

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-00844
ETA Case No.: A-09289-69299

In the Matter of:

STEVE'S BAKERY AND CUCHIFRITO CORP.,
Employer,

on behalf of

ROSALINDA ALARADO-REYES,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Jamal Jbara, Esquire
Long Island City, New York
For the Employer

Gary M. Buff, Associate Solicitor
Julia R. Fuma, 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 **OF REMAND**

This matter involves an appeal of the denial of permanent alien labor certification 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 20 C.F.R. Part 656.

BACKGROUND

On October 6, 2009, the Certifying Officer ("CO") accepted for filing the Employer's Form 9089 Application for Permanent Employment Certification for the position of "Baker." (AF 7, 9-29).¹ The application had been submitted by mail. Section M of the Form 9089 is the declaration of the preparer of the application. Section M-1 asks "Was the application completed by the employer?" and requires a Yes or No selection. Immediately under Section M-1 is a certification block in which the preparer attests that he or she prepared the application at the request of the employer and that to the best of the preparer's knowledge the information contained in the application is true and correct. In the instant case, the Employer failed to make a selection for Section M-1, but signed and dated the certification. (AF 26).

On March 23, 2010, the CO denied certification under 20 C.F.R. § 656.17(a) on the ground that Section M-1 of the application was not completed. (AF 7-8). On April 5, 2010, the Employer filed a "Request to Review" the denial. Attached was a corrected Form 9089 with Section M-1 completed. (AF 1-6). The CO forwarded an Appeal File to this Board without ruling on whether the Employer's corrected Form 9089 would be accepted.

On August 2, 2010, the Employer filed a letter with the Board stating that the Employer was only seeking reconsideration and not a formal appeal to BALCA. The CO filed a letter arguing that because the Employer had not titled its April 5, 2010 letter as a

¹ "AF" is an abbreviation for Appeal File.

“request for reconsideration” as set out in FAQs published on the Office of Foreign Labor Certification (“OFLC”) web site, the Board should affirm the denial. In a footnote, the CO stated: “Although not relevant in this situation, if the request had used both the phrases ‘request for review’ and ‘request for reconsideration’ or neither phrase, the CO would have reconsidered the case.” (CO’s Sept. 1, 2010 letter at n.1).

DISCUSSION

Motions for reconsideration treated as requests for review

In *Denzil Gunnels*, 2010-PER-628 (Nov. 16, 2010), slip op. at 11, this panel rejected the contention that OFLC’s December 1, 2009 FAQ on best practices for titling a request for reconsideration or request for BALCA review is binding on employers. The panel noted that a FAQ is not a method by which an agency can impose substantive rules that have the force of law. *Gunnels, supra* at 12-14.

That said, the Employer’s April 5, 2010 letter requesting review of the denial was not clearly a motion for reconsideration. For purposes of this appeal we will assume that it was. Under the PERM regulations, when a motion for reconsideration is filed the CO has the discretion to either reconsider the denial determination or treat the employer’s request as a request for review by the Board of Alien Labor Certification Appeals. 20 C.F.R. § 656.24(g)(4). By forwarding the Appeal File to the Board without ruling on the Employer’s request in the instant case, the CO exercised that discretion *sub silentio*.

In *Gunnels*, 2010-PER-628, slip op. at 11, this panel held that a CO will be found “to have abused his or her discretion when treating what is substantively a request for reconsideration as a request for BALCA review where doing so would have the unsolicited effect of precluding the employer from developing the necessary factual record upon which the denial of certification is properly based under the [2007 amendments to the PERM] regulations.” *Id.* at 16. However, we held that a CO will not be found to have precluded an employer from developing the necessary factual record where the regulations would not have permitted the employer to supplement the record.

Id. at 15 (referencing the regulation describing what documentation can be used to support a motion for reconsideration).

In the instant case, the Employer responded to the denial based on the failure to check the Section M-1 box on the Form 9089 by submitting an amended Form 9089. The regulation at 20 C.F.R. § 656.11(b), however, provides that “[r]equests for modifications to an application will not be accepted for applications submitted after July 16, 2007.” Accordingly, we find that the CO’s action of treating the Employer’s motion for reconsideration as a request for BALCA review did not prevent the Employer from supplementing the record because under the amended regulations, it was not permitted to amend its application once submitted.

Materiality of Omission

Although we find that the CO did not abuse his discretion in treating the Employer’s request for review of the denial as a request for BALCA review rather than a motion for reconsideration, as a matter of fundamental fairness, we are nonetheless remanding this matter because the record needs to be better developed as to whether the Employer’s omission was actually material to the consideration of its application.

Specifically, although the Employer failed to check Question M-1 on the Form 9089, its attorney completed the remainder of Section M which clearly advised the Department of Labor that the Form 9089 had been completed by someone other than the Employer. In fact, the Employer’s attorney certified under penalty of perjury that he had been the one who prepared the application.

We can understand why making a selection for Section M-1 would be important if an employer filed the application online. In those instances, the certification is not signed and dated until after a certification is granted. (AF 26, Form 9089, Section M Note). Thus, the selection for M-1 is the only indicator on an online application of who the preparer was.

But where the application was filed by mail, Section M is required to be signed and dated, thus providing the actual certification under penalty of perjury of a preparer’s

preparation of the application. In the situation where the certification was signed and dated on a mailed in application, it is not clear what purpose Section M-1 serves.

The *Gunnels* decision also involved a denial based on the failure to make a selection for Section M-1, even though the preparer had completed the certification block in Section M of the Form 9089. We observed in *Gunnels* that a denial on this basis appears to elevate form over substance, and remanded the matter for the CO for reconsideration. Although the Employer in the instant case did not raise the issue, we conclude that without information on why a selection for Section M-1 of the Form 9089 is a material consideration in the review of a mailed in application where the preparer actually signed and dated the certification block in Section M, a remand for reconsideration by the CO is warranted. See *Ben Pumo*, 2009-PER-40 (Oct. 29, 2009) (finding that a denial of reconsideration may be found arbitrary where it is unclear why omissions are material, but cautioning that employers who fail to fully answer all of the Form 9089's questions run the peril of having the application denied).

In remanding this case for reconsideration, we wish to emphasize that we have not made a finding whether failure to make a selection in Section M-1 is or is not material under the circumstances of this case. Rather, the point is that it does not appear to be a material consideration, and without an explanation from the CO as to why it is a material consideration, we decline to affirm the denial. Neither are we prepared to reverse the denial because the record is silent as to the import of Section M-1 for a mailed in application. Remand is an opportunity for the CO to consider the issue and either find that it was not a material omission, or to provide an explanation as to why it was important to the CO's review of the application.

ORDER

Based on the foregoing, **IT IS ORDERED** that the CO's denial of certification is **VACATED** and this matter **REMANDED** for reconsideration by the CO of whether the omission in Section M-1 was material in the instant case.

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.