



**Issue Date: 15 August 2003**

**BALCA Case Nos. 2002-INA-236  
2002-INA-237**

ETA Case Nos. P2000-CA-09499313/ML

*In the Matters of:*

**CARDENAS MARKETS, INC.,**  
*Employer,*

*on behalf of*

**MARIA PINEDA-ALVAREZ,**  
*and*  
**MARINA SOSA-MUNIZ,**  
*Aliens.*

Certifying Officer: Martin Rios  
San Francisco, California

Appearance: Robert G. Berke  
Larry Smith  
For Employer

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

## **DECISION AND ORDER**

Cardenas Market, Inc. (“Employer”), filed two applications for labor certification<sup>1</sup>

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<sup>1</sup> Permanent 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 Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the records upon which the CO denied certification and Employers’ request for review, as contained in the respective appeal files and any written arguments. 20 C.F.R. 656.27(c).

on behalf of (Aliens) Maria Pineda-Alvarez and Marina Sosa-Muniz in January 1998.<sup>2</sup> Employer sought to employ both Aliens for the same position, "Cashier Supervisor." (AF 51-133 ) In the Spring of 2002, the Certifying Officer ("CO") denied certification for both applications. The issue on appeal in both cases is whether the CO's denial of Employer's Motion for Reconsideration constituted an abuse of discretion such that the issues addressed in the motion could not have been addressed in Rebuttal. 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. We find that, because the motion addresses issues which could not have been addressed in Rebuttal, the CO's denial was improper.

### **STATEMENT OF THE CASE**

On March 1, 2002, the Certifying Officer ("CO") proposed in a Notice of Finding ("NOF") to deny certification. (AF 47-49) In the NOF, the CO instructed Employer what it needed to submit to rebut the findings therein and instructed Employer that its rebuttal was "to be sent to the Certifying Officer by certified mail on or before [April 5, 2002]." By a letter dated April 5, 2002 and received by the CO on April 9, 2002, Employer submitted its rebuttal to the NOF. (AF 22-46) On April 16, 2002, the CO issued a denial letter, stating: "[E]mployer failed to rebut the Notice of Findings dated March 1 within the allotted 35 days. Therefore, the Notice of Findings automatically becomes the FINAL decision of the Secretary of Labor DENYING labor certification." (AF 21) (emphasis in original)

In the spring of 2002, Employer filed a Motion for Reconsideration. (AF 4-5) In the Motion, Employer asserts that its Rebuttal was timely submitted. Employer contends that the rebuttal was ready for mailing on April 5, 2002 and that Employer, along with Employer's Counsel, have both signed a declaration attesting to the fact that the rebuttal

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<sup>2</sup> In this decision, "AF" refers specifically to the Marina Sosa-Muniz Appeal File as representative of the Appeal File in both appeals. A virtually identical application was filed for both Aliens and the issues raised and dealt with by the CO (*i.e.*, NOF, FD, *etc.*) in each case are identical.

was, indeed, deposited in First Class Mail before 5p.m. on April 5, 2002. Additionally, Employer submits a return receipt for the Rebuttal in support of its assertions. (AF 6)

## DISCUSSION

Where the FD is based on untimely rebuttal and the employer obviously has had no prior opportunity to submit evidence to support a contention that it filed a timely rebuttal, it is an abuse of discretion for the CO not to reconsider. *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (*en banc*). In *Computer Horizons Corp.*, 1993-INA-506 (Sept. 26 1994), for example, the employer contended that its attorney submitted additional timely rebuttal evidence, and employer supplied a copy of such evidence along with certified mail receipts documenting such timeliness in its request for review. In that case, the matter was remanded for CO to consider that evidence. The facts of this case warrant similar treatment.

In order to prove timely mailing of the rebuttal, an employer must present the certified mail receipt, with postmark. *Andrea Foods*, 1994-INA-309 (Sep. 21, 1994). See also *Vicki Mizell*, 1994-INA-488 (Sept. 21, 1994); *Hankins & Tegenborg, LTD.*, 1994-INA-600 (Sept. 23, 1994)(hand dated certified mail receipt not adequate, objective evidence of date of mailing); *Disc*, 1994-INA-489 (Nov. 30, 1994)(applying the standards discussed in *Andrea Foods* and *Vicki Mizell* to employer's request for extension of time within which to request review). In the instant case, Employer has provided two sworn affidavits and a return receipt for the rebuttal. The Board also notes close proximity between the date of receipt by the CO and Employer's alleged date of mailing.<sup>3</sup>

The CO should have at least considered Employer's arguments and evidence regarding the exact date of mailing submitted with its Motion to Reconsider. Employer is entitled to present its case, and have it considered by the Certifying Officer. Denial of

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<sup>3</sup> It should be noted that although the return receipt is not entirely legible, and the date of mailing could be called into question, the date of receipt by the local Employment office supports the credibility of Employer's assertions. April 5, 2002 fell on a Friday. If Employer's Rebuttal was mailed at 5p.m. on April 5, 2002, it is plausible that the employment office would have received it on Tuesday, April 9, 2002.

that opportunity is arbitrary and capricious, and an abuse of discretion. The case will be remanded so that the CO can give the applicant the fair consideration it is entitled to under our system. See: *Al-Ghazali School*, 1988-INA-347 (May 31, 1989) (*en banc*); *Alabama Reweaving Co.*, 1988-INA-294 (June 2, 1989); *University of Miami*, 1990-INA-447 (March 27, 1991); and *Magnesium Alloy Products Co*, 1990-INA-174 (March 27, 1991).

## **ORDER**

Accordingly, it is **ORDERED**, that this case be, and it hereby is, **REMANDED** to the Certifying Officer for further action consistent with this decision.

For the panel:

**A**

**JOHN M. VITTON**  
Chief Administrative Law Judge

**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.