U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 July 2003

BALCA Case No. **2002-INA-110**
ETA Case No. P1999-CA-09474761/JS

In the Matter of:

EMILY'S HOME 1,
Employer,

on behalf of

ROMEO ZANO, IV,
Alien.

Certifying Officer: Martin Rios
San Francisco, CA

Appearance: Theodore A. Behlendorf
For Employer

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Romeo Zano, IV ("Alien") filed by Emily's Home 1 ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties.

STATEMENT OF THE CASE

On December 19, 1997, the Employer filed an application for labor certification on behalf of the Alien for the position of Residence Supervisor. (AF 62-63).

On August 30, 2001, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on the grounds that it did not appear that the Employer had a job opportunity for a skilled worker. Additionally, some requirements for the position seemed to be unduly restrictive. (AF 12-17). The CO found that the Employer did not appear to have any additional employees and since there were only six residents in the "home," the Employer had not established that the job opportunity for a skilled worker in fact existed. To remedy the deficiency, the CO requested details regarding the number of residents, type of patients, number of caregivers, and health aides working for the Employer. In addition, the CO requested documentation that the job duties as described were performed by a manager and not by a care provider.

The CO also found that the requirements of health screening, current first aid card, and clearance from the California Department of Justice were unduly restrictive. The CO found that those requirements were not normal for the successful performance of the job. The CO added that the Employer should arrange for the applicant to satisfy those requirements after she is hired and not before. The CO advised the Employer to delete the unduly restrictive requirements and retest the labor market.

In its Rebuttal dated September 22, 2001, (AF 18-23), the Employer asserted that there were six patients in its facility, all under the age of eighteen, with various medical and psychological illnesses. To care for the patients, the Employer employed one administrator, three resident supervisors, and eleven caregivers. The Employer listed the names of the employees and their salaries. The Employer then detailed the responsibilities of the resident supervisor and contrasted them with those of the caregivers.

Regarding the restrictive requirements, the Employer stated that according to title 22, division 6, chapter 1 of the general licensing requirements issued by the Department of Social Services of the State of California, any adult responsible for the direct supervision of staff shall be fingerprinted and shall sign a declaration under penalty of perjury regarding any prior criminal convictions prior to employment. Therefore, the Employer concluded, the clearance requirement was not a mere preference of the Employer but a business necessity, as it was required by law. The Employer indicated its willingness to delete the requirements of possession of a first aid card and health screening. The Employer also indicated its willingness to retest the labor market.

In correspondence dated September 26, 2001, the Employer stated that it wanted to amend item 15 of the ETA 750A so it read "must have clearance from the California Department of Justice." The Employer clarified that it was deleting the requirement of a first aid card and health screening. The Employer then reiterated that according to the general licensing requirements for the State of California's department of social services any adult responsible for the direct supervision of staff must be fingerprinted and sign a declaration under penalty of perjury regarding any criminal convictions prior to employment. The Employer insisted that its requirement of a Department of Justice clearance was solely to comply with the licensing requirements and it was therefore a business necessity. Additionally, the Employer reasserted its willingness to retest the labor market. (AF 24-25).

On November 7, 2001, the CO issued a Final Determination (FD) denying certification. The CO indicated that in the NOF several issues were raised, and that the only remaining issue was the unduly restrictive requirement. The CO noted that the NOF did not indicate that the Employer could not arrange to have the applicants fingerprinted or could not require a clearance from the Department of Justice after being hired. The NOF noted instead that it was unduly restrictive to require the clearance before the applicant was interviewed. The CO found that there was no indication that it was normal to require the applicants to have their own Department of Justice clearance and that it be done before an interview was granted. Further, there was no indication that the referral of the applicant for fingerprinting could not be performed once the person was hired. The CO then denied the application based on his finding that the unduly restrictive requirement unfairly disqualified U.S.

applicants. (AF 10-11).

On November 13, 2001, Employer filed a document titled Motion for Reconsideration/Request for Review. (AF 2-6). The Employer asserted that according to the law the worker had to be fingerprinted prior to employment, residence or initial presence in the facility. The Employer noted that it wanted to retain the requirement to ensure that there was no confusion about the position's requirements. The Employer stated that it believed that it would be misleading to delete the requirement, as the applicant's employment could not start without the clearance from the Department of Justice of California. The Employer concluded by stating that all U.S. applicants have the right to be informed of all the requirements, which was the reason for Employer's reluctance to delete the requirement. Having said that, the Employer indicated its willingness to remove the background clearance requirement and have the labor market retested. Consequently, the Employer requested that the denial be reconsidered based on its willingness to amend the requirements.

On December 26, 2001, Employer's Request for Reconsideration was denied. The CO noted that in accordance with *Matter of Tancredi*, 1988-INA-441 (Dec. 1, 1988), motions for reconsideration could only be entertained with respect to issues that could not have been addressed in the Rebuttal. Since the Employer's Motion for Reconsideration did not raise such issues, the Motion was denied. (AF 1).

On April 2, 2002, the Employer submitted a brief in support of its position. The Employer re-asserted that it was simply following the licensing requirements by requiring the Department of Justice clearance. The Employer considered that it would be misleading to select an applicant based on initial qualifications, knowing that the applicant needed to undergo a fingerprint clearance before starting to work. The Employer concluded that the CO erred in finding the requirement unduly restrictive, as the requirement is mandated by law and can not be considered restrictive. Instead, it must be considered a business necessity.

DISCUSSION

The issue to review in the present case is whether the background clearance requirement was an unduly restrictive requirement reflecting a lack of good faith recruitment, or a requirement mandated by law and therefore a business necessity. A good faith recruitment effort is implicit in the regulations. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Therefore, an Employer may not place unnecessary burdens on the recruitment process. *Lin and Associates*, 1988-INA-7 (Apr. 14, 1989). If the Employer acts in a way which indicates a lack of good faith recruitment, such as actions which discourage U.S. workers from pursuing their applications, denial of certification is appropriate. *Vermillion Enterprises*, 1989-INA-43 (Nov. 20, 1989); *Berg & Brown, Inc.*, 1990-INA-481 (Dec. 26, 1991).

The regulation at 20 C.F.R § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. Unduly restrictive requirements are prohibited because they have a chilling effect on the number of U.S. workers who may apply or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 1987-INA-569 (January 13, 1989) (*en banc*). A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the Dictionary of Occupational Titles (DOT) and are normally required for a job in the United States. *Ivy Cheng*, 1993-INA-106 (June 28, 1994); *Lebanese Arak Corp*, 1987-INA-683 (April 24, 1989) (*en banc*). The job definition of a Resident Supervisor, as found in code 187.167-186 of the DOT, does not include a criminal background clearance requirement. Additionally, the record does not show that the requirement is normally required for the job in the United States.

The Employer consistently argued that the criminal background check was required by law and therefore was a business necessity. To establish business necessity under 20

C.F.R.§656.21(b)(2), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform in a reasonable manner the job duties as described by the employer. *Information Industries*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). In support of its business necessity argument, the Employer submitted a copy of the State of California's Health and Safety Code.

The Health and Safety Code (HSC) section1522 (c), states:

> (c) *Prior to employment, residence or initial presence in the facility, all individuals subject to criminal record review* ***shall be fingerprinted and sign a declaration under penalty of perjury regarding any prior criminal convictions*** *that acknowledges and explains the criminal convictions. The declaration shall also acknowledge that his/her continued employment, residence or presence in the facility is subject to approval of the Department as specified in Section 80065(i).* (emphasis added).

(*See* AF 40) In reviewing the language in section 1522(c) of the HSC, we note that all that is required from the applicant is to allow the employer to fingerprint her and for the applicant to sign a statement declaring her criminal record. The HSC then adds that the applicant's continued employment is subject to a successful completion of the background check, meaning that a check of the applicant's criminal record must confirm the written assertions of no criminal convictions. Consequently, section 1522(c) of the HSC does not support the Employer's position that the applicants have to have clearance by the Department of Justice of California, before being interviewed.

Additionally, the Health and Safety Code section 1522(c)(1) in its relevant part states:

> (1) ***The licensee shall submit these fingerprints*** *to the California Department of Justice, ……. (emphasis added)*

Here again, the HSC fails to support the Employer's argument, as the HSC places the responsibility of initiating the applicant's background check on the Employer, who is the licensee, and not on the employee as the Employer would have us believe and as the Employer requires from the applicants.

Furthermore, the Health and Safety Code section 1522(f) in its relevant part states:

(f) *If the criminal record transcript of any of the individuals …… discloses a plea or verdict of guilty … for any crime …… The Department shall take the following actions: ……..*

(3) *For current or prospective employees, exclusion of the affected individual pursuant to Health and Safety Code Section 1558, and denial of the application or revocation of the license, if the individual continues to provide services and/or reside in the facility.*

(AF 41) As noted in section 1522(f), the HSC provides that in the event that the applicant lied about her criminal background, Employer's exposure is limited to terminating the applicant/employee. The Employer's dismissal of the applicant is consistent with the warning in section 1522(c) where the applicant was advised that her continued employment would be contingent on receiving a clearance from the Department of Justice.

Finally, The Health and Safety Code section 1522(g) states:

(g) *The Department shall notify the licensee and the affected individual associated with the facility, in concurrent, separate letters, that the affected individual has a criminal conviction and needs to obtain a criminal record exemption.*

(AF 41) Since any negative outcome is conveyed to both the employer and the employee, the intent of the code, as noted by the HCS' language, is for the background check to be conducted while the applicant is already employed, or in the process of being hired. Curiously, the HSC has a provision for an exemption in the event of a conviction that may be sought by the state agency on its own motion. *See* HSC § 1522(g)(1)(B).

It is clear that the HSC does not require the background clearance to occur before the applicant is interviewed. Instead, it explicitly provides for the employer to facilitate the background check by supplying the fingerprints. Consequently, it is not expected that the applicant take any steps to obtain the clearance. All that the applicant is required to do is to allow her fingerprints to be taken and assert in writing that she has no criminal record, but only after the decision to hire the applicant has been made. The HSC further provides that if the applicant does not clear the criminal background check, the employer can remedy the situation with her dismissal. Therefore, we find that the background clearance requirement is not a business necessity, as it is not required by the HSC.

We note that the Employer in its Rebuttal amended its initial requirements by deleting the requirement of a first aid certificate and health screening. Then, in its Request for Review, Employer indicated a willingness to eliminate the criminal background clearance requirement. The latter amendment could not be considered by this Panel because our review must be based on the record upon which the CO reached his decision. Evidence first submitted with the Request for Review cannot be weighed. *Memorial Granite*, 1994 INA 66 (Dec. 23, 1994). Additionally, an employer cannot be allowed to state a restrictive requirement and reshape the requirement until one is found to which the CO will not object, confident that it can avoid a Final Determination denying labor certification by merely stating that it is willing to readvertise. In such a situation the Employer is not engaging in a good faith effort to recruit. *Spanish American Institute,* 1990-INA-435 (March 18, 1991).

The Employer's allegation that it would be unfair for an applicant to be hired based on her qualifications and then be unable to start working until she clears the background check, is

disingenuous. The requirement of a clearance from the Department of Justice prior to being interviewed was intimidating. Therefore, we hold that the requirement was unduly restrictive, was intended to discourage U.S. applicants, had a chilling effect on them, and constituted bad faith recruitment. Consequently, as the record supports the CO's findings and for the above stated reasons, we affirm the CO's denial and the following order will enter[1]:

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

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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

[1] In *Spanish American Institute*, 1990-INA-435 (March 18, 1991), we similarly held that the requirement of a teaching license was unduly restrictive when the norm was only to require eligibility for such license at the time applicant was hired.

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.