Employer remained in violation of 20 C.F.R. § 656.21(b)(2)(i)(A) and denied the application. (AF 2-3).

On February 3, 2003, the Employer filed its Request for Review stating that the CO's decision was erroneous, arbitrary and capricious, as shown by the fact that the Alien was already working for the Employer with an H-1B visa and the clinic has been more profitable since the Alien's employment. (AF 1).

The Employer, in its brief submitted on June 5, 2003, asserted that the educational requirement was a business necessity. To support its position, the Employer indicated the different kinds of illnesses treated at the clinic and the duties performed in the position offered. The Employer argued that because the clinic is dedicated to providing unsurpassed patient care, it is a business necessity that the applicant possess a Bachelor of Science degree with a major in Medical Technology. The Employer concluded that it had demonstrated that the educational requirement was justified because the requirement bears a reasonable relationship to the occupation.

DISCUSSION

The issue to review in the present case is whether the Employer's educational requirement is an unduly restrictive requirement. Twenty C.F.R § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. Unduly restrictive requirements are prohibited because they have a chilling effect on the number of U.S. workers who may apply or qualify for the job opportunity. The purpose of 20 C.F.R. § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 1987-INA-569 (Jan. 13, 1989) (*en banc*).

A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the Dictionary of

Occupational Titles ("DOT") and the requirements are those normally required for a job in the United States. *Lebanese Arak Corp*, 1987-INA-683 (Apr. 24, 1989) (*en banc*).

The job of Medical Assistant, as found in code 079.362-010 of the DOT, is defined as:

> Performs any combination of following duties under direction of physician to assist in examination and treatment of patients: Interviews patients, measures vital signs, such as pulse rate, temperature, blood pressure, weight, and height, and records information on patients' charts. Prepares treatment rooms for examination of patients. Drapes patients with covering and positions instruments and equipment. Hands instruments and materials to doctor as directed. Cleans and sterilizes instruments. Inventories and orders medical supplies and materials. Operates x ray, electrocardiograph (EKG), and other equipment to administer routine diagnostic test or calls medical facility or department to schedule patients for tests. Gives injections or treatments, and performs routine laboratory tests. Schedules appointments, receives money for bills, keeps x ray and other medical records, performs secretarial tasks, and completes insurance forms. May key data into computer to maintain office and patient records. May keep billing records, enter financial transactions into bookkeeping ledgers, and compute and mail monthly statements to patients.

Specific Vocational Preparation ("SVP") is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. An SVP of six, as listed in DOT for the position of Medical Assistant, indicates over one year up to and including two years of training to properly perform the position.

Accordingly, the CO was correct in determining that the Employer's educational requirement of a Bachelor's degree exceeded the requirements listed in the DOT. The duties of the job, as described by the Employer in the labor certification application, mirror the duties found in the DOT. Further, the Employer did not demonstrate that the educational requirement is normally required for the job in the United States. However, the Employer consistently alleged that the educational requirement was necessary to perform the job and therefore was a business necessity.

To establish business necessity under 20 C.F.R. § 656.21(b)(2), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer. *Information Industries*, 1988-INA-82 (Feb. 9, 1989) (*en banc)*. In support of its business necessity argument, the Employer made unsupported and self-serving statements that the educational requirement was needed to provide good service to the Employer's patients.

Bare assertions by an employer are not sufficient to carry his burden of demonstrating good faith recruitment. *Brilliant Ideas, Inc.*, 2000-INA-46 (May 22, 2000). Denial of certification has been affirmed where the employer has made only generalized assertions. *Winner Team Construction, Inc.*, 1989-INA-172 (Feb. 1, 1990). Additionally, under the regulatory scheme of 20 C.F.R. § 656.24, the Rebuttal following the NOF is the employer's last chance to make his case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that certification should be granted. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

Unfortunately, the Employer wasted that opportunity by not documenting its business necessity argument in its Rebuttal. The Employer limited its Rebuttal to making unsupported, self-serving statements that the educational requirement was a business necessity. The Employer's statement, standing alone, is insufficient to carry the burden. An employer bears the burden in labor certification applications both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997).

Consequently, as the record supports the CO's findings and for the above stated reasons, we affirm the CO's denial and the following order will enter[1]:

[1] We note that the Employer's appellate brief relied on its Counsel's factual statements of the duties and tasks of the position to support its appeal. However, a factual theory presented by counsel in a brief cannot serve as evidence of material facts. *Yaron Development Co., Inc.,* 1989-INA-178 (Apr. 19, 1991) (*en banc*). Allegations of fact by an employer's counsel do not constitute evidence when not supported by statements of a person with knowledge of the facts. *Moda Linea, Inc.,* 1990-INA-25 (Dec. 11, 1991). The exception in *Modular Container Systems, Inc.,* 1989-INA-228 (July 16, 1991)(*en banc*), that an attorney may be

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.

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competent to testify about matters of which he has first-hand knowledge, does not apply to Counsel's statements of fact in this appeal because there is no indication of such first hand knowledge in the record. Consequently, no weight will be given to Counsel's allegations of fact.