



**Issue Date: 17 December 2007**

**BALCA Case No.: 2007-PER-00079**  
ETA Case No.: C-06058-90654

*In the Matter of:*

**JOAN M. BUGAJSKI-LANG,**  
*Employer,*

*on behalf of*

**MARIE SHARMINI DE SARAM,**  
*Alien.*

Certifying Officer: Dominic Pavese  
Chicago Processing Center

Appearances: Joan M. Bugajski-Lang  
*Pro se for the Employer*<sup>1</sup>

Gary M. Buff, Associate Solicitor  
Vincent C. Costantino, Senior Trial 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**

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<sup>1</sup> At the time of the Employer's request for reconsideration, attorney Maria C. Angeles filed a G-28 Notice of Entry of Appearance. Ms. Angeles, however, did not appear before BALCA, and Ms. Bugajski-Lang filed her appellate brief *pro se*.

**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 Live-in Caregiver. (AF 24-42). On February 28, 2006, the Certifying Officer (CO) issued a letter denying the application on the ground that the Employer had not supplied its Federal Employer Identification Number (FEIN or EIN) on the ETA Form 9089 at Section C-7.<sup>2</sup> (AF 20-22). On March 16, 2006, the Employer's attorney requested reconsideration, arguing that the Employer had, in fact made a selection for Section C-7 in her manual submission, writing "None at this time." The Employer's attorney speculated that this statement was omitted when the CO's staff re-keyboarded the manual form for inclusion in ETA's computerized system.<sup>3</sup> The attorney stated that the Employer had now obtained a FEIN, and that failure to have a FEIN at the time of the PERM application was harmless error because the Employer had recruited in good faith (including during an earlier pre-PERM application which was being converted to a PERM application) and was otherwise in compliance with the regulations.

In a letter dated July 16, 2007, the CO denied reconsideration of this citation, writing:

Only an employer may file an application for permanent employment certification. The regulation at 20 CFR 656.3, defines employer as possessing a valid FEIN. Therefore, the Certifying Officer has determined that the denial reason is valid because this applicant was not an employer at the time of filing ETA Form 9089 because it did not possess a valid FEIN, and therefore did not qualify to file the application.

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<sup>2</sup> The CO also found that a selection had not been made for Section F-3, Skill Level, but later dropped this citation upon reconsideration. (AF 1-2).

<sup>3</sup> The Employer's attorney speculation is supported by the Appeal File, which establishes that the Employer did not leave Section C-7 blank in the original submission (AF 34), but that it was blank in the re-keyboarded version. (AF 23). However, the appeal in this matter turns on the question of whether the Employer must have a FEIN when it files the ETA Form 9089, and not on whether Section C-7 was left blank.

(AF 1-2).

The CO forwarded the matter to BALCA, which docketed the appeal on July 17, 2007. The Board issued a notice of docketing on August 8, 2007. On August 29, 2007, the Board extended the briefing period, ordering that briefs would be considered timely "if received by the Board by the close of business on September 21, 2007." (Emphasis as in original). The Employer filed her *pro se* brief by a submission dated August 29, 2007, and received by the Board on August 31, 2007. The brief reiterates the arguments made by the Employer's attorney in the earlier request for reconsideration. The CO filed a letter brief dated September 21, 2007, postmarked September 22, 2007, and received by the Board on September 25, 2007. The CO's brief was not timely and has not been considered in this appeal.<sup>4</sup>

## **DISCUSSION**

In *Maria Gonzalez*, 2007-PER-24 (Apr. 25, 2007), the CO denied certification for failure to provide a FEIN in Section C-6 of the ETA Form 9089. The Employer then requested reconsideration, attaching thereto a revised ETA 9089 containing the Employer's Social Security Number, but not a FEIN. The panel affirmed the CO's denial of certification, writing:

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. [<sup>5</sup>] See [www.irs.gov/publications/p926/ar02.html](http://www.irs.gov/publications/p926/ar02.html). Thus, the requirement at

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<sup>4</sup> Under the OALJ Rule of Practice at 29 C.F.R. § 18.4(c), five days are normally added to a time period for filing a document when filing by mail. However, in this instance, the Board's order specified the date by which briefs must be received.

<sup>5</sup> 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](http://www.irs.gov/businesses/small)."

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

The instant matter is similar to *Gonzalez* in that the Employer did not have a FEIN at the time of the PERM application. It is different in that in *Gonzalez* the employer attempted to cure its failure by providing a Social Security number, whereas in the instant matter, the Employer attempted to cure its failure by obtaining a FEIN after being notified of the deficiency with the application, and asserting that the failure was harmless error.

In *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), the CO was found to have abused his discretion in refusing to permit an employer to correct a typographical error where the employer was in actual compliance with the regulation at issue. In *HealthAmerica*, the Board observed, however, that "a CO will not be found to have abused his or her discretion in denying a motion for reconsideration of a denial ... if the [Employer's] pre-existing documentation does not establish conclusively that the error was merely on the face of the Form 9089, and that there was actual compliance with the applicable substantive requirement." Slip op. at 21.

In the instant case, failure to have a FEIN at the time of application for labor certification was not a mere typographical or clerical error or innocent oversight. Rather, at the time of the application the Employer was not in compliance with the substantive requirement that she possess a FEIN, but in fact had employed the Alien for the past six years without a FEIN. Private households are not exempt from the requirement of possessing a FEIN when engaging domestic workers. Thus, Section C-7 served its purpose as intended – by exposing a deficiency in the Employer's application of not employing a domestic worker in compliance with applicable law.

Based on the foregoing, we find that the CO did not abuse his discretion in declining to permit the Employer to remedy the deficiency in her application by obtaining

a FEIN after being notified of the deficiency. The CO correctly denied certification, and the Employer's remedy is to re-file the application now that she has obtained a FEIN.

**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.