U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

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

Issue Date: 22 July 2003

BALCA Case Nos.: 2002-INA-176 and 2002-INA-177
ETA Case Nos.: P1998-CA-09437071/ML and P1998-CA-09437073/ML

In the Matters of:

EVERGREEN HAVEN CARE,
Employer,

on behalf of

SUSANA PEREZ,

and

MAURICIO PEREZ,
Aliens.

Appearance: Evelyn Sineneng-Smith
Immigration Consultant
San Jose, California

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. These cases arise from applications for labor certification filed by Evergreen Haven

Care Home ("Employer") for the position of Nurse Assistant.[1] (AF 76).[2] The following decision is based on the records upon which the Certifying Officer (CO) denied certification and Employer's *Requests for Review.* Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. §18.11.

STATEMENT OF THE CASE

SUSANA PEREZ APPEAL

On December 16, 1996, Employer filed an application for alien employment certification on behalf of the Alien, Susana Perez, for the position of Uncertified Nurse Assistant. (AF 77-78). On May 11, 2001, the CO issued a Notice of Finding (NOF) stating the Department's intention to deny the application and providing suggestions for corrective actions. (AF 72-75). The CO issued a Supplemental NOF (SNOF) on August 17, 2001, stating that Employer's efforts to rebut the determinations in the NOF failed or raised new issues which necessitated further corrective action. (AF 59-61). On November 21, 2001, the CO issued a Second Supplementary NOF (SSNOF) which stated that Employer's subsequent efforts had not completely rebutted the findings of the SNOF and provided suggested steps for corrective action. (AF 23-25).

In the SSNOF, the CO made two determinations relevant to this appeal. First, the CO determined that Employer did not adequately recruit as set forth by the regulations at 20 C.F.R. §§ 656.21(b)(1) and 656.21(g) because Employer's advertisement did not make a distinction between hours worked and hours spent on-call. (AF 24). Second, the CO determined that Employer's application did not comport with 20 C.F.R. § 656.23(c) because the occupation of "Nurse Aide" is on the Schedule B list of non-certifiable occupations, and Employer had not submitted a Schedule B waiver as directed by the SNOF. (AF 24-25).

---

[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" refers to the Susana Perez Appeal File. "AF2" refers to the Mauricio Perez Appeal File.

With regard to the CO's determination that Employer failed to adequately recruit, the record shows that Employer recruited applicants through an advertisement which stated in relevant part:

> Nurse Asst / live-in . . . avail on call 24hrs/day / live-in / OT pd. / . . . Thurs - Mon 6am-3pm (40 hrs) $382.00/week / free rm/bd.

(AF 53). The Employer stated on the labor application, Form ETA 750, that the position required 40 hours per week and overtime "as needed." (AF 76). The application also stated that the rate of pay was in the amount of $382.00 per week and overtime would be paid at the rate of "1 ½" per hour. (AF 76). The application was amended to also include the statement that "Employer would compensate in accordance with [California] State law and regulations." (AF 76).

Based on the evidence in the record which showed that the Alien was expected to be available in order to respond to emergencies that might occur amongst the residents of Employer's residential care home, the CO determined that the status of the job during the time not included in the 40-hour work week should be characterized as "controlled standby." (AF 24). The CO determined that "controlled standby," as set forth by the California Division of Labor Standards Enforcement EP&I Manual part 46.3, was a status which required time spent to be paid at an amount of remuneration that was not less than the applicable minimum wage rate.[3] (AF 24). Therefore, the CO determined that the advertisement's description of the rate of pay was incomplete as it did not describe the rate of pay during the "on-call" time in accordance with the mandate of California State Law for time employed in controlled standby status. (AF 24).

With regard to the CO's second ground for denying the application, the CO determined that the position listed on the application is not certifiable, as set forth by 20 C.F.R. § 656.23(c). (AF 61). Employer stated on the application that the name of the job title was "Uncertified Nurse Assistant." (AF 76). The CO likened the occupation of Uncertified Nurse Assistant to that of a Nurse Aide, and

---

[3] The California Division of Labor Standards Enforcement EP&I Manual upon which the CO relied on to define "controlled standby" is not found within the record.

determined that the occupation of Nurse Aide was an occupation designated on the Schedule B list of non-certifiable occupations. (AF 24-25, 61).

The SSNOF provided remedial steps that Employer could take to correct and/or rebut both grounds for denial found by the CO. (AF 24-25). The SSNOF also stated that Employer had until December 26, 2001 to rebut the findings or to remedy the defects, otherwise the NOF would become the final decision of the Secretary denying labor certification. (AF 24).

The Final Determination denying certification was issued on March 2, 2002. (AF 5). After consideration of the rebuttal evidence, the CO determined that Employer remained in violation of 20 C.F.R. §§ 656.21(b)(1) and 656.21(g) because Employer failed to provide an opinion letter from the California Labor Commissioner that the position advertised was not "controlled standby." (AF 6). The CO also determined that Employer remained in violation of 20 C.F.R. § 656.23(c) because Employer did not provide evidence of a Schedule B waiver containing evidentiary documentation that the Job Service ran a suppressed job order. (AF 6).

Employer filed a Request for Review of the Denial of Certification on March 29, 2002. (AF 1). Employer bases its appeals on the following two reasons: 1) "Explanation of Failure to Adequately Recruit- 24 hour on-call and other supporting documents;" and 2) "Explanation on Schedule B occupation." (AF 2).

STATEMENT OF THE CASE
MAURICIO PEREZ APPEAL

On December 19, 1997, Employer filed an application for labor certification on behalf of the Alien Mauricio Perez for the position of Nurse Assistant. (AF2 72-73).

On May 11, 2001, the CO issued a Notice of Finding (NOF) indicating intent to deny the

application on two grounds. As the first ground, the CO noted that the job duties combined the job duties of a general houseworker and a nurse assistant in violation of 20 C.F.R. § 656.21(b)(2)(ii). The CO advised Employer that it could cure the deficiency by revising the job duties or by justifying the combination of duties as a business necessity.

For the second ground, the CO found that the Alien when hired did not have the three months experience required by Employer. To remedy the deficiency, the CO advised Employer to amend the form ETA 750A or demonstrate that the Alien possessed the necessary qualifications. (AF2 67-70).

In its Rebuttal dated June 13, 2001, Employer asserted that the general houseworker duties to be performed by the applicant comprised only 20 percent of the applicant's total employment time. Hiring a part-time worker to perform the general houseworker's duties was not a possibility because Employer would not be able to properly supervise the worker's preparation of the meals. Additionally, the combination of the duties was consistent with Title 22, the guideline for the residential home care industry. Employer also submitted an amended job advertisement. Employer addressed the Alien's experience by submitting a document signed by the Alien's previous employer indicating one year of experience caring for the elderly. (AF2 55-66).

On August 17, 2001, the CO issued a Supplement Notice of Finding (SNOF). The CO noted that in accordance to the Dictionary of Occupational Titles (DOT), a Nurse Aid works under the supervision of medical or nursing staff. As Employer did not appear to have medical or nursing training, the CO questioned whether there was an actual job opening for a Nurse Aid. The CO asked Employer to submit evidence that a job opening that complied with the DOT existed in Employer's business.

The CO also noted that Employer's advertisement for the job did not state that Employer would compensate in accordance with California's state law and regulations. To correct the

deficiency the CO referred Employer to the recruitment instructions.

Additionally, the CO found that the occupation of Nurse Aid is a Schedule B occupation. Consequently, Employer had to request a Schedule B waiver and was required to document that the local job service had a suppressed job order on file for thirty days. (AF2 51-54).

In its Rebuttal to the SNOF, dated September 19, 2001, Employer requested that the houseworker's duties be deleted. A more detailed description of Alien's experience was provided along with Employer's income tax returns and business license. Employer also argued that its advertisement stated the requirement of 24 hour on call and that overtime would be paid. Employer asserted that it is known that overtime is paid once an employee works over eight hours in one day. Therefore, the advertisement indicates compliance with California's rules and regulations. (AF2 24-49).

The CO issued a Second Supplement Notice of Finding on November 21, 2001. (AF2 21-23). The CO found that Employer had cured the deficiency regarding the Alien's work experience. Two issues remained outstanding. The CO was not satisfied by Employer's argument that a statement that overtime was going to be paid complied with the state regulations. The CO found that to be "on call" was "controlled standby" as per the California Division of Labor Standards Enforcement and such "controlled standby" had to be paid no less than the minimum wage. Consequently, the employment advertisement had to reflect that fact. If Employer disagreed, it had to seek and receive a legal finding from the State Labor Commissioner within thirty-five days.

The CO also found that Employer had misunderstood how to address a suppressed job order. The CO provided a brief explanation and requested that Employer comply with the corrective action stated in the SNOF.

On December 8, 2001, Employer filed its Rebuttal to the SSNOF. (AF2 7-19). Employer

alleged that the position offered was that of Uncertified Nurse Assistant who is normally supervised by the administrator of the residential care home, unlike a Nurse Assistant who needs to be supervised by medical personnel. A consumer guide from the State of California was provided in support of that argument. Employer also argued that it needs an individual to live-on the premises in order to provide proper care to the residents of its facilities. A copy of a letter addressed to the State Labor Commissioner requesting a legal finding of the 24-hour on-call issue was submitted. Employer also asserted that a suppressed job order was performed by the state agency.

On March 4, 2002, the CO issued a Final Determination (FD) denying certification. (AF2 5-6). The CO found that Employer did not document its assertion that it had contacted the California Labor Commissioner for a ruling on its 24-hour standby requirement. The CO noted that the record did not reflect evidence of Employer's request,[4] nor a response from the state agency. The CO also found that although Employer alleged that the Job Service placed a suppressed job order, the evidence from the Job Service shows that the order ran unsuppressed in violation of the regulations. Consequently, Employer did not adequately test the availability of applicants for the position. As Employer failed to properly address the issues raised in the SSNOF, the CO denied Employer's labor certification application.

On March 21, 2002, Employer filed its Request for Review. (AF2 1-4). Employer reasserted that it made a request to the California State Labor Commissioner regarding the 24-hour on call requirement and still had not received a response. Employer alleged that Mr. Rosales from EDD in Sacramento stated that every request for labor certification is automatically processed as a suppressed job order.

[4] At AF2 19 a copy of a letter addressed to the State Labor Commissioner is found. In the letter, Employer requests a finding on the 24-hour on call issue.

DISCUSSION

A. Whether Employer Failed to Adequately Recruit a 24 Hour On-Call Applicant

Fundamental to an employer's recruitment effort is an advertisement in a newspaper or other publication, whichever is appropriate to the occupation and is most likely to attract responses from able, willing, qualified and available U.S. workers. 20 C.F.R. § 656.21(g)(1)-(9); *see also,* § 656.21(h)-(j). An employer must include certain elements of the position in the advertisement, including: a description of the job opportunity; a statement of the rate of pay, which must not be below the prevailing wage; an offer of prevailing working conditions; and, a statement of the minimum job requirements. 20 C.F.R. § 656.21(g)(3)-(6). The CO may specify additional terms to be included in a job advertisement. *See Riccardo Di Capua*, 1990-INA-489 (Dec. 23, 1991) (affirming the CO's determination that in order to make a full and fair test of the labor market for a child monitor position, the employer was required to include in its recruitment advertisements, among other items, the job's daily work schedule, expected overtime hours, overtime pay, and days of the week off, despite the employer's contentions that these items were not required by section 656.21(g)(1) through (9)). Advertisements which offer terms and conditions less favorable than those set forth in the ETA 750 are considered unduly restrictive. *Michael and Miriam Lehrer*, 1988-INA-485 (Dec. 12, 1989); *Montana State University*, 1987-INA-743 (May 9, 1988). Posting a wage offer below the prevailing wage will result in a denial of labor certification, unless the employer cures the defect in response to the CO's request in the NOF. *Yuma Construction Co., Inc.*, 1989-INA-341 (May 3, 1990).

The record contains evidence showing that Employer expected the Aliens to respond to emergencies that may occur during the sixteen-hour time frame which was separate from the eight hours when regular compensation would be paid. (*e.g.*, AF 11). This expectation was articulated by Employer through a memo it submitted as rebuttal evidence, titled "Justification for the Live-In Requirement/On-call 24 hrs a day," which stated in part:

> Our care home takes care of 6 residents who are frail elderly. Their personal and sanitation needs occur irregularly, sometimes during the night, sometimes during the early morning, or during the afternoon. It is essential that a caregiver must be available on call at night/24 hrs a day *and waiting during these hours to respond their personal needs.*

(*e.g.*, AF 11) (emphasis added). The on-call portion of the employee's work responsibility, which was characterized by the CO as "controlled standby," creates a situation where the employee would be "waiting during these hours to respond" to emergencies. Although the record does not document California law regarding mandatory wages for time spent in "controlled standby" status, the CO's determination that an employee should be compensated for the entirety of the time spent while waiting to respond to emergencies is reasonable because the employee would not be completely free of all work responsibility during this spent "on-call" or on "controlled standby."

In its rebuttal, Employer argued that the advertisement sufficiently stated the appropriate rate of pay for the on-call portion of the job position because the advertisement stated that "overtime" would be for any time in which the employee actually worked which was not included in the regular eight-hour day. (*e.g.*, AF 52). However this argument does not rebut the CO's determination that the presumption of a "controlled standby" occupation necessitated Employer to advertise the rate of pay in accordance with that the directives of California State law, *i.e.*, that wages would be provided at a rate not less than the applicable minimum wage during the sixteen hours of "on-call" time.

The SSNOF suggested that Employer could rebut the presumption that the job offered was "controlled stand-by" by submitting a legal opinion of Arthur Lujan, the State Labor Commissioner, which stated that the job was not controlled standby. (*e.g.*, AF 24). The record shows that Employer requested such an opinion of the State Labor Commissioner (*e.g.*, AF 19), but a responsive opinion letter was not received or submitted into the record. When challenging a CO's prevailing wage determination, an employer bears the burden of establishing both that the CO's determination is in error and that the employer's wage offer is at or above the correct prevailing wage. *PPX Enterprises, Inc.*, 1988-INA-25 (May 31, 1989) (*en banc*); *Sun Valley Co.*,

1990-INA-391 (Jan. 6, 1992) (prevailing overtime wage rate). Because Employer did not provide evidence to rebut the CO's determination that the job offered was a "controlled standby" position which would necessitate a specific rate of pay and because the record shows that Employer recruited through the publication of an incomplete advertisement with respect to the description of the compulsory wage rate for an occupation with a "controlled standby" component, the CO's denials of certification on this ground are affirmed.

B. Whether Occupation was a Non-Certifiable Schedule B Occupation

"Schedule B" lists occupations for which the Department of Labor has determined that a nationwide surplus of United States workers exists and that the employment of aliens in these positions would adversely affect the wages and working conditions of U.S. workers employed in similar occupations.[5] 20 C.F.R. § 656.23. An employer's application for alien labor will not be certified for an occupation listed on Schedule B unless the employer obtains a waiver. 20 C.F.R. § 656.23(d). There is no entitlement to a waiver from Schedule B based upon the failure by the local employment service to refer all of the applicants for the job offered. *Bob's Exxon*, 1989-INA-259 (May 2, 1991) (adequate test of the labor market was not achieved).

Schedule B includes the occupations of "Nurses' Aides and Orderlies" and describes the occupations as follows:

> Nurses' Aides and Orderlies assist in the care of hospital patients by performing such activities as bathing, dressing and undressing patients and giving alcohol rubs, serving and collecting food trays, cleaning and shaving hair from the skin areas of operative cases, lifting patients onto and from beds, transporting patients to treatment units, changing bed linens, running errands, and directing visitors.

---

[5] Occupations listed on Schedule B generally fall into two classes. First are jobs that require little or no education, experience or skill and workers can generally be trained quickly to perform satisfactorily. Then there are jobs characterized by relatively low wages, long and irregular working hours, and poor working conditions which lead to excessive turnover. 20 C.F.R. § 656.23(a) and (b).

20 C.F.R. § 656.11(a)(36). The regulatory definition of Nurses' Aide is substantially analogous to the description of the job duties to be performed by the Alien as listed on Employer's application, ETA 750 Form. (*e.g.*, AF 77). Hence, the CO is correct in his determination that Employer must obtain a Schedule B waiver in order to receive approval for the application submitted in this matter. 20 C.F.R. § 656.11(a).

The CO advised Employer that its Schedule B waiver must contain documentation showing that a "suppressed" job order was on file with the local job service office for a period of 30 days, in order to obtain an accurate assessment of the availability of U.S. workers to perform the job. (*e.g.*, AF 24-25, 61). In the SSNOF, the CO described a suppressed job order as one in which "the employer is not identified to the U.S. applicant and vice-versa, meaning contact between them is managed by the Job Service." (*e.g.*, AF 24). Although the CO did not articulate the reason why a "suppressed" job order is needed to adequately assess the availability of U.S. workers, this Board will not substitute its own judgment with regard to this matter, and thereby defers to the expertise of the CO for determining the method necessary to adequately test a specific labor market. *See Riccardo Di Capua*, 1990-INA-489 (Dec. 23, 1991). Denial of a Schedule B waiver may be based on grounds similarly found under the basic labor certification process, such as the failure to document sufficient testing of the labor market. *Bill Ellis & Sons*, 1990-INA-226 (Sept. 20, 1991). Therefore, because the Employer did not submit a Schedule B waiver with specific accompanying documentation as directed in the SNOF and SSNOF, the CO's denials of the applications on the ground that an appropriate Schedule B wavier has not been submitted are affirmed.

ORDER

The Certifying Officer's denial of labor certifications in the above-captioned matters are 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. 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 pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.