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: 17 August 2004

BALCA Case No.: 2003-INA-126
ETA Case No.: P2000-CA-09509546

In the Matter of:

ORLANDO GUEST HOME,
Employer,

on behalf of

MAUREEN PATALINGHUG,
Alien.

Appearance: Deborah Chew, Esquire
San Diego, 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 Maureen Patalinghug ("the Alien") filed by Orlando Guest Home ("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, San Francisco, California, 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 26, 2000, the Employer, Orlando Guest Home, filed an application for labor certification to enable the Alien, Maureen Patalinghug, to fill the position of Administrative Housekeeper, which the Job Service classified as Executive Housekeeper. (AF 77). The job duties for the position were to plan work schedules, oversee repairs, inventory supplies, hire and train new employees, and perform cleaning duties, if required by shortage of staff. The stated job requirements for the position were four years of experience in the job offered or in the related occupation of Housekeeper or maintenance.

In a Notice of Findings ("NOF") issued on November 4, 2002, the CO proposed to deny certification on the grounds that the job opportunity involves a combination of duties, which is unduly restrictive under the provisions of 20 C.F.R. § 656.21(b)(2)(ii). (AF 72-75). The CO stated that the job opportunity as described on the ETA 750A involved a combination of the duties of two or more occupations. Pursuant to 20 C.F.R. § 656.21(b)(2)(ii), the CO advised the Employer that such a combination of duties is deemed unduly restrictive unless the Employer documents that workers customarily perform such duties in the area of intended employment, or such duties are based on business necessity. Accordingly, the CO directed the Employer to either delete the excessive combination of duties or to submit documentation justifying the combination. (AF 73-74).

The Employer filed its rebuttal on December 5, 2002. (AF 39-71). The Employer submitted a letter from the Employer's owner stating that the job requirements are based on business necessity because the home housed over thirty patients and had 1,600 square feet to maintain. The Employer cited *Ratnayake v. Mack*, 499 F.2d 1207 (8th Cir. 1974),

arguing that job requirements cannot be set aside if they are "reasonable and tend to contribute to or enhance the efficiency and quality of the business." *Id.*

The CO found the rebuttal unpersuasive and issued a Final Determination ("FD"), dated January 10, 2003, denying certification (AF 37-38). The CO stated that the position combined duties of three distinct occupations. The CO argued that the Employer could either partition the duties among the other workers in the facility or hire two workers to perform separate duties at the three facilities owned by the Employer. The CO found that the job requirements were merely the Employer's preference for convenience. (AF 38).

The Employer filed a Request for Review, together with various supporting documents, on February 4, 2003. (AF 1-36). The matter was docketed in this Office on March 6, 2003 and the Employer filed a brief on March 21, 2003.

DISCUSSION

As outlined above, the Employer's rebuttal relies on the holding in *Ratnayake v. Mack* to attempt to justify the business necessity for the combination of duties. (AF 41). This reliance is erroneous and fails to establish business necessity for the requirements.[1]

> As stated in *Robert L. Lippert Theatres*, 1988-INA-433 (May 30, 1990) (*en banc*)
>
> [t]he application of the Information Industries standard to combination of duties situations…would be inappropriate because it was fashioned specifically for the analysis of requirements, and not duties, and cannot easily be adapted to combination of duties issues. [sic] [f]or a combination of duties to be based on business necessity under section 656.21(b)(2)(ii), an employer must document that it is necessary to have one worker to perform the combination of duties, in the context of the employer's business, including a showing of such a level of impractability as to make the employment of two workers infeasible.

[1] This Board explicitly rejected the standard for business necessity set forth in *Ratnayake v. Mack* in *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). Furthermore, the *Ratnayake v. Mack* and *Information Industries* cases applied business necessity in the context of restrictive job requirements, not combination of duties.

The Employer has not shown that it is necessary to have one worker perform this combination of duties. The Employer merely stated that the requirements bore a reasonable relationship to the occupation, yet provided no documentation to support this bare assertion.[2] The Employer has not demonstrated that it would be infeasible for two workers to perform the duties or for the duties to be spread amongst multiple workers. In view of the foregoing, we find that the CO correctly determined that the Employer's rebuttal is inadequate because it clearly fails to meet the applicable business necessity standard set forth in *Robert Lippert Theatres, supra*. Accordingly, we find that labor certification was properly denied.[3]

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

[2] Bare assertions, while they must be given the weight they rationally deserve, are generally insufficient to support the employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*).

[3] Because certification was properly denied on these grounds, it is unnecessary to address the other grounds listed in the FD.

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.