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Issue Date: 09 September 2004

BALCA Case No.: 2003-INA-257
ETA Case No.: P2001-CA-09511347/LA
In the Matter of:

SUMMERVILLE AT GARDEN MANOR,
Employer,

on behalf of

ANA PATRICIA CAPILLA-TELLO,
Alien.

Appearance: Maria Maqueda, Esquire
Huntington Park, 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 matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien employment certification. Permanent alien employment 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."). 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 July 3, 2000, the Employer filed an application for alien employment certification on behalf of the alien, Ana Patricia Capilla-Tello, to fill the position of Nurse Aide, later changed to Caregiver. (AF 28-29). The job to be performed included assisting in patient care, under the direction of nursing and medical staff. (AF 28).

On February 21, 2003, the CO issued a Notice of Findings (“NOF”), proposing to deny certification. (AF 21-26). The CO found the Employer’s proposed work schedule to be unduly restrictive, as it covered a span of three different shifts per week, as illustrated below:

Thursday	7:00 a.m. to 3:30 p.m.
Friday	3:00 p.m. to 11:00 p.m.
Saturday	7:00 a.m. to 3:30 p.m.
Sunday	11:00 p.m. to 7:30 a.m.
Tuesday	11:00 p.m. to 7:30 a.m.

Accordingly, the CO instructed the Employer to amend the work schedule to a schedule that fits a normal requirement for U.S. workers or to justify the stated work schedule as a business necessity. (AF 22).

The CO further found that the Employer had rejected U.S. applicants for other than lawful, job-related reasons. The CO explained that the Employer scheduled interview times without first contacting each applicant to find a convenient time, which likely dissuaded applicants from attending the interviews. In addition, the CO found that the Employer rejected the U.S. applicants it interviewed for other than lawful, job-related reasons. The CO stated that the Employer could rebut this finding by documenting specific lawful job-related reasons for rejection of the applicants. (AF 24-25).

The Employer filed a rebuttal dated March 18, 2003, addressing the above-listed deficiencies. (AF 10-12). On June 6, 2003, the CO issued a Final Determination (“FD”)

denying certification. (AF 3-5). The CO noted that although the Employer proposed a new work schedule, the hours it listed were still unduly restrictive as they failed to fit a normal requirement for U.S. workers and the Employer failed to justify the work schedule as a business necessity. (AF 22). In addition, the Employer failed to demonstrate that it rejected U.S. applicants for lawful, job-related reasons. Because of the Employer's unduly restrictive work hours and unlawful rejection of U.S. applicants, the CO stated that it would be unnecessary for the Employer to remedy its advertising deficiency by retesting the labor market with another advertisement.

DISCUSSION

Unduly Restrictive Work Schedule

Twenty C.F.R. § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. An employer cannot impose a requirement that is abnormal for the occupation or not included in the *Dictionary of Occupational Titles* ("DOT") unless it establishes a 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).

In order to show business necessity, an employer must first show that the requirement it imposes bears a reasonable relationship to the occupation in the context of the employer's business. Secondly, the employer must show that the requirement is essential to performing, in a reasonable manner, the job duties of the position as described by the employer. *Information Industries, Inc.* 1988-INA-82 (Feb. 9, 1989)(*en banc*). Vague and incomplete rebuttal documentation will not meet an employer's burden of establishing business necessity. *Analysts International Corporation*, 1990-INA-387 (July 30, 1991).

Here, although the Employer was instructed either to amend the work schedule to a schedule that fits a normal requirement for U.S. workers, or to justify the work schedule

as a business necessity, the Employer both amended its schedule and offered an explanation for its hourly requirements. (AF 22, 30-32). However, neither of its attempts to remedy the deficiency was suitable. The Employer's amended schedule merely changed the hours from covering three shifts to two shifts and the Employer's explanation for the unusual hours failed to demonstrate business necessity.

In the absence of a showing of business necessity, a work schedule of 2:00 p.m. to 10:00 p.m., for the job of "household service worker," was found to be unduly restrictive. *Louis Rosen*, 1990-INA-488 (Aug. 21, 1992). In *Louis Rosen*, aside from finding that the employer's rebuttal failed to show business necessity, the CO found that the employer failed to prove the duties could not be performed during normal workday hours with occasional overtime. Similarly, in the case at issue, the Employer failed to prove why the employee would be required to fulfill duties over periods of two shifts, from 2:30 p.m. to 11:00 p.m. and 7:00 a.m. to 3:00 p.m. The Employer explained that the unusual hours were in place so as to coordinate with the similarly unusual hours of its CNA nurses. (AF 30). However, without any offering of evidence behind the necessity for unusual hours, this reasoning only further demonstrates the Employer's overall failure to meet normal requirements for U.S. workers.

In another instance, a work schedule of 11:00 a.m. to 7:00 p.m., for the job of "dressmaker," was found to be unduly restrictive. *Something Greek, Inc.*, 1995-INA-96 (Mar. 27, 1997). In *Something Greek, Inc.*, the employer attempted to rebut the CO's Notice of Findings, by making assertions that its schedule was not restrictive and that its hours were the result of its other business commitments. The CO found the employer's rebuttal to be unpersuasive, as the employer merely made assertions instead of offering proof. A bare assertion, without supporting reasoning or evidence, is generally insufficient to carry an employer's burden of proof. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*).

In the case at issue, the Employer asserted that its unusual schedule was necessary, but failed to support its assertion with any proof. In a letter dated March 18,

2003, the Employer simply explained that the two shift schedule was based on the CNA nurses' schedules: "That is why the alien is force [sic] to have 2 different schedules within the 5 days, this schedule is a necessity to the facility because the nurse's schedule is different each day..." (AF 30). As in *Something Greek, Inc.*, the assertion by the Employer in this case does not constitute evidence and is unpersuasive. See *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(en banc).

Unlawful Rejection of U.S. Applicants

An employer who seeks to hire an alien for a job opening must demonstrate that it first made a good faith effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by employers that demonstrate lack of an effort to recruit U.S. workers, or that prevent qualified U.S. workers from pursuing their applications, constitute grounds for denial of alien employment certification. *Id.*

An employer who offers a job opportunity to an alien must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). If a U.S. applicant has applied for the position, the CO must consider the applicant able and qualified for the job opportunity if the applicant, by education, training, experience or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. 20 C.F.R. § 656.24(b)(2)(ii).

In this case, the CO found that the Employer rejected five U.S. applicants for other than lawful job-related reasons. (AF 4-5). Although the Employer insisted that each of these U.S. applicants was not qualified for the position, it failed to document job-related reasons for each applicant's rejection. (AF 4-5, 42-44). Thus, the Employer failed to demonstrate that it validly rejected the U.S. applicants. In view of the foregoing, labor certification was properly denied.

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 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.