



(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 23 August 2004

BALCA Case No.: 2003-INA-166
ETA Case No.: P2000-CA-09508943/ML

In the Matter of:

TCM ELDERLY CAMINO RAMON HOME CARE,
Employer,

on behalf of

ARLENE LUSNONG,
Alien.

Appearance: Evelyn Sineneng-Smith, Immigration Consultant
San Jose, 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 TCM Elderly Home Care's ("the Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. 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 January 19, 1999, the Employer filed an application for labor certification on behalf of the Alien, seeking to fill the position of "Caregiver/Household Domestic Worker." The following job requirements were necessary for the position: four years of high school education and three months of experience. The position required that the caregiver live at the Employer's facility, a residential home for the elderly. (AF 48). In its application, the Employer indicated that it would provide free board and a private room. (AF 48).

On October 24, 2002, the CO issued a Notice of Findings ("NOF") proposing to deny labor certification. (AF 40-45). The CO questioned whether there was a bona fide job opportunity, noting that there was not enough room in the Employer's residential facility to house both patients and nurse assistants. Observing that job service records indicated that the Employer's residential facility consisted of six rooms and that the Employer intended to hire two live-in workers, the CO questioned whether there was sufficient room for the six resident patients. The CO instructed the Employer to submit "documentation of the Employer's ability to provide permanent, full-time employment to a U.S. worker at the terms and conditions stated on the ETA 750A," as well as a copy of the Employer's business/care home license, and the Employer's state and federal business income and tax returns.

The Employer filed a rebuttal on November 28, 2002. (AF 7-39). In response to the CO's finding that the Employer failed to establish that the position was a bona fide job opportunity, the Employer submitted tax forms and its business license, as requested. Addressing the CO's concern that the Employer's residential facility did not have sufficient space for both residents and employees, the Employer stated that its facility had

six bedrooms, five of which were occupied by residents, leaving one bedroom which was shared by the two employees.

The CO issued a Final Determination (“FD”) denying labor certification on December 27, 2002, finding that the Employer failed to adequately document the existence of a bona fide job opportunity. (AF 4-6). The CO reasoned that the Employer’s rebuttal statement was not consistent with the terms of the ETA 750A, which indicated that the employee would be provided with a private room. The CO also noted that, under 20 C.F.R. § 656.21(a)(ii)(I), live-in workers *must* be provided with a private room. Accordingly, the CO denied certification.

The Employer requested review on January 28, 2003 and the matter was docketed by the Board on April 10, 2003. (AF 1-3).

DISCUSSION

An employer petitioning for permanent alien employment certification must demonstrate that the job opportunity offered to the alien “has been and is clearly open to any qualified U.S. worker.” 20 C.F.R. § 656.20(c)(8). A “totality of the circumstances” test is used to determine whether a job opportunity is *bona fide*. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*). The burden of showing that the job opportunity is *bona fide* is on the employer. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988)(*en banc*).

In the NOF, the CO stated that the Employer violated 20 C.F.R. § 656.20(c)(8), explaining that the Employer’s facility did not appear to have sufficient space to house both the staff and the resident patients. The CO instructed the Employer that it could rebut this finding by providing documentation of its ability to provide employment “at the terms and conditions stated on the ETA 750A.” A private room was a condition of employment stated on the ETA 750A. Therefore, the Employer failed to rebut the CO’s finding that it violated 20 C.F.R. § 656.20(c)(8).

Although the NOF did not specifically mention the requirement under 20 CFR 656.21(a)(ii)(I), that live-in workers be provided with a private room,¹ “the CO is not required to provide a detailed guide to the employer on how to achieve labor certification.” *Miaofu Cao*, 1994-INA-53 (March 14, 1996)(*en banc*). All that is required is that the CO identifies the section or subsection allegedly violated and the nature of the violation, informs the employer of the evidence supporting the challenge, and provides instructions for rebutting the violation. *Id.* Here, the CO met all three requirements: he cited 20 C.F.R. § 656.20(c)(8), informed the Employer that the alleged violation was based on a finding that the Employer’s facility had an insufficient number of rooms, and instructed the Employer to rebut by documenting its ability to provide employment “at the terms and conditions stated on the ETA 750A.” Since a private room was a condition stated on the ETA 750A and the Employer’s rebuttal indicated that the Alien would share a room, the Employer’s rebuttal was inadequate and the CO properly denied certification.

ORDER

The CO's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

¹ The CO cited this regulation for the first time in the FD. However, though the Employer’s failure to provide a private room violated 20 C.F.R. § 656.21(a)(ii)(I), the CO’s denial is properly understood as being based on the Employer’s violation of 20 C.F.R. § 656.20(c)(8). That is, the Employer’s failure to provide a private room and to abide by the terms of the ETA 750A is evidence that there is no bona fide job opportunity. Thus, the CO’s failure to cite 20 C.F.R. § 656.21(a)(ii)(I) in the NOF is not a violation of due process.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.