

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 August 2008

BALCA Case No.: 2008-PER-00011
ETA Case No.: C-06299-74093

In the Matter of:

KAY MAYS,

Employer,

on behalf of

MINERVA OCHOA,

Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Gary M. Buff, Associate Solicitor
Stephen R. Jones, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Yanpin Yang, Esquire
Law Offices of Adan G. Vega & Associates, PLLC
Houston, Texas
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

By letter dated October 23, 2006, counsel for the Employer mailed to the Chicago Processing Center the Employer's Application for Permanent Employer Certification. (AF 26-36).² The Employer – a private household – was seeking to sponsor the Alien for the job of Maid. (AF 28).

The CO accepted the application for processing on October 24, 2006, and apparently re-keyboarded the application into ETA's electronic system. (AF 16-25). On November 6, 2006, the CO wrote to the Employer, stating that the Employer was denied access to submit a Form 9089 electronically until the Employer submitted documents showing proof of a Federal Employer Identification Number (FEIN), proof of a business entity, and proof of a physical location. (AF 14). The Appeal File does not indicate whether the Employer responded to this letter.

On January 4, 2007, the CO issued a letter denying certification. (AF 11-13). The ground for denial was stated in a single sentence: "The company applying could not be verified as a bonafide entity (656.3-Definition of employer)." (AF 13).

On January 25, 2007, the Employer requested reconsideration or alternatively BALCA review. (AF 5-10). The Employer argued that the denial was very vague, did not identify how the Employer was verified, and pointed out that it is a private household and not a "company." To prove that the household was a bona fide employer, the request included attachments of the Employer's passport and her most recent tax return for 2005.

¹ The final PERM regulations were published on December 27, 2004, 69 Fed. Reg. 77326, and are applicable to permanent labor certification applications filed on or after March 28, 2005. The regulations were amended on June 21, 2006, 71 Fed. Reg. 35522, and May 17, 2007, 72 Fed. Reg. 28903.

² AF is an abbreviation for "Appeal File."

The Employer argued that neither she nor her legal counsel was ever contacted by the Department of Labor regarding verification of the Employer's existence.

On October 11, 2007, the CO denied reconsideration. (AF 1-2). The CO explained that providing a Social Security Number in section C-7 of the Form 9089 was not a valid substitute for a FEIN.

The matter was then referred to this Board and a briefing schedule issued on October 19, 2007. The CO filed a brief arguing that because the Employer had only provided a Social Security Number in the application and the request for review, the household was not an "employer" as defined by 20 C.F.R. § 656.3. In support, the CO cited the BALCA decision in *Maria Gonzalez*, 2007-PER-24 (Apr. 24, 2008).

The Employer's brief observed that the first time the absence of a FEIN was identified as the ground for denial was in the CO's letter denying reconsideration. The denial procedure, therefore, "effectively impaired the employer's ability and opportunity to provide the pertinent evidence to bolster her application...." The Employer argued that simply citing a regulation in the denial determination, without elaboration, was a denial of due process. In support, the Employer cited *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) and *Zarif*, 1999-INA-129 (Jan. 6, 2000).

DISCUSSION

A Social Security Number is not a substitute for a FEIN

In *Maria Gonzalez*, 2007-PER-24 (Apr. 24, 2008), the panel held that the requirement in ETA Form 9089 requiring submission of a FEIN was 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." See 20 C.F.R. § 656.3 ("an employer **must** possess a valid Federal Employer Identification Number (FEIN)" (emphasis added)); 69 Fed. Reg. 77326, 77329

(Dec. 27, 2004) (preamble to the PERM regulations stating that the FEIN will be used to verify whether an employer is a "bona fide business entity."). Thus, the panel in *Gonzalez* held that the regulations do not permit a domestic employer to use a Social Security Number as a substitute for a FEIN, observing that IRS Publication 926 states that employers must possess a FEIN in order to file tax forms for domestic household employees.

An employer is entitled to a description of the nature of a violation

Under the regulations in effect prior to March 28, 2005, when the CO proposed to deny an application, a "Notice of Findings" (NOF) was required to be issued. An employer was then permitted to file a rebuttal in order to attempt to cure the violations stated in the NOF. In the pre-PERM decision in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc), the full Board held:

In all cases, a NOF must be clear and provide adequate notice to an employer of the regulatory violations found. A finding of a violation of section 656.20(c)(8) is especially problematic insofar as it is a highly generalized citation of error. An employer faced with a section 656.20(c)(8) citation is in a difficult position unless the precise reasons for finding that a job is not clearly open to U.S. workers is stated in the NOF. Thus, when the CO invokes section 656.20(c)(8) as grounds for denial of an application, administrative due process mandates that the CO specify precisely why the application does not appear to state a *bona fide* job opportunity.

Carlos Uy III, USDOL/OALJ Reporter at 7 (footnote omitted). Under the pre-PERM case law the CO was required to identify the section or subsection allegedly violated, and the nature of the violation, in order to give the employer adequate notice of what it needed to rebut. *Flemah, Inc.*, [19]88-INA-62 (Feb. 21, 1989) (en banc).

The PERM regulations eliminated the NOF/Rebuttal procedure found in the pre-PERM regulations. *HealthAmerica*, 2006-PER-1, slip op. at 16 (July 18, 2006) (en banc). The PERM regulations very purposefully were designed to eliminate back-and-forth between applicants and the government, and to favor administrative efficiency over

dialogue in order to better serve the public interest overall, given the resources available to administer the program. *Id.* at 8-9. BALCA cannot rewrite the PERM regulations to restore a NOF/rebuttal procedure; however, “it has the responsibility to interpret the meaning of regulations and decide whether they have been applied in individual cases consistent with procedural due process.” *Id.*, slip op. at 17.

The PERM regulations permit an employer to file for reconsideration. An employer needs to know the basis for a denial in order to file a meaningful motion for reconsideration. Thus, recognizing that PERM is not designed for a dialogue between applicants and the government and that a PERM application normally cannot be amended once filed, we nonetheless reaffirm the principle that the CO must identify the section or subsection allegedly violated, and the nature of the violation, when notifying the applicant of a denial.

In the instant case, the Employer accurately pointed out that the first time the CO identified the absence of a FEIN as the ground for denial was in the letter denying reconsideration. Prior to that letter, the Employer had to guess as to the basis for the CO’s denial. Thus, the CO’s original denial letter was deficient in failing to state that the reason the petitioning Employer could not be verified as an “employer” was the failure to provide a FEIN in the application.³ Accordingly, the CO’s determination letter had the potential to deny the Employer’s due process rights.

Whether the Employer was deprived of a substantive right

Although we find that the CO’s original denial letter was deficient in failing to state that the reason the petitioning Employer could not be verified as an “employer” was the failure to provide a FEIN in the application, we find that the CO’s failure to fully

³ Arguably, the CO’s November 6, 2006 letter to the Employer denying her access to electronic filing may have alerted her to the FEIN issue. But denying access to electronic filing and denying an application are slightly different. Moreover, the letter was clearly a generic form, and an applicant may not have understood the need for a FEIN, given that the letter also asked for other documentation obviously irrelevant to a domestic household, such as articles of incorporation and a business license.

describe the nature of the violation did not prevent the Employer from obtaining a labor certification that should have been granted.

The only evidence the Employer could have supplied on reconsideration that might have convinced the CO to grant the application was evidence that the Employer had a FEIN at the time that she applied for labor certification. *See HealthAmerica*, 2006-PER-1, slip op. at 16 (a document supporting a motion for reconsideration under PERM must have been demonstrably in existence at the time of application).⁴ Based on the record, it is clear that the Employer did not have a FEIN at the time of the application, but rather believed that her Social Security Number was a sufficient substitute. A FEIN, however, is required even for domestic households. The Employer's failure to obtain one prior to filing for labor certification rendered her application deficient as a matter of law.

Thus, although we concur with the Employer that the CO's original determination letter was deficient, the Employer could not be deprived of something to which she was never entitled. Without a FEIN, the application was fatally flawed. The most the Employer was deprived of was an opportunity to try to establish something that could not have been established.

The Employer's remedy is to obtain a FEIN (which is not a difficult or onerous requirement⁵) and file a new application.

⁴ Since the Employer did not have a FEIN when she applied for labor certification, the Employer's argument is distinguishable from the issue addressed in *HealthAmerica, supra*, whether the CO abused his discretion in denying reconsideration where the employer made a clear typographical error. The deficiency in this application went well beyond a mere typographical error. We do not reach the question of whether the CO would have been obliged to grant reconsideration if the Employer had presented evidence that it actually had a FEIN, but inadvertently used her Social Security Number on the Form 9089.

⁵ We took official notice in *Gonzalez, supra*, 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."

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.