



**Issue Date: 11 September 2003**

**BALCA Case No.: 2002-INA-171**  
ETA Case No.: P2000-CA-09486782/JS

*In the Matter of:*

**CAMBRIDGE HOUSE,**  
*Employer*

*on behalf of*

**AGUSTINA PENA DAVID,**  
*Alien.*

Certifying Officer: Martin Rios  
San Francisco, California

Appearance: Eric E. Castelblanco, Esquire  
Bakersfield, California

Before: Burke, Chapman and Vittone  
Administrative Law Judges

### **DECISION AND ORDER**

**PER CURIAM.** This case arises from an application for labor certification<sup>1</sup> filed by an elderly care facility for the position of caregiver. (AF 18).<sup>2</sup> The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File.

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<sup>1</sup> Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

<sup>2</sup> "AF" is an abbreviation for "Appeal File".

## **STATEMENT OF THE CASE**

An application for Alien Employment Certification was filed on behalf of Agustina Pena David by Cambridge House on January 14, 1998. (AF 26).

The CO issued a Notice of Findings (“NOF”) dated October 5, 2001, indicating his intent to deny the application for certification. (AF 14). The CO found that Employer’s requirement that U.S. applicants possess two years of experience was unduly restrictive. (AF 15). The Dictionary of Occupational Titles (“DOT”), the CO noted, indicates that the normal amount of experience required for a Nurse Assistant is a maximum of six months. (AF 15). The CO directed Employer to justify or delete the restrictive requirement. (AF 15).

In its Rebuttal to the NOF, Employer submitted a statement attempting to justify the two year experience requirement. (AF 12). Employer asserted that two years of experience is necessary because the nurse assistant is required to work with Alzheimer’s patients who require additional skilled care. (AF 12). In addition to the specialized care needed for the patients, Employer explained that the position required contact with social services agencies, including completing detailed paperwork. (AF 12). Employer felt that these two aspects of the position justified the required two years of experience. (AF 12).

On November 29, 2001, the CO issued a Final Determination denying certification. (AF 5). The CO found that:

[t]he employer’s statements do not contain information which shows with any specificity how two years experience is required for the care giver position.

(AF 6). While acknowledging that Alzheimer’s patients present a challenge, the CO found that there is no indication that more than the customary six months of experience requirement is necessary. (AF 6). The CO also found that Employer’s record keeping duties did not warrant two year of experience. (AF 6).

Employer requested administrative review of the CO's determination on January 2, 2002. (AF 1). On appeal, Employer contends that the CO failed to consider that all members of its staff working with Alzheimer's patients have at least two years experience. (AF 1). Additionally, Employer believed that the CO failed to consider the two year experience requirement indicated on the ETA-750A. (AF 1). Employer continued to advance its position that two years of experience is necessary for the care of Alzheimer's patients. (AF 1).

### **DISCUSSION**

Unduly restrictive job requirements are prohibited by 20 C.F.R. §656.21(b)(2). If an employer has additional requirements for a position, which are not normally included in the job as listed in the DOT, the employer must establish business necessity.

The purpose of 20 C.F.R. §656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associate, Ltd.*, 1987-INA-569 (Jan. 13, 1989) (*en banc*); *Super Super Inc.*, 1994-INA-604 (Aug. 29, 1995). The requirements cannot exceed those defined for the job in the DOT and are those normally required for job in the U.S. *Lebanese Arak Corp.*, 1987-INA-683 (April 24, 1989)(*en banc*); *Daurte Gallery Inc.*, 1988-INA-92 (Oct. 11, 1989)(*en banc*). Before an analysis of business necessity is undertaken, consideration must be given to whether the particular job requirement is normally required or falls within the applicable DOT code. *Tri-P's Corp.*, 1987-INA-686 (Feb. 17, 1989)(*en banc*).

To determine whether a particular job requirement falls within the applicable DOT code, the CO must determine what job title best describes the job and determine whether the job requirements specified by the employer fall within those defined in the DOT. *CDS Hospital*, 1987-INA-558 (April 11, 1989)(*en banc*). The CO, as described below, found that the caregiver position was most closely associated with the nurse assistant description in the DOT as detailed below: (AF 15).

Performs any combination of following duties in care of patients in hospital, nursing home, or other medical facility, under direction of nursing and medical staff: Answers signal lights, bells, or intercom system to determine patients' needs. Bathes, dresses, and undresses patients. Serves and collects food trays and feeds patients requiring help. Transports patients, using wheelchair or wheeled cart, or assists patients to walk. Drapes patients for examinations and treatments, and remains with patients, performing such duties as holding instruments and adjusting lights. Turns and repositions bedfast patients, alone or with assistance, to prevent bedsores. Changes bed linens, runs errands, directs visitors, and answers telephone. Takes and records temperature, blood pressure, pulse and respiration rates, and food and fluid intake and output, as directed. Cleans, sterilizes, stores, prepares, and issues dressing packs, treatment trays, and other supplies. Dusts and cleans patients' rooms. May be assigned to specific area of hospital, nursing home, or medical facility. May assist nursing staff in care of geriatric patients and be designated Geriatric Nurse Assistant May assist in providing medical treatment and personal care to patients in private home settings and be designated Home Health Aide.

*Dictionary of Occupational Titles*, 4<sup>th</sup> ed. Rev. 1991 (Job Title #355.674.014). This DOT description was not challenged by the employer and appears to be the closest description available in the DOT for the job opportunity as described by Employer.

Additionally, the SVP for nurse's aide is listed as a Category "4" which indicates that the experience required for the position is over three months and up to and including six months of relevant experience. *Supra*.

Employer was given the opportunity to delete the restrictive requirement or justify the business necessity of the two year experience requirement. (AF 15). Employer submitted a statement attempting to justify the requirement, arguing that the position requires working with Alzheimer's patients and contact with social service agencies. (AF 12).

Because the requirements exceed those listed in the DOT, Employer was required to show the business necessity of the two year experience requirement. 20 C.F.R. §656.21(b)(2); *Escalan Institute Soviet American Exchange Program*, 1992-INA-401

(Dec. 28, 1994) (*en banc*). For an employer to establish business necessity, it must be shown that (1) the requirement bears a reasonable relationship to the occupation in the context of Employer's business; and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. *Information Industries Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*).

Business necessity for an experience requirement may be supported by documentation establishing that the skills needed to perform the job must be developed over time or the job involves a high level of responsibility or difficult duties. See *California Graduate Institute*, 1988-INA-395 (April 1990); *Knowlton Realty Ltd.*, 1988-INA-236 (May 30, 1990); *Promex Corp.*, 1989-INA-331 (Sept. 12, 1990); *Broadway & 89<sup>th</sup> Street Prescription Center*, 1988-INA-346 (Mar. 2, 1990).

In general, business necessity is not established by a mere assertion by the employer. See *Aquarius Enterprises*, 1987-INA-579 (Mar. 24, 1988)(*en banc*); *Fresh Pond Shopping Center Trust*, 1990-INA-235 (Sept. 3, 1991); *Chapman Manufacturing Co.*, 1989-INA-303 (May 14, 1991); *Patsy's Italian Restaurant*, 1989-INA-80 (Oct. 25, 1989).

When the employer's evidence consists of bare conclusions unsupported by any evidence or specific reasoning to the offered position, business necessity is not established. *Analyst International Corp.*, 1995-INA-131 (May 28, 1996).

Pursuant to the requirements of *Information Industries*, it must be determined whether the requirement bears a reasonable relationship to the occupation in the context of Employer's business. In the instant case, Employer has failed to establish this element of its burden. Employer has furnished nothing beyond mere assertions that the requirement of two years of experience is reasonably related to its business.

Furthermore, Employer has failed to establish the second element of its burden. Employer has produced no evidence that two years of experience is essential to

performing the caregiver position in a reasonable manner. It is irrelevant that all of the other persons employed in the same position possess that level of experience. Such an assertion does not establish that two years of experience is essential to successfully performing the tasks of the caregiver. Employer has produced no evidence that more than six months of experience is necessary to care for Alzheimer's patients or to complete the necessary paperwork.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

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 of Labor 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, NW, 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 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.