

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 20 June 2011**

**BALCA Case No.: 2010-PER-00530**  
ETA Case No.: A-09106-39834

*In the Matter of:*

**TARLETON STATE UNIVERSITY,  
PART OF TEXAS A & M UNIVERSITY,**  
*Employer,*

*on behalf of*

**OSCAR GALLEGO,**  
*Alien.*

Certifying Officer: William Carlson  
Atlanta Processing Center

Appearances: David Swaim, Esquire  
The Law Firm of Tidwell, Swaim & Associates, P.C.  
Dallas, Texas  
*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: **Colwell, Johnson and Vittone**  
Administrative Law Judges

**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

**DECISION AND ORDER**  
**VACATING DENIAL OF CERTIFICATION**  
**AND**  
**REMANDING FOR FURTHER PROCESSING**

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 May 1, 2009, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of Senior Research Associate. (AF 73-84).<sup>1</sup> Section H-1 of the application, ETA Form 9089, requested the Employer to provide the address of the primary worksite where the work is to be performed. (AF 74). The Employer provided the following address for the primary worksite: “Texas Institute for Applied Environmental Research (TIAER), Box T-0410 Stephenville, TX 76402.” *Id.*

On March 11, 2010, the CO denied the Employer’s application under 20 C.F.R. § 656.3. (AF 70-72). The CO found that the Employer failed to provide a physical street address in Section H-1 of the ETA Form 9089, and instead only provided a P.O. Box address that was not accompanied by a physical street address but a building name or research center. (AF 72). Therefore, the CO determined that the Employer did not meet the definition of an employer under Section 656.3(1), because the Employer did not

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<sup>1</sup> In this decision, AF is an abbreviation for Appeal File.

provide a location within the United States to which U.S. workers may be referred for employment. *Id.*

On April 8, 2011, the Employer requested review of the denial, sending its request to BALCA and a copy of the request for review to the CO's Recon/Appeals Unit. (AF 1-3). The Employer's request was addressed to BALCA, and was titled "Request for Review of Denial of ETA 9089." (AF 1). In its request, the Employer argued that the Employer meets the regulatory definition of employer and that the address provided on the Form 9089, Section H was not a post office box number, but a centralized box used within the Texas Institute for Applied Environmental Research department at Tarleton State University. (AF 1-3). The Employer also submitted additional documentation to support its argument that many universities maintain a similar box system for their departments. (AF 19-43).

On June 1, 2010,<sup>2</sup> the CO forwarded this matter to BALCA.<sup>3</sup> The Employer filed a Statement of Intent to Proceed on June 1, 2010, but did not add any additional arguments on appeal. On June 21, 2010, the Employer filed a letter with BALCA titled "Request for Reconsideration Determination," informing the Board that on May 27, 2010, the CO issued a Notice informing the Employer that its request for reconsideration or review did not overcome the deficiencies in the final determination letter. The Employer provided a copy of the May 27, 2010 letter, which did not provide the basis for the determination. Instead, the May 27, 2010 letter is essentially a form letter that the CO uses to forward cases to BALCA for administrative review. The body of the letter states:

**Denial Summary: [Analyst type summary here]**

**Employer Rebuttal: [Analyst type rebuttal here]**

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<sup>2</sup> The CO also transmitted a duplicate copy of the appeal file to BALCA on July 1, 2010.

<sup>3</sup> The Board inadvertently issued a Notice of Docketing on May 19, 2010, after receiving the Employer's request for review, rather than the standard practice of issuing a Notice of Docketing upon receipt of the appeal file from the Certifying Officer.

**Results of Department of Labor Review: [Analyst type results of review here]**

This letter was not part of the appeal files the Board received from the CO on either June 1, 2010 or July 1, 2010. The CO filed a Statement of Position on July 7, 2010, stating that the Solicitor's Office had only received the appeal file in the past few days and therefore requested that BALCA affirm the denial based on the CO's March 11, 2010 determination.

**DISCUSSION**

*Scope of Record for Review*

The PERM regulations restrict BALCA's review of a denial of labor certification to evidence that 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); *5<sup>th</sup> Avenue Landscaping, Inc.*, 2008-PER-27 (Feb. 11, 2009); *Tekkote*, 2008-PER-218 (Jan. 5, 2008).

Despite the peculiar May 27, 2010 denial form letter from the CO, the record is clear that the Employer requested BALCA review of the CO's March 11, 2010 denial of certification. The Employer sent a letter addressed to BALCA explicitly requesting review, and only sent a copy of this letter to the CO. (AF 1-3). The Board has held that when an employer unambiguously requests BALCA review, it makes a tactical decision to have the Board rather than the CO review the denial of certification, and the employer is deemed to understand the consequence. *See Denzil Gunnels*, 2010-PER-628, slip op. at 14 (Nov. 16, 2010).

As we are only permitted to consider the evidence that was in the record when the CO denied certification, we may not consider any of the documentation submitted with the Employer's request for review to support its argument that many universities maintain

a similar box system for their departments. Instead, we may only consider the Employer's ETA Form 9089 in determining whether the CO's denial was proper.

*Definition of Employer*

The authority cited by the CO in its denial letter is the regulatory definition of "employer," under 20 C.F.R. § 656.3. The PERM regulations define employer, in relevant part, as:

- (1) A person, association, firm, or corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number. For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.

The CO does not dispute that the Employer has a valid FEIN, but rather found that the Employer was not an employer within the meaning of the PERM regulations because the Employer provided a P.O. Box number in Section H-1 of the ETA Form 9089, rather than a physical street address.

BALCA reviews the CO's factual findings de novo. 5 U.S.C. § 557(b). The CO's determination that the Employer does not have a physical location, but rather only a post office box, is clearly erroneous. The Employer provided a box number in Section H-1, but the box is not located at the post office; it is located at the Texas Institute for Applied Environmental Research, a physical building on the Employer's university campus. There is no doubt that the Employer, a university with 950 employees and a

valid FEIN, has a location within the U.S., and the Employer's response in Section H-1 clearly indicates this physical location.

Based on the foregoing, we find that the CO improperly found that the Employer did not meet the definition of employer under 20 C.F.R. § 656.3. Nevertheless, as there is no indication that the CO actually reviewed the merits of this application, the most appropriate remedy is to remand this case to the CO for continued processing.

### **ORDER**

**IT IS ORDERED** that the CO's denial is **VACATED** and this matter is **REMANDED** to the CO for further processing consistent with this decision.

For the Board:

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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.