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: 28 April 2009

BALCA Case Nos.: **2009-TLN-00054**
2009-TLN-00055
2009-TLN-00056
2009-TLN-00057
2009-TLN-00058
2009-TLN-00059
2009-TLN-00060
2009-TLN-00061
2009-TLN-00062

ETA Case Nos.: C-08310-40929
C-08310-40932
C-08318-41453
C-08311-41024
C-08310-40936
C-08311-41012
C-08311-41033
C-08311-40986
C-08311-40979

In the Matter of:

HUTCO, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **JOHN M. VITTONE**
Chief Administrative Law Judge

SUA SPONTE
ORDER OF RECONSIDERATION

On April 27, 2009, I issued an Order of Dismissal Based on Lack of Jurisdiction in the above-captioned matter. Due to a misrouting of mail, I was not aware when issuing this order that the Employer had filed earlier that day a response to the Certifying Officer's Motion to Dismiss for Lack of Jurisdiction. Accordingly, I have sua sponte[1] reconsidered the Order of Dismissal.

The Employer's position is that the Chicago National Processing Center ("NPC") misled it about its appeal rights; that the United States Citizenship and Immigration Services (USCIS) verbally advised the Employer that it will not adjudicate this case because the U.S. Department of Labor has such authority; and that if the Board of Alien Labor Certification Appeals does not review the case "the government has effectively removed Hutco's right of appeal." The Employer requested that the letter written by the CO on March 23, 2009 (advising of a right to BALCA review) should stand as the proper procedure based on 20 C.F.R. § 655.3, which states, in pertinent part that" "[t]he Office of Foreign Labor Certification (OFLC) Administrator has the authority to establish or to devise, continue, revise, or revoke special procedures in the form of variances for the processing of certain H–2B applications when employers can demonstrate, upon written application to the OFLC Administrator, that special procedures are necessary."

Attached to the Employer's response are copies of correspondence between the Employer and the Employment and Training Administration. On February 19, 2009, the Employer wrote to the Chicago NPC stating that it felt that it had been caught between two sets of regulations, and that it did not believe that an appeal to USCIS would be beneficial. On March 23, 2009, the Administrator of the Office of Foreign Labor Certification wrote to the Employer stating that the Chicago NPC had referred the Employer's letter to the national headquarters, and that the Chicago NPC had informed him that the applications had been denied on January 9, 2009. The Administrator's letter then cited the appeals procedure at 20 C.F.R. § 655.33. On April 6, 2009, the Employer filed its request for BALCA review.

[1] "Sua sponte" means on the judge's own initiative.

DISCUSSION

The Administrator did, on March 23, 2009, inform the Employer of the procedure for appealing to BALCA under the new H-2B regulations at 20 C.F.R. § 655.33. But, to put this in perspective, the Administrator's letter was dated over two months after the January 9, 2009 denials by the Chicago NPC in which the Employer had been informed that there was no right to appeal with the Department of Labor. The Administrator's letter was in response to the Employer's February 19, 2009 letter to the Chicago NPC in which the Employer stated that it did not believe that an appeal to USCIS would be beneficial, and was essentially requesting that the CO reconsider the denials. Thus, it is not clear to me that the Administrator's misstatement of the appeal procedure applicable to the Employer's application actually caused the Employer to miss its opportunity to appeal to USCIS.

The issue before me, however, is simply whether I have any jurisdiction over this matter. Indisputably, under the regulations in effect when the denials in these matters occurred, BALCA lacked jurisdiction to entertain these appeals. Although the new regulation at 20 C.F.R. § 655.3 gives the Administrator discretion to create special procedures in certain circumstances, this regulation itself was not effective until after the denials had been issued. Even if it gives the Administrator authority to create special procedures retroactively, I decline to find that a letter in which the CO erroneously quoted the current regulations rather than the ones in effect at the time of denials was an affirmative decision by the CO to create a special appeal path for the Employer. Rather, it appears to be nothing more than a simple mistake.

Even if grounds for equitable relief for the Employer were present, BALCA cannot create jurisdiction for itself based on equitable considerations.

Accordingly, I find that my April 27, 2009 Order of Dismissal Based on Lack of Jurisdiction was valid.

SO ORDERED.

A

JOHN M. VITTONE
Chief Administrative Law Judge