

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 23 June 2009

BALCA Case No.: 2009-PER-00246
ETA Case No.: A-06070-95559

In the Matter of:

ORNELAS, INC.,
d/b/a
LA CARRETA MEXICAN RESTAURANT,
Employer,

on behalf of

ALEJANDRO LEONARDO CALIXTRO,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Richard I. Fleischer, Esquire
Cohen, Todd, Kite & Stanford, LLC
Cincinnati, Ohio
For the Employer

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

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

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

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.

STATEMENT OF THE CASE

On February 27, 2006, Ornelas, Inc. ("Employer") filed an Application for Permanent Employment Certification on behalf of the Alien for a "Cook" position. (AF 8). On November 8, 2007, the CO denied certification under 20 C.F.R. § 656.3, on the ground that "the company applying could not be verified as a bona fide entity." (AF 18-20).¹ The Employer responded on November 28, 2007, with a request for reconsideration. (AF 5-6). In this request, the Employer argued that the company was bona fide, and as proof submitted a copy of a certified Form ETA 9089 for the same employer, but for a different alien. (AF 7-15). The Employer stated that the Form ETA 9089 that he was enclosing was for the "same employer, same address, same telephone number, and same FEIN #." (AF 5). The Employer also enclosed a copy of an advertisement for the company in the Yellow Pages and a copy of its business license. (AF 16-17).

On March 14, 2009, the CO issued a letter of reconsideration finding that that the application would be denied because "the company applying for permanent employment certification could not be verified as a bona fide entity pursuant to 20 C.F.R. 656.3, which states, in part, to be considered an employer the entity must possess a valid Federal Employer Identification Number (FEIN)." (AF 1). The CO asserted that the other approved Form ETA 9089, which the Employer submitted with its request for review, did not contain the same FEIN and therefore did not serve to verify the identity of the entity.

¹ The CO previously denied certification on November 1, 2006 because a selection was not made for "Section M-3, Preparer's title." (AF 23-25). The Employer responded (AF 21-22), and in the second denial letter there is no mention of the original reason for denial. Nor is the original reason for denial mentioned again in the CO's later decision on reconsideration, or in the CO's appellate brief. Thus, we find that this original ground for denial is no longer at issue.

Additionally, the CO stated that the copy of the company's advertisement in the Yellow Pages and the copy of the company's business license did not provide evidence of the Employer's valid FEIN. Since the Employer failed to provide evidence of possessing a valid FEIN, the CO determined the reason for denial to be valid.

The matter was forwarded to BALCA on March 14, 2009, and a Notice of Docketing was issued on March 30, 2009. The Employer notified BALCA on March 31, 2009, that it would like to proceed with the appeal and filed a brief, arguing that the CO never clarified that he wanted proof of the FEIN and at no time did he actually request such proof. The CO filed a brief urging that the denial be affirmed because the Employer had not provided a valid FEIN, as required pursuant to the regulation at 20 C.F.R. § 656.3.

DISCUSSION

Under 20 C.F.R. § 656.3, to be considered an "employer" for the purposes of the permanent labor certification program, an entity must possess a valid FEIN. We concur with the CO that the FEIN in the ETA Form 9089 in the instant case did not match the FEIN in the approved Form 9089 provided by the Employer with its motion for reconsideration.

Nonetheless, there is some merit to the Employer's argument that it never submitted proof that its FEIN was valid because the CO never requested such proof. The CO did not state that the FEIN was an issue in the November 8, 2007 denial, but merely stated that the company could not be verified as a bona fide entity, without elaboration. This left the Employer guessing as to the reason the CO could not verify the bona fides of the application.

Unfortunately for the Employer, its submission of a prior approved labor certification containing a FEIN which did not match the FEIN used in the current

application² only reinforced the CO's conclusion that the Employer had not established that it was a bona fide entity.

Under the pre-PERM regulations, the Board ruled that certification could not be denied based on an issue first raised in the Final Determination. *Barbara Harris*, 1988-INA-392 (Apr. 5, 1989) (en banc). However, the Board drew a distinction between raising an entirely new issue and merely explaining an assessment of the credibility of rebuttal documentation. See *Ledgewood International, Inc.*, 2002-INA-43 (Oct. 11, 2002) (per curiam); *Twin Industries*, 2007-INA-270 (Jan. 16, 2008) (per curiam).

In the instant case, when the CO pointed out that the Employer's prior application did not serve to verify the Employer's FEIN, he was responding to the credibility of the Employer's evidence accompanying the motion for reconsideration. Thus, arguably, the CO was not raising a new issue, but merely pointing out the flaws in the Employer's documentation. However, to get to this issue, it had to have been implicit that the original problem with verification of the Employer's bona fides as a business entity was the failure to provide a valid FEIN. Given the terseness of the November 8, 2007 denial, and the lack of an opportunity for the Employer to supplement the record in response to the CO's letter on reconsideration, we conclude that fundamental fairness dictates that we return this matter to the CO to provide the Employer an opportunity to clear up the inconsistency between the FEIN used on the current application and the FEIN used in the prior approved application.³

² The Employer submitted a copy of certified Form ETA 9089 it had received in regard to a different alien. (AF 7-15).

³ We are perplexed as to why the Employer did not proffer any explanation on appeal as to why the FEINs did not match, but rather chose to rely solely on the argument that it was never asked to provide the FEIN. We understand that the Employer was concerned that the PERM regulations bar it from submitting new evidence on appeal, but this left open the question as to whether the present Form 9089 merely had a typographical error, or whether there are two different FEINs under which the Employer operates.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **VACATED** and that this matter is returned to the CO for additional proceedings consistent with the above.

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, 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.