U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 March 2011

BALCA Case No.: 2010-PER-00525
ETA Case No.: A-08091-37360

In the Matter of:

MICHAEL E. GORHAM RACING STABLE, LLC,
Employer

on behalf of

SERGIO HERNANDEZ-MARTINEZ,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Zulma I. Martinez, Esquire
Marcus Hook, Pennsylvania
For the Employer

Gary M. Buff, Associate Solicitor
Jonathan R. Hammer, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Colwell, Johnson and Vittone**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
VACATING DENIAL OF CERTIFICATION

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 ("C.F.R.").

BACKGROUND

On September 6, 2007, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of Animal Trainers. (AF 36-49).[1] On May 21, 2008, the CO denied the Employer's application without performing an audit, finding that "[t]he company applying could not be verified as a bona fide entity (656.3 – Definition of employer)." (AF 21-23); *see* 20 C.F.R. § 656.3 ("an employer must possess a valid Federal Employer Identification Number (FEIN)"); 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."). Subsequently, on June 18, 2008, the Employer submitted a request for reconsideration with copies of its 2006-2008 State of Delaware Business Licenses with the Federal Employer Identification Number ("FEIN") listed (AF 11-13); a Certificate of Liability Insurance with coverage for Michael Gorham (AF 14); a Bunkhouse Agreement between Michael Gorham and the Delaware Racing Association (AF 15); a receipt from Delaware Park, indicating that Michael Gorham's business occupies 15 stalls (AF 16); a stall rent credit statement from Delaware Park to Michael E. Gorham (AF 17); and the 2006 Individual Income Tax Return (Form 1040) of Michael E. Gorham (AF 18-19).

The CO issued a decision on reconsideration on April 1, 2010. (AF 1). The CO stated that the Employer provided documentation verifying the Employer's license to conduct business and its physical location. However, the CO found that none of the documentation verified the Employer's FEIN. Furthermore, the CO stated that the Atlanta National Processing Center had requested proof of the Employer's FEIN via

[1] In this decision, AF is an abbreviation for Appeal File.

email on January 29, 2010, but had not received a response from the Employer as of March 16, 2010. (AF 1).

The CO forwarded the case to BALCA for administrative review, and BALCA issued a Notice of Docketing on May 4, 2010. (AF 1). The Employer filed a Statement of Intent to Proceed on May 18, 2010, but did not submit an appellate brief. On June 23, 2010, the CO filed a Statement of Position, asserting that the Employer had failed to submit any documentation of its FEIN, and the CO has been unable to determine whether the Employer is a bona fide entity. The CO requests that the Board affirm its decision for denial of the Labor Certification.

DISCUSSION

The PERM regulations at 20 C.F.R. §656.24(g)(2)(i)-(ii) provide that an employer is permitted to request reconsideration of a denial of labor certification, and the request may include the following types of documentation:

> (i) Documentation that the Department actually received from the Employer in response to a request from the Certifying Officer to the employer; or
>
> (ii) Documentation that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of §656.10(f).

Unless the above listed exceptions apply, the CO will not consider any other documentation on reconsideration. In other words, the CO will consider additional documentation submitted with an employer's request for reconsideration *only if* the employer did not have the opportunity to submit it previously. *See Denzil Gunnels d/b/a Gunnels Arabians*, 2010-PER-628 (Nov. 16, 2010).

In this case, the CO denied the Labor Certification due to the inability to verify the company as a bona fide entity. In its request for reconsideration, the Employer provided documentation in support of the company's bona fide existence, including copies of 2006-2008 Business Licenses containing the FEIN. The Employer did not have an opportunity to provide this documentation to the CO previously, and the CO correctly

considered the newly submitted documentation on rendering a decision on reconsideration. Accordingly, this documentation is within BALCA's scope of review because it was part of the record upon which the CO's decision was made. *See* 20 C.F.R. §§ 656.26(a)(4)(i) and 656.27(c); *Eleftheria Restaurant Corp.*, 2008-PER-143 (Jan. 9, 2009); *5th Avenue Landscaping, Inc.*, 2008-PER-27 (Feb. 11, 2009); *Tekkote*, 2008-PER-218 (Jan. 5, 2008).

The CO denied the Employer's application based on a failure to verify the Employer as a bona fide entity, as required by 20 C.F.R. § 656.3. Under section 656.3, "an employer must possess a valid Federal Employer Identification Number (FEIN)." *See also* 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.").

The CO's decision on reconsideration states that none of the documentation provided by the Employer verified its FEIN. (AF 1). Upon review of the documentation, however, the Business Licenses provided for the years 2006, 2007, and 2008 all list the Employer's FEIN which, in turn, all match the number provided in the original Labor Certification Application. (AF 11-13). Therefore, the CO improperly denied certification on this basis, and we vacate the denial of labor certification and remand the case to the CO for further processing.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **VACATED** and **REMANDED** for further processing.

For the panel:

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WILLIAM S. COLWELL
Associate 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.