

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 25 April 2007

BALCA Case No.: 2007-PER-00024
ETA Case No.: A-05312-50854

In the Matter of:

MARIA GONZALES,
Employer,

on behalf of

DOLORES VAZQUEZ,
Alien.

Certifying Officer: Melanie Shay
Atlanta Processing Center

Appearances: Gary M. Buff, Associate Solicitor
Harry L. Sheinfeld, Counsel for Litigation
Frank P. Buckley, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Jose E. Rodriquez
CEO, Latin American Legal Council Corp.
Brooklyn, New York
For the Employer

Before: **Chapman, Wood and Vittone**
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.¹

BACKGROUND

On November 8, 2005, the Employer – a private household – filed an Application for Permanent Employer Certification on behalf of the Alien for the position of Domestic House-Keeper. (AF 42).² On November 7, 2005, the Certifying Officer (CO) denied certification for a variety of reasons, including failure to provide a Federal Employer Identification Number (FEIN) in Section C-6 of the ETA Form 9089, in violation of 20 C.F.R. 656.17(a). (AF 4-7; *see also* AF 31). The Employer requested reconsideration, attaching thereto a revised ETA 9089. (AF 2-18). The revised form contains the Employer's Social Security Number, but not a FEIN. (AF 8). In a determination letter dated February 22, 2007, the CO denied reconsideration on the ground that a FEIN had not been provided as required under the regulations. (AF 1). The matter was then referred to this Board and a briefing schedule issued on March 1, 2007.

The CO filed a brief dated March 30, 2007 arguing that the denial of certification should be affirmed because of the failure to enter a FEIN number on the Form 9089. According to the CO, 20 C.F.R. § 656.17(a) mandates that applicants file a "completed" ETA Form 9089, and states that "[i]ncomplete applications will be denied." Because a FEIN is a required entry, the Employer's application was incomplete and must be denied. The CO also argued that the regulatory definition of "Employer" at 20 C.F.R. § 656.3 states that "an employer must possess a valid Federal Employer Identification Number (FEIN)." In addition, the CO observed that the preamble to the PERM regulations stated that the FEIN will be used to verify whether an employer is a "bona fide business entity." 69 Fed. Reg. 77326, 77329 (Dec. 27, 2004). The CO also observed that the instructions

¹ The PERM regulations appear in the 2006 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2006).

² AF is an abbreviation for "Appeal File."

to Form 9089 stated that the FEIN is assigned by the Internal Revenue Service. 69 Fed. Reg. 77404 (Dec. 27, 2004).³ The CO noted that IRS Publication 926, "Household Employer's Tax Guide" requires that employers include their FEIN on tax forms filed for household employees. Finally, the CO argued that a "FEIN is necessary to validate the bona fides of the employer, and thus, the job opportunity offered." CO Brief at 2, quoting AF 1.

The Employer did not file a brief.⁴

DISCUSSION

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.⁵ 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 regulatory history of the PERM regulations to use the FEIN as a means of verifying whether an employer is a "bona fide business entity." We find nothing in the regulations that permits a domestic employer to use a Social Security Number as a substitute for a FEIN. Accordingly, the CO properly denied certification.

³ See also www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf (Form 9089 instructions).

⁴ It is noted that the copy of the Notice of Docketing served on the Alien was returned by the U.S. Postal Service as undeliverable. A handwritten note on the envelope states "Return to Sender. No longer at this address."

⁵ We take official notice that 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." Thus, obtaining a FEIN is not a difficult or onerous requirement.

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.