U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 September 2004

BALCA Case No.: **2003-INA-250**
ETA Case No.: P2000-CA-09509737/ML

In the Matter of:

MJM HOME,
Employer,

on behalf of

NILO NOSA,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Evelyn Sineneng-Smith, Immigration Consultant
San Jose, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Simeon Marcial of MJM Home Care ("the Employer") filed an application for labor certification[1] on behalf of Nilo Nosa ("the Alien") on April 10, 2000. (AF 70).[2] The Employer seeks to employ the Alien as a nurse assistant. This decision is

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. §1182 (a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision, AF is an abbreviation for Appeal File.

based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

In the application, the Employer described the duties of the position as caring for elderly patients, including caring for personal hygiene needs, as well as cleaning the home and reporting unusual behavior to a social worker. The Employer also required First Aid and CPR certification, and required the worker to live on the premises and be on call twenty-four hours per day. The Employer required a high school education and three months of experience in the job offered. (AF 70).

In the Notice of Findings ("NOF") issued November 7, 2002, the CO noted that the documentation submitted by the Employer to establish that an on-going business was present which would provide permanent full-time employment to which U.S. workers could be referred was insufficient because the business license was over ten years old. In addition, the CO noted that the occupation is on the Schedule B list of non-certifiable occupations. The CO stated that the Employer could petition for a Schedule B waiver. The CO noted that waiver documentation should include verification from the local job service office that the Employer had a "suppressed" job order on file with the local office for a period of thirty calendar days and was not able to obtain a qualified U.S. worker.

The CO also found that the advertisement did not assure applicants that they would be compensated "in accordance with CA state law and regulations" for being on call twenty-four hours a day. The CO stated that if the Employer chose to retest the job market, they should submit a statement indicating that fact and a draft advertisement. The CO also found that the Alien was hired without three months of experience in all of the job duties listed in box 13 of the ETA 750A. The CO stated that the Employer could either amend the ETA 750B, delete the requirement from the ETA 750B or document how it is not feasible to hire workers with less training or experience than that required by the job offer. Finally, the CO found that the job description combined duties of multiple

occupations and required the Employer either to delete the duties causing the combination or to submit documentation justifying the combination as a business necessity. (AF 65-68).

In rebuttal, dated January 16, 2003, the Employer submitted documentation to establish that it was an operating business with a full-time opening. The Employer included a copy of the current business license dated June 27, 1993, a copy of the 2001 check for annual license fee renewal, the Employer's 2001 and 2000 federal tax forms showing business income and expenses for three different adult care homes in 2001 and two different homes in 2000. The address for the adult care home in this application showed a loss of $4,341 with wages of $10,800 in 2001 and a profit of $13,400 with no wages listed in 2000. (AF 17-45). The Employer petitioned for a Schedule B waiver and reiterated its earlier recruitment report that no applicants responded to the job posting nor were any applicants referred from the California Employer Development Department ("EDD") or the CALJOBS listing. In addition, the Employer stated that they had been informed by the EDD in Sacramento that every request for labor certification is automatically processed for "suppressed CALJOBS order." (AF 47).

The Employer indicated its willingness to retest the labor market and to add the words "employer will compensate according to CA state laws and regulations" to the advertisement. A draft advertisement was included with those words inserted. In addition, the Employer deleted some requirements from the job offer and requested that the ETA 750A be amended accordingly. (AF 48). A statement verifying the Alien's employment from January 1995 to August 1999 was submitted. This statement noted that the Alien performed patient care according to hospital policies, under the supervision of an RN and assisted patients in bathing, changing clothes or diapers, administered medication and assisted with daily activities. (AF 49).

The Employer submitted a memorandum arguing that the combination of duties is a business necessity for several reasons, including the need for consistency in care by a known caregiver or nurse assistant with mentally ill adults. As noted above, in a separate

communication, the Employer also offered to delete the housekeeping requirements and included an amended draft advertisement. (AF 51, 48).

The CO issued the Final Determination ("FD") on February 13, 2003, denying certification. (AF 12-14). The CO found that the evidence submitted regarding the Employer's business was not convincing because the tax returns showed the three homes operating at a loss and the total wages paid were less than that offered to the Alien. Regarding the Schedule B waiver request, the CO found that the Employer's statement that the Job Service verbally informed the Employer that all job orders are run suppressed was not sufficient documentation as required by the NOF. The CO noted that while it might be true that the Job Service runs all job orders suppressed now, the job order run from September 7, 2000 to October 7, 2000 was unsuppressed and therefore, there was no way to account for responses from available U.S. workers. Because this job order did not qualify the Employer for a Schedule B waiver, the CO found the position was not waived from the list of non-certifiable occupations.

In addition, the CO stated that the additional statements on the Alien's background did not establish that the Alien had experience with all the specific job duties listed in the application for labor certification. Thus, the CO found that the Alien was hired without necessary qualification and the Employer required a higher standard of qualifications from the U.S. workers than was required of the Alien. Finally, the CO found the Employer's rebuttal on the combination of job duties was not sufficient. The CO concluded that the Employer had not satisfactorily rebutted the NOF and certification was denied. (AF 12-14).

On March 7, 2003, the Employer requested review and the matter was docketed in this Office on August 5, 2003. (AF 1). The Employer submitted a statement by their accountant with copies of bank accounts to support his contention that there is a job opening. The Employer again requested "to re-advertise the job offer and to allow him to retest the labor market." In addition, the Employer noted that according to a letter from

the EDD, job seekers are instructed to contact the Employer directly. The Employer also submitted a copy of the employment verification submitted on rebuttal. (AF 1-11).

DISCUSSION

Twenty C.F.R. § 656.25(e) provides that the employer's rebuttal evidence must rebut all of the findings of the NOF, and that all findings not rebutted shall be deemed admitted. The employer must provide directly relevant and reasonably obtainable documentation that is requested by the CO. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*).

The NOF specifically directed the Employer to submit documentary verification from the local job service office that the Employer had a "suppressed" job order on file with the local office for a period of thirty calendar days and was not able to obtain a qualified U.S. worker in order to qualify for the waiver regarding this Schedule B non-certifiable occupation The Employer only submitted a statement that verbal information indicated that all job offers were automatically processed for "suppressed CALJOBS order." The Employer did not state why a written confirmation that their job order was suppressed was not included. The Employer did not indicate any reason why he failed to submit written documentation from the local job office verifying that the job order was suppressed and was on file for thirty calendar days. An employer's failure to provide documentation reasonably requested by the CO will result in a denial of labor certification. *Gencorp*, *supra.*

We agree with the CO that the rebuttal documents on the issue of bona fide job opportunity were not sufficient to correct that deficiency. In *Amger Corp,* 1987-INA-545, (Oct. 15, 1987) (*en banc*), the Board stated that the "employer has the burden of providing clear evidence that a valid employment relationship exists, and that a *bona fide* job opportunity is available to domestic workers, and that the Employer has, in good faith, sought to fill the position with a U.S. worker." The Employer's tax records do not document a bona fide job opportunity since neither the loss in 2001 nor the profit in 2000

were sufficient to pay the wage offered to the Alien. *Fred's Allaf Jewelers*, 1994-INA-620 (Aug. 15, 1996). The Employer has presented no additional evidence explaining or rebutting the financial position presented in the tax returns. Accordingly, certification was properly denied and it is unnecessary to reach the other issues.

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.