

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 September 2013

OALJ Case No.: 2013-PED-00003

ETA Case No.: C-06032-81728

In the Matter of

SNS ENTERPRISES, INC.,
Employer

on behalf of

NASRUDDIN SULTAN ALI,
Alien

Certifying Officer: Chicago National Processing Center

Appearances: Vincent C. Costantino
on behalf of the Certifying Officer

Chiranjaya Nanayakkara,
on behalf of Employer

Before: **Romero, Price, Rosenow**
Administrative Law Judges

DECISION AND ORDER

This case arises from a request for review of a revocation of an approved labor certification by the Office of Foreign Labor Certification dated October 9, 2012, under 20 C.F.R. Sections 656.26, 656.30(d), and 656.32.¹ Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.).

By letters dated March 20-21, 2013, Employer requested reconsideration of the Certifying Officer's (CO) decision.² The CO found that Employer's request did not overcome the deficiency that led to the revocation, and forwarded the case to the BALCA.³ Employer

¹ Appeal File (AF) 87-88.

² AF 6-86.

³ AF 1-5.

requested BALCA review in accordance with 20 C.F.R. Sections 656.26 and 656.27. Both Employer and the CO submitted briefs to the panel.

PROCEDURAL HISTORY

Employer submitted an ETA Form 9089 for the position of “Alteration Tailor” on February 1, 2006.⁴ Employer indicated in Section A.1 that it was seeking to use a filing date from a previously-submitted application, with a priority date of March 30, 2001.⁵ The prior ETA Form was filed on March 20, 2001 for an employer entitled Kalam Enterprises, Inc., DBA Arcola Food Market, on behalf of the same alien beneficiary, for the position of “Manager, Convenience Store.” The appeal file does not contain a prior ETA Form 9089, but does include correspondence related to it from the Texas Workforce Commission on April 18, 2001⁶ and a letter to the same from Employer stating that it wished to withdraw its case, effective September 25, 2002.⁷

On June 19, 2006, the CO sent notice that Employer’s application for “Alteration Tailor” had been certified and instructed Employer to file it and an I-140 petition (Immigrant Petition for Alien Worker) with the appropriate office of the United States Citizenship and Immigration Services (USCIS).⁸

A letter from Employer’s attorney to the USCIS Texas Service Center dated December 23, 2009 states that the ETA Form 9089 filed on February 1, 2006 and approved on June 19, 2006 contained an error, stating a priority date of March 30, 2001, when the proper date should have been February 1, 2006.⁹ The letter urged that this was harmless error on the part of the preparer, Mr. Harry Patel. On November 16, 2011, the USCIS sent a letter to Employer stating that its Form I-140 was denied.¹⁰ Employer appealed the USCIS determination on December 19, 2011.¹¹

On February 2, 2012, the USCIS notified Employer that the proceedings would be held in abeyance because it had determined that consultation with the US Department of Labor (DOL) was necessary.¹² Specifically, there were concerns about the validity of the labor certification, since 20 C.F.R. Section 656.17(d) does not permit using a filing date based on a previously-filed labor certification for an alien beneficiary unless it is for an identical job opportunity. The USCIS Administrative Appeals Office indicated it would refer the approved ETA Form 9089 to the DOL for advice about the certification’s validity.

On February 27, 2012, the DOL Office of Foreign Labor Certification responded to the USCIS, stating that it intended to revoke Employer’s permanent labor certification.¹³ This was based on

⁴ AF 134-42.

⁵ AF 134.

⁶ AF 133.

⁷ AF 132.

⁸ AF 124.

⁹ AF 114.

¹⁰ AF 108-113.

¹¹ AF 102-107.

¹² AF 98-99.

¹³ AF 96-97.

the discovery that Employer had used an improper priority date (March 30, 2001) on its application. Specifically,

[a]s evidenced by Departmental records and the documentation provided with your letter, application C-06032-81728 was filed by [Employer] for the position of Alteration Tailor in Houston, Texas on February 1, 2006, and certified on June 20, 2006, but was awarded the earlier filing date pursuant to the aforementioned provision [20 C.F.R. § 656.17(d)] as a result of the employer indicating on the form its desire to use the filing date of a previously submitted Form ETA 750, application 0059320, filed under the regulations in effect prior to March 28, 2005. This initial application, filed by Kalam Ent Inc. DBA Arcola Food Market for the position of Manager, Convenience Store in Arcola, Texas, was submitted to the Texas Workforce Commission on March 30, 2001, and withdrawn on September 25, 2002. The use of the application 0059320 filing date was unwarranted because the applications' job opportunities were not identical and application 0059320 was not in process when the ETA Form 9089 was filed in 2006, having been withdrawn in 2002.¹⁴

On May 11, 2012, the DOL sent Employer a Notice of Intent to Revoke (NOIR), based on the finding that the certification was not justified because it was issued an illegitimate filing date based on erroneous information provided by Employer.¹⁵ It stated that Employer had to submit any rebuttal evidence within 30 days of receipt of the Notice, after which the CO would review the relevant documentation and make a final decision within 30 days of receiving the evidence. The NOIR also stated that if the CO's final determination was to uphold the revocation, Employer could request BALCA review per 20 C.F.R. Section 656.26. If Employer did not submit any rebuttal evidence, the letter stated, it could not file an appeal with the BALCA.

Nearly five months later, on October 9, 2012, the DOL sent a Revocation Notice to Employer, noting that it had not received any response to its NOIR.¹⁶ Because Employer did not file rebuttal evidence within 30 days of receiving the Notice of Intent to Revoke, it became the final decision of the Secretary, per 20 C.F.R. Section 656.32(b)(2). The letter also stated:

[t]he Department received notification from the U.S. Postal Service (USPS) that it was unable to deliver and/or forward the mail to the employer point of contact's address or to the attorney's address as listed on the ETA Form 9089. The application's file does not indicate a change of address was provided to the Department; however, the USPS provided the Grants Lake Boulevard address listed below for the employer point of contact. As a courtesy, a copy of this letter is being sent to that address.¹⁷

¹⁴ *Id.*

¹⁵ AF 89-95.

¹⁶ AF 87-88.

¹⁷ AF 88.

POSITIONS OF THE PARTIES

On March 20, 2013, Employer requested review of the revocation and stated that it was filing within 30 days of receipt of the copies of the NOIR and the Revocation Notice.¹⁸ Employer stated that it did not know about the DOL's decision until it was referred to by the USCIS in its denial of the I-140 petition on March 4, 2013. Employer also stated, however, that "[t]he first time [it] came to know of the fact that DOL has issued a NOIR on the Certified Labor Certification (C-06032-81728) was upon receipt of the denial of the appeal by [USCIS] on 23 Oct 12."¹⁹

Moreover, Employer stated that its ETA 9089 was prepared by Mr. Harry Patel, who was sentenced to six months in prison and \$165,000 in fines for violating an Agreed Permanent Injunction against practicing law entered into on August 19, 2002. Employer argued that its new representative, George R. Willy P.C.,²⁰ sent correspondence to the DOL on August 31, 2012 to correct the mistaken priority date and that the DOL had knowledge that Mr. Patel was engaged in the unauthorized practice of law when he filed the ETA Form 9089.²¹ Employer's position is that it did not have an opportunity to respond to the NOIR as per 20 C.F.R. Section 656.32, which contravenes both the regulations and its due process rights. Employer seeks an order vacating the revocation and directing the CO to issue a fresh NOIR.

The CO urges BALCA to dismiss Employer's appeal as untimely because it failed to respond to the NOIR within 30 days (which the CO argues precludes it from filing an appeal) and also failed to file an appeal within 30 days of the date of the revocation, October 9, 2012. Though the DOL received notice from the USPS that it was unable to deliver the mail, the CO noted that the application file did not contain a change of address notification and the CO also sent the revocation notice to a new address for Employer suggested by the USPS. The CO claims the DOL received email notice that Employer was represented by new counsel on November 7, 2012, after the issuance of the NOIR.²²

Substantively, the CO argues that the regulations permit an employer to re-file an application filed under the regulations in effect prior to March 28, 2005, under the PERM program and retain the filing date of the Form ETA 750, but only if the Form ETA 750 is still in process, a job order has not been placed, and the applications' job opportunities are identical. Employer used the filing date for a different application in which the job opportunities were not identical, and which was not in process because it had been withdrawn in 2002. The CO notes that per 20 C.F.R.

¹⁸ AF 27-86.

¹⁹ Employer's brief at p. 4. The record suggests Employer should have known its application was in jeopardy before DOL before that date. On November 16, 2011, The USCIS sent a letter to Employer stating that its Form I-140 was denied. (AF 108-113). The letter referenced Employer's ETA 9089, and stated that Employer should have immediately requested to correct the incorrect priority date with DOL, prior to filing any I-140 petition with USCIS. Employer appealed the USCIS determination on December 19, 2011, and on February 2, 2012, the USCIS notified Employer that the proceedings would be held in abeyance until the DOL weighed in on the validity of the labor certification. (AF 102-107; 98-99).

²⁰ Later known as Willy, Nanayakkara, Rivera, and Goins.

²¹ AF 31.

²² CO's Brief at p. 3.

Section 656.10(b), Employer takes responsibility for the accuracy of any representations made by the attorney or agent.

Finally, the CO notes that the burden is on Employer to show that it has complied with the regulations and requirements of the Act. He requests the appeal be dismissed as untimely or that the revocation be affirmed upon substantive review of the record.

LAW

Revocation

The BALCA engages in de novo review of the record upon which the CO denied or revoked permanent alien labor certification, together with the request for review and any statements of position or legal briefs.²³ The BALCA must then either affirm or overrule the revocation of certification, or direct that a hearing on the case be held.²⁴

After issuance, a labor certification may be revoked by ETA using the procedures described in 20 C.F.R. Section 656.32. A labor certification is subject to invalidation by the Department of Homeland Security or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application.²⁵

Section 656.32 provides that the CO may revoke an approved labor certification if he or she finds the certification was not justified, upon providing individualized written notice to an employer. The procedures are, in pertinent part:

(b)(1) The Certifying Officer sends to the employer a *Notice of Intent to Revoke* an approved labor certification which contains a detailed statement of the grounds for the revocation and the time period allowed for the employer's rebuttal. The employer may submit evidence in rebuttal within 30 days of receipt of the notice. The Certifying Officer must consider all relevant evidence presented in deciding whether to revoke the labor certification.

(2) If rebuttal evidence is not filed by the employer, the *Notice of Intent to Revoke* becomes the final decision of the Secretary.

(3) If the employer files rebuttal evidence and the Certifying Officer determines the certification should be revoked, the employer may file an appeal under § 656.26....²⁶

Section 655.26 provides in pertinent part that:

²³ 20 C.F.R. § 656.26(a)(4)(ii); *In the Matter of Albert Einstein Medical Center*, BALCA Case No. 2009-PER-00379 et al. (Nov. 21, 2011).

²⁴ 20 C.F.R. § 656.26(c)(1)-(3).

²⁵ 20 C.F.R. §656.30(d).

²⁶ 20 C.F.R. § 656.32(b)(1)-(3).

(a)(1) If a labor certification is denied, if a labor certification is revoked pursuant to § 656.32, or if a debarment is issued under § 656.31(f), a request for review of the denial, revocation, or debarment may be made to the Board of Alien Labor Certification Appeals by the employer or debarred person or entity making a request for such an administrative review in accordance with the procedures provided in paragraph (a) of this section. In the case of a finding of debarment, receipt by the Department of a request for review, if made in accordance with this section, shall stay the debarment until such time as the review has been completed and a decision rendered thereon.

(2) A request for review of a denial or revocation:

(i) Must be sent within 30 days of the date of the determination to the Certifying Officer who denied the application or revoked the certification....²⁷

In the notice of intent to revoke (NOIR), the CO stated that

[s]hould the employer choose to rebut these findings, it must submit evidence within 30 days of the receipt of this notice....If the Certifying Officer makes a final determination to uphold the revocation, the employer may file a request for review of the determination to the Board of Alien Certification Appeals (BALCA) per 20 C.F.R. §656.26. However, the employer may only file an appeal to BALCA if it previously submitted rebuttal evidence to the Department in response to this notice.²⁸

Notice Requirements

Cases filed prior to the effective date of the current PERM regulations set forth a standard we find applicable to the questions presented by this case.²⁹ In *Madeleine S. Bloom*, the BALCA held that regulatory deadlines would only be tolled in the rare instances in which failure to do so would result in manifest injustice.³⁰ This holding was narrowed in *Park Woodworking, Inc.*, in which the Board found that mere inadvertence or negligence of an employer or its counsel was insufficient to excuse an untimely rebuttal.³¹

In *In the Matter of Claritas, Inc.*, the CO issued a Notice of Findings (NOF), noting that the attorney representing the employer had been suspended from practicing and inquiring if the employer wanted to withdraw the application, continue without representation, or identify new

²⁷ 20 C.F.R. §656.26(a)(1)-(2)(i).

²⁸ AF 91.

²⁹ See Fed. Reg. 77326 (Dec. 27, 2004); 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004).

³⁰ 88-INA-152 (Oct. 13, 1989).

³¹ 90-INA-93 (Jan. 29, 1992).

representation and continue processing the application.³² The NOF was addressed to the employer's chief financial officer. The CO did not receive a response to the NOF within 35 days of issuance and therefore considered the application denied by operation of law. The BALCA considered the chief question to be whether the employer ever got notice of the NOF, and found the preponderance of the evidence supported the employer's contention that it did not receive the NOF when it was mailed, and thus could not be found to have timely responded.

In *In the Matter of Vincheer Fashion, Inc.*, the employer failed to timely rebut a NOF and its counsel argued that he never received it as it was mailed to an old address, and requested the time limitation for filing the rebuttal be tolled.³³ The sole issue before the BALCA was whether it would be a manifest injustice to not toll the regulatory deadline for filing rebuttal, and the panel found it turned on whether or not counsel timely notified the CO of his change of address such that the CO erred in mailing the NOF to his old address. The panel noted that it was immaterial that the CO had mailed the NOF and final determination to the employer and the alien, stating that "it would be unreasonable...to impute knowledge of Employer or Alien onto counsel where the CO failed to effect service on the representative as required by the regulations. In our system of justice, a client relies on his or her representative to respond to all pleadings....It is not expected, nor is it the job of the client to call the representative each time s/he receives a paper relevant to the proceeding."³⁴ The BALCA found that though there was "confusion in the record" about when employer's counsel informed the CO of his change of address, the employer was deprived of the opportunity to respond to the NOF and ordered the CO to issue a new NOF to counsel and provide them a new period in which to rebut the findings.

On the other hand, in *In the Matter of Valle Verde Retirement Homes*, the CO's denial was affirmed because the panel found that "superseding oversights" on the part of the employer's counsel regarding providing the proper service address to the CO were the direct cause of her failure to file a timely rebuttal.³⁵ Additionally, it was not clear that labor certification would have been granted if the rebuttal had been timely filed, nor was it a clear case of an employer being misled by its own counsel. "Therefore, [it was] not one of those rare instances in which failure to waive the deadline for the filing of Employer's rebuttal would result in manifest injustice."³⁶

DISCUSSION

The BALCA has jurisdiction to decide if Employer was properly notified of the issuance of the NOIR, since the regulations provide that a failure to rebut the NOIR can preclude an

³² 2008-INA-00164 (April 1, 2009).

³³ 98-INA-00024 (Sept. 23, 1998).

³⁴ *Id.* at *2.

³⁵ 89-INA-00356 (Feb. 8, 1991).

³⁶ *Id.* at *5.

appeal to the panel. Otherwise, an employer would have no recourse if its failure to provide rebuttal evidence was due to a mistake on the part of the CO.

The record before the panel establishes the following:

1. Employer's 2006 ETA Form 9089 listed an Employer Contact Address c/o Shaukat Ali at 1800 Austin Parkway, Apt. #213, Sugarland, TX 77479. Employer's address was listed at 3402 Chimney Rock Road, Houston, TX 77056. Employer's Agent or Attorney was listed as Harry Patel at 6065 Hillcroft Ave. Suite 502, Houston, TX 77081. (AF 134).
2. On November 16, 2011, the U.S. Citizenship and Immigration Services denied Employer's Form I-140 Immigrant Petition for Alien Worker in a letter that was mailed to Employer c/o Shaukat Ali at a different address than that on the ETA Form 9089, 5615 Richmond Ave., Ste. 230, Houston TX 77057. (AF 108-113).
3. On December 6, 2011, Employer's new counsel submitted a Form G-28 Notice of Appearance to the Department of Homeland Security in regard to immigration matters before the USCIS. (AF 9).
4. Employer did not file anything with the DOL to indicate a change in its mailing address or that it was represented by new counsel.
5. On December 19, 2011, a receipt for Employer's I-290B Notice of Appeal of the USCIS denial was sent to Employer's new counsel at 1200 Soldiers Field Dr. Ste. 100, Sugarland, TX 77479. (AF 102).
6. On February 2, 2012, USCIS requested DOL expedite its determination of whether or not Employer's labor certification was valid. (AF 100-101). The letter noted "there are some anomalies in the petitioner's claimed address and location throughout the record...which raises issues related to the veracity of the petitioner's representative's claims, and the legitimacy of the petitioner based on other evidence in the record."
7. On February 2, 2012, the USCIS Administrative Appeals Office wrote to Shaukat Ali at 3402 Chimney Rock Road, Houston, TX 77056 (the address provided for Employer in its 2006 ETA Form 9089), stating that proceedings before it would be held in abeyance while it consulted with DOL about the validity of the labor certification. (AF 98-99). A copy of the letter was sent to Employer's new counsel at 1200 Soldiers Field Drive, Ste. 100, Sugarland, TX 77479.
8. On February 27, 2012, William Carlson, Administrator of the Office of Foreign Labor Certification, wrote a letter to USCIS' Administrative Appeals Office stating that the Department intended to revoke certification of Employer's PERM application. (AF 96-96).
9. On May 11, 2012, the CO mailed a NOIR to Employer c/o Shaukat Ali at 1800 Austin Parkway, Apt. #213, Sugarland TX 77479, and to Harry Patel at 6065 Hillcroft Ave., Ste. 502, Houston, TX 77081, the addresses provided in the 2006 ETA Form 9089. (AF 89-91).

10. On May 17, 2012, the United States Postal Service (USPS) provided the DOL an address for Employer's point of contact, Shaukat Ali, at 2710 Grants Lake Blvd., Unit M4, Sugarland, TX 77479, in lieu of the Austin Parkway address. There was no indication Mr. Patel's address was invalid. (AF 94-95). There is no evidence the CO mailed another copy of the NOIR to this suggested address.
11. On August 31, 2012, Employer's new attorney sent an email to the Certifying Officer at PLC.Atlanta@dol.gov requesting an amendment to the ETA Form 9089 priority date from 30 Mar 01 to 1 Feb 06. The email was signed by Zaheer Zaidi, "Senior Associate Attorney for Petitioner" at 1200 Soldiers Field, Suite 100, Sugarland, TX 77479.
12. On October 9, 2012, the CO mailed a Revocation Notice to Employer c/o Shaukat Ali at 5615 Richmond Ave., Ste. 130, Houston, TX 77057 (see No. 2, *supra*), and to Harry Patel at the Hillcroft Ave. address. The letter noted that though the Department had not received any indication Employer's address had changed, the USPS suggested a different address (Grants Lake Blvd.) and it had, as a courtesy, provided a copy of this letter to that address. It also stated that the copy of the NOIR to Mr. Patel had been returned to sender but an online search revealed the attorney's address matched that on the ETA Form 9089. It did not indicate that the DOL had sent the NOIR to any other addresses besides those on the 2006 ETA Form 9089.
13. On November 7, 2012, Employer's new attorney sent an email to the Certifying Officer at PLC.Atlanta@dol.gov requesting a duplicate NOIR with a fresh date to respond. (AF 79). This email appears to contain an attached affidavit from Shaukat Ali (AF 74-75) and a Form G-28 Notice of Appearance to the Department of Homeland Security (see No. 3, *supra*). The affidavit states that Employer did not receive the NOIR. The email lists 1200 Soldiers Field Dr., Suite 100, Sugarland, TX 77479, as counsel's address.

The regulations provide that an employer has thirty days from the date of *receipt* of a NOIR to file its rebuttal evidence. They go on to state that only if rebuttal evidence is filed may an employer appeal a subsequent revocation to the BALCA.³⁷ This is because the PERM regulations favor administrative efficiency over dialogue in order to better serve the public interest overall, given the resources available to administer the program.³⁸

Regulatory and due process requirements do not require extraordinary measures on the part of the Agency to ensure its correspondence reaches an employer. The evidence shows, however, that both Employer and the DOL were remiss in ensuring that proper notice could be given. Employer did not specifically provide updated contact information to the DOL until its email on August 31, 2012, but the DOL was on notice as early as February 2, 2012 that the contact information it had on file may not have been accurate.³⁹

³⁷ 20 C.F.R. § 656.32(b).

³⁸ *HealthAmerica*, 2006-PER-1, slip op. at 19 (July 18, 2006) (en banc).

³⁹ See numbers 6 and 10, above.

As evidenced by its active correspondence with USCIS, Employer was on notice that there were some problems with its ETA Form 9089, and it was trying to correct those before USCIS as early as December 23, 2009, when its new lawyer wrote that an inadvertent error on the form led to a mistaken priority date. It was provided further notice that this issue would be relevant before the DOL on February 2, 2012, when the USCIS told Employer that it would be holding its appeal of the denial of the I-140 in abeyance until the DOL weighed in. The records shows Employer did not announce that it was no longer represented by Mr. Patel or provide the DOL with a formal notice of appearance from its new attorneys until November 7, 2012.

Nevertheless, Employer was deprived of the opportunity of timely submitting rebuttal evidence to the NOIR, and the CO was on notice that its contact information was out of date. Employer stated that it became aware the CO had sent a NOIR on October 23, 2012, and submitted a request to the CO for the re-issuance of the NOIR and a fresh date to respond on November 7, 2012, to the attorney's return address.⁴⁰ There is no evidence in the record that the CO responded to this request, and Employer avers that it did not receive copies of the NOIR or the Revocation until the DOL responded to its Freedom of Information Act Request on March 4, 2013. The record supports Employer's contention that it did not receive the NOIR until that date, and it filed its request for BALCA review within 30 days.

We find that though the PERM regulations require strict interpretation to facilitate quick resolution, an employer's right to respond to a CO's preliminary findings is also enshrined in them. In this case, Employer's counsel did not receive a copy of the NOIR within a period of time that would have allowed him to timely submit rebuttal evidence, a condition that results in manifest injustice and renders the CO's revocation an abuse of discretion.

Therefore, we overrule the revocation of certification and remand the case to the CO to re-issue the NOIR to Employer and its counsel at the proper addresses. Within 30 days of receipt, Employer must submit rebuttal evidence or the NOIR will become the final decision of the Secretary and it will be precluded from filing an appeal of the revocation with the BALCA, in accordance with 20 C.F.R. Section 656.32.

⁴⁰ AF 79.

Accordingly, **IT IS ORDERED** that the revocation of labor certification in this matter is **OVERRULED** and the case is remanded to the CO for further processing in accordance with this order.

For the panel:

Larry W. Price
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.