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Issue Date: 28 September 2004

BALCA Case No.: 2003-INA-264
ETA Case No.: P2001-CA-09511270/LA

In the Matter of:

DIAMOND CARE HOME,
Employer,

on behalf of

RENE SAPALICIO SABIO,
Alien.

Appearance: Rene C. Fernando, Esquire
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 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 December 22, 2000, the Employer filed an application for alien employment certification on behalf of the alien, Rene Sapalicio Sabio, to fill the position of Nurse Assistant. (AF 24-25). The job to be performed was described as assisting in the supervision of client care, providing medication, and preparing meals. Other job duties included walking residents in and out of the home, assisting in bathing, grooming, and personal hygiene, doing laundry, and cleaning residents' rooms.¹ Other special requirements included CPR and First Aid certification, and availability on-call twenty-four hours per day, to be compensated in accordance with state and federal regulations. (AF 24).

On February 24, 2003, the CO issued a Notice of Findings ("NOF"), proposing to deny certification due to a restrictive combination of duties, restrictive requirements, and that the advertisement lacked specificity. Under each noted deficiency, the CO instructed the Employer on how to take corrective action. (AF 17-22).

The Employer filed a rebuttal dated March 24, 2003. (AF 10-12). However, the CO found that the rebuttal failed to address all of the stated deficiencies and issued a Final Determination ("FD") denying labor certification, dated June 6, 2003. (AF 8-9). On June 18, 2003, the Employer filed a motion for reconsideration addressing issues that it inadvertently failed to address in its March 24, 2003, rebuttal. (AF 2-3).

DISCUSSION

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. *Lucky Horse*

¹ "Live-in" was handwritten below the description of the job duties.

Fashion, Inc., 1997-INA-182 (Aug. 22, 2000) (*en banc*). Requirements are considered unduly restrictive when they are not normally required for the successful performance of a job. 20 C.F.R. § 656.21(b)(2)(i)(A).

In order to show business necessity, an employer must first show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business. Secondly, it 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).

In this case, the CO found that the combination of duties was unduly restrictive. The CO noted that "providing medications, meal preparations and laundering clothes are not duties of a nurse assistant." (AF 18). Accordingly, the Employer eliminated this restrictive combination of duties in its rebuttal. (AF 9-10).

The CO additionally identified the following requirements as unduly restrictive: the live-in requirement, the requirement to be available on-call twenty-four hours per day, the CPR and first aid certification, and the requirement to "perform similar services at various facilities." In its rebuttal, the Employer eliminated "perform similar services at various facilities" from the list of job duties and amended its special requirements to read: "CPR, First Aide Certificate and Health Screening Report and Fingerprinting must be acquired after being hired. Employer will compensate in accordance with State and Federal regulations." The rebuttal did not address the live-in requirement or the requirement to be on-call twenty-four hours per day. (AF 10-11).

As indicated in the FD, the CO accepted the amendments made by the Employer but still denied certification because the Employer's rebuttal failed to address the other unduly restrictive requirements. (AF 8-11). The CO indicated that the Employer also

failed to respond to the subject of overtime, thereby providing an additional basis for denial of certification. (AF 9).

An employer's rebuttal to the Notice of Findings is its "last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). A CO is not required to consider an untimely rebuttal. *Augusta Bakery*, 1988-INA-297 (Jan. 12, 1989) (*en banc*).

In this case, the NOF clearly indicated that the Employer's rebuttal was due by March 31, 2003. (AF 17). The Employer submitted a timely rebuttal on March 24, 2003, but failed to address its noted deficiencies regarding the live-in requirement, the requirement to be on-call, and the overtime provisions. (AF 10-11). Although the Employer later submitted a "modified rebuttal" on June 18, 2003, addressing these issues, its arguments were in response to the FD and were untimely. (AF 2-3). As such, the Employer's arguments in its modified rebuttal will not be considered.²

The Employer failed to timely rebut the CO's determination that the position contained unduly restrictive requirements. In addition, the Employer failed to timely designate an overtime provision, even after the CO noted this omission in the NOF. Because the Employer failed to timely cure the aforementioned deficiencies, labor certification was properly denied.

² If the untimely rebuttal had been submitted before the issuance of the FD, there is still no assurance that certification would have been approved. In its modified rebuttal, the Employer still listed a preference that the Nurse Assistant be on-call twenty-four hours per day, but failed to provide supporting documentation explaining business necessity. Further, the Employer failed to add the overtime provision into its draft advertisement.

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.