

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 26 March 2012

BALCA Case No.: 2011-PER-00218
ETA Case No.: A-10207-10268

In the Matter of:

ALFONSO'S MEXICAN FOOD,
Employer

on behalf of

MANUEL MARTINEZ-MARTINEZ,
Alien.

Certifying Officer: William Carlson
Atlanta National Processing Center

Appearances: Kevin M. Tracy, Esq.
Del Mar, California
For the Employer

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

Before: Malamphy, Sarno, Krantz
Administrative Law Judges

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

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 Title 20, Part 656 of the Code of Federal Regulations.

BACKGROUND

On July 23, 2010, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Cook.” (AF 11-31).¹ The Employer mailed in its application, and Alfonso² Luna, the Employer’s contact and company owner, signed the Employer Declaration (Section N) under penalty of perjury certifying to the conditions of employment listed in 20 C.F.R. § 656.10(c). (AF 29).

On October 28, 2010, the CO denied the Employer’s application because the Employer’s sponsorship of the foreign worker could not be verified. (AF 8-9). In stating the authority for denial, the CO cited the attestation requirement listed at 20 C.F.R. § 656.10(c)(1)-(5). The CO stated that attempts were made to contact Alfonso Luna via telephone on October 20, 2010; October 21, 2010; October 22, 2010; and October 26, 2010 that were “not successful.” The CO concluded, “Because the contact with the employer’s contact could not be made, and sponsorship and the employer’s awareness of the application, therefore, could not be verified, the application is denied.” (AF 9).

On November 23, 2010, the Employer requested review by the Board of Alien Labor Certification Appeals (“BALCA”). (AF 1-6). The Employer’s attorney explained:

The problem as I understand it is this: The owner of Alfonso’s Mexican Food speaks primarily Spanish. He [sic] employees speak only Spanish, not English.

When a government employee calls the restaurant, the individual answering the telephone only speaks Spanish. There is a total lack of communication because neither person understands the other person, their wants or needs. When the government representative calls two or three times it becomes frustrating for all concerned.

¹ “AF” is an abbreviation for Appeal File.

² Section N has the owner’s name typed in as “Aldo” although the signature appears to read “Alfonso.”

As the attorney preparing and submitting the PERM application, I would expect to at sometime be in the loop so as to be able to make sure a response is made to the government agent calling the business.

(AF 1). He also explained, “This type of call is intimidating in itself for these people. English is not their native language. The reason they are able to communicate with the patrons is that they ask for “tamales, enchiladas”, etc. Which are pronounced the same in English and Spanish.” (AF 3).

The CO forwarded the case to BALCA on December 9, 2010, and BALCA issued a Notice of Docketing on February 7, 2011. The Employer filed a Statement of Intent to Proceed on February 24, 2011, but did not file an appellate brief. The CO filed a Statement of Position on March 29, 2011.

DISCUSSION

The issue before us is whether the CO properly denied certification based on the CO’s inability to verify the Employer’s sponsorship of the foreign worker. The CO cited to 20 C.F.R. § 656.10(c) in denying the Employer’s application. Under Section 656.10(c), the employer must certify to the conditions of employment in the Application for Permanent Employment Certification under penalty of perjury. Failure to attest to any of the conditions listed under 20 C.F.R. § 656.10(c) results in denial of the application.

A review of the process is warranted to understand the steps leading to the denial in this case. The process begins with the Employer’s submission of an application to the ETA. Applications may be submitted either electronically or by mail. Applications submitted by mail must be signed by the Employer under penalty of perjury certifying to the conditions of employment outlined in 20 C.F.R. § 656.10(c). The ETA requests applications submitted electronically be signed either as part of an audit or when labor certification is issued. After the CO receives an application by either method the application is screened. 20 C.F.R. § 656.17(b)(1). As part of that screening, the CO may conduct checks to ensure that the employer is aware that the application was filed on its behalf. ETA, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed.

Reg. 77326, 77329, 77341 (Dec. 27, 2004). Although not specifically provided for in the regulations or regulatory history, the CO may call the individual designated as the employer's contact in Section D of the employer's application in an effort to verify that the employer is aware of the application for permanent labor certification and is sponsoring the alien. The practice has been implemented with the intent to reduce the number of non-meritorious applications that are filed. 69 Fed. Reg. at 77329. Notably, verification of sponsorship by telephone is not a regulatory requirement, but rather a tool that the CO has utilized as part of its preliminary screening.³

In the instant case, the Employer's application was mailed to ETA and included Alfonso Luna's sworn statement under penalty of perjury certifying to the conditions of employment outlined in 20 C.F.R. § 656.10(c). (AF 29). This signed statement alone places the Employer in full compliance with the regulatory requirements listed at 20 C.F.R. § 656.10(c).

The CO cites to *Diamond Valley Contracting, LLC*, 2009-PER-00121 (June 23, 2009) in support of its argument that the CO's inability to contact the Employer to verify sponsorship of the alien is a valid ground for denial. However, unlike this case, in *Diamond Valley Contracting* when the CO called the number listed for the employer's contact person it connected to an answering machine for a different person, suggesting that in fact the employer was not aware that the application had been filed. We do note as well that other BALCA panels have affirmed denials of certification under Section 656.10(c) where the CO was unable to verify sponsorship. However, in many of those cases there are either factual differences or it is unclear whether the employer mailed in its application, certifying to the requirements at Section 656.10(c), as the Employer did in the instant case. More recently, BALCA panels have remanded cases where the CO was unable to successfully make contact with an employer and that employer had signed the declaration in Section N of the application attesting to the conditions of employment. See, e.g.,

³ Despite it not being a regulatory requirement, we recognize the goal of this practice and do not take issue with the CO continuing it. Understanding the purpose is to verify sponsorship directly with the Employer, we do not believe, as the Employer suggests, that the CO is obligated to contact the Employer's attorney/preparer of the Form ETA 9089. The Employer should list correct contact information for its contact in Section D of the ETA Form 9089 and be prepared to respond to inquiries from the ETA at the phone number, address, and email address listed. We also note that like "enchilada" and "tamale" the name of the owner, "Alfonso Luna," is also the same in English and Spanish, which should aid in directing a telephone call to him despite a language barrier.

Pickering Valley Contractors Inc., 2010-PER-01146 (Aug. 23, 2011); *John E. Richardson Jr. Inc.*, 2010-PER-01014 (Aug. 29, 2011). We do so in this case as well.

We find that the Employer has fully complied with 20 C.F.R. § 656.10(c), and therefore, denial of certification on this ground is improper. Based on the foregoing, we find that the most appropriate remedy is to remand this case to permit the CO to follow the procedures at Section 656.31(b) to investigate fraud, the procedures at Section 656.20(d)(1) to issue a written request for information to verify the Employer's sponsorship, or to continue processing the Employer's application.

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's denial of Employer's application for labor certification in the above-captioned matter is **VACATED** and **REMANDED** for further processing consistent with this opinion.

For the Panel:

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/AMC/jcb
Newport News, Virginia

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.