

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 17 December 2007

BALCA Case No.: 2007-PER-00109
ETA Case No.: A-06104-07231

In the Matter of:

DEBRA ALPERT
and
DANIEL ALPERT,
Employer,

on behalf of

SILVIA CASTRO,
Alien.

Certifying Officer: Melanie Shay
Atlanta Processing Center

Appearances: Anita Delgado, Esquire
White Plains, New York
For the Employer

Gary M. Buff, Associate Solicitor
Frank P. Buckley, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

DECISION AND ORDER

PER CURIAM. This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations. In this case, the Employer filed an application for permanent alien labor certification for the position of Houseworker, General. (AF 8-16). On September 22, 2006, the Certifying Officer (CO) issued a letter denying the application on the ground that a selection had not been made on the ETA Form 9089 for Section C-7, the Employer's Federal Employer Identification Number (FEIN or EIN). (AF 5-7). On October 18, 2006, the Employer's attorney requested reconsideration, arguing that the Employer had in fact filled in Section C-7, and noting that Section C-7 does not require a "selection." (AF 3-4). In a letter dated August 23, 2007, the CO denied reconsideration on the ground that the Employer's entry in Section C-7 was not a FEIN. (AF 1-2). The CO observed that a FEIN was necessary to verify whether an employer is a "bona fide business entity."

The CO forwarded the matter to BALCA, which docketed the appeal on August 29, 2007. The Board issued a notice of docketing on September 12, 2007. The Employer filed a brief by a submission received by the Board on September 28, 2007. The Employer argued that "[t]he number that was entered on Section C-7 was given to the employer after they applied for the Federal Employer Identification Number (FEIN)." The Employer also argued that because it is a husband and wife sponsoring a houseworker in their home, it is not a business and therefore there would be no reason to verify that the employer is a "bona fide business entity."

The CO filed a letter brief dated October 12, 2007, and received by the Board on October 16, 2007. The CO argued that the number used in Section C-7 was not a nine-digit FEIN assigned by the Internal Revenue Service.

DISCUSSION

According to IRS Publication 1635, "Understanding Your EIN," an Employer Identification Number (EIN) is a nine-digit number that IRS assigns in the following format: XX-XXXXXXX.¹ The string of letters and numbers that the Employer typed into Section C-7 of its Form 9089 application was this format: YY-XXXXXXX X.² The first two characters were the letters "TF" followed by a string of numbers. Although the Employer's attorney argued on appeal that this was the number supplied to the Employer after it applied for a FEIN,³ based on the statement in IRS Publication 1635 that an EIN is a nine-digit number, we find that the number supplied by the Employer on the Form 9089 was not a FEIN.

In regard to the Employer's argument that a household is not a business and therefore there is no reason to verify it as a bona fide business entity, this panel held in *Maria Gonzalez*, 2007-PER-24 (Apr. 25, 2007):

The CO correctly cited 20 C.F.R. § 656.3, which states that "an employer must possess a valid Federal Employer Identification Number (FEIN)." (emphasis added). Moreover, the CO correctly cited IRS Publication 926 for the proposition that employers must possess a FEIN in order to file tax forms for domestic household employees.^[4] See www.irs.gov/publications/p926/ar02.html. Thus, the requirement at Section C-6 of the ETA Form 9089 requiring submission of a FEIN is fully supported by the regulations, and by the policy stated in the

¹ www.irs.gov/pub/irs-pdf/p1635.pdf (visited Nov. 30, 2007).

² In this example, Y symbolizes a letter, and X symbolizes a number.

³ The Employer's attorney did not supply any documentation to verify this assertion. Panels of the Board have ruled that statements of counsel in a brief or otherwise presented, unsupported by underlying party or non-party witness documented assertions do not constitute evidence, and are not entitled to evidentiary value. *DeSoto, Inc.*, 1989-INA-165 (June 8, 1990); *Dr. Sayedur Rahman*, 1988-INA-112 (Mar. 20, 1990). Similarly, in *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (en banc), the Board ruled that the factual theory presented by counsel in a brief cannot serve as evidence of material facts.

⁴ In *Gonzalez*, we noted that obtaining a FEIN is not a difficult or onerous requirement. IRS Publication 926 states: "If you do not have an EIN, get Form SS-4, Application for Employer Identification Number. The instructions for Form SS-4 explain how you can get an EIN immediately by telephone or in about 4 weeks if you apply by mail. In addition, the IRS is now accepting applications through its website at www.irs.gov/businesses/small."

regulatory history of the PERM regulations to use the FEIN as a means of verifying whether an employer is a "bona fide business entity."

Thus, although a household may not be a business in the commercial sense, it nonetheless must obtain an EIN in order to legally employ a domestic worker. In a pre-PERM decision involving the issue of business necessity, the Board concluded that in the context of a household seeking to employ a domestic worker, the relevant "business" was the "business" of running a household or managing one's personal affairs. *Marion Graham*, 1988-INA-102 (Feb. 2, 1990) (en banc). Similarly, we find that in the context of a household supplying a FEIN in Section C-7 of Form 9089, the policy of verifying whether an employer is a "bona fide business entity" is served by ensuring that the Employer has applied for and received an EIN in order to legally employ a domestic worker.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **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, NW Suite 400

Washington, DC 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.