



Issue Date: 08 February 2011

BALCA Case No.: 2011-TLN-00007
ETA Case No.: C-10343-52205

In the Matter of:

COASTAL VENTURES MANAGEMENT, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: David A. Beach
Destin, Florida
For the Employer

Gary M. Buff, Associate Solicitor
Vincent C. Costantino, Senior Trial Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

DECISION AND ORDER
OF REMAND

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the CO") denial of an application for temporary alien labor

certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.33(a). The scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e).

STATEMENT OF THE CASE

On December 9, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary seasonal labor certification from Coastal Ventures Management, LLC ("the Employer"). AF 46-72.¹ The Employer requested certification for 50 maids and hotel housekeepers from February 25, 2011 to October 31, 2011. AF 51. The Employer checked the box in section C-14 of its application that it was a job contractor. AF 52. Additionally, the Employer submitted a copy of its service agreement with Flautt Cornerstone Bay Point, LLC d/b/a Marriott's Bay Point Resort Village in Panama City Beach, Florida, for 50 housekeeper/housemen positions from February 25, 2011 to October 31, 2011. AF 59-62.

On December 13, 2010, the CO issued a *Request for Further Information* ("RFI"), notifying the Employer that it was unable to render a final determination for the Employer's application because the Employer did not comply with all requirements of the H-2B program. AF 42-45. Specifically, the CO informed the Employer that pursuant to *Comité de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis*, No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), a recent federal district court decision, DOL

¹ Citations to the 72-page appeal file will be abbreviated "AF" followed by the page number.

could no longer approve applications submitted by job contractors unless the employers contracting with the job contractor for H-2B workers also submit applications for labor certification. AF 44. The CO determined that the Employer was a job contractor, and requested that the Employer submit a response regarding its job contractor status to the CO within seven calendar days from the date of the RFI. AF 42. The CO also informed the Employer that failure to comply with the RFI may result in denial of the application. AF 43.

On December 29, 2010, the CO denied the Employer's application, finding that the Employer failed to respond to the RFI. AF 2-6. The Employer communicated with the CO several times by email from January 4, 2011 to January 10, 2011, asserting that it did in fact respond to the RFI within the requested time allotted and that its RFI response package had been received by the CO on December 17, 2010. AF 7-13. The CO informed the Employer that the Employer had put the wrong ETA case number on its RFI response cover letter, and therefore, the Employer's response was not associated with the appropriate case file. AF 11. Despite clarification of this issue on January 10, 2011, the CO informed the Employer that the H-2B regulations do not permit the CO to reconsider a denial, and that the Employer must either appeal the denial or file a new application. AF 13.

On January 13, 2011, this Office received the Employer's request for administrative review of the denial. In its request for review, the Employer states that it received the CO's denial letter on January 4, 2011. Additionally, while it concedes that the cover page of its RFI response contained the incorrect ETA case number, it says that this packet of information included other documentation containing the correct ETA case number. The CO filed a brief arguing that the request for review is untimely, and therefore, that this matter should be dismissed.

DISCUSSION

Ten Calendar Day Period for Requesting Administrative Review

The H-2B regulations provide that an employer must file its request for administrative review of a denial of temporary labor certification within ten calendar days of the date of the determination. 20 C.F.R. § 655.33(a)(1). The general rules of practice and procedure applicable to proceedings before the Office of Administrative Law Judges (“OALJ”)² are found at 29 C.F.R. Part 18. The regulation at 20 C.F.R. § 18.4(c) provides that when documents are filed with OALJ by mail, five days shall be added to the prescribed period. The Part 18 rules, however, do not apply if inconsistent with a rule of special application. 29 C.F.R. § 18.1(a). Because section 655.33(a)(1) is a “rule of special application,” in that it specifies both the time period in which to file a request for review and how that time period should be calculated, section 655.33(a)(1) is controlling, and an employer’s appeal of a denial of temporary labor certification under the H-2B program must be received by the OALJ within ten calendar days of the date of the determination. See *Delmar Family Dental Center*, 1988-INA-132 (Sept., 26, 1988) (en banc); *Arn Scrap Processing, Inc.*, 1997-INA-363 (Oct. 27, 1997).

In this case, the CO’s denial was dated December 29, 2010. AF 15. The Employer’s request for review was received in this Office on January 13, 2011, more than ten calendar days after the date of the determination.

Tolling of Period for Requesting Administrative Review Based on Pending Motion for Reconsideration

In this case, however, the Employer sent an email to the Chicago National Processing Center (“CNPC”) on January 4, 2011, stating that it had sent the RFI response, and that a UPS tracking system showed that the response was delivered on

² BALCA is housed within OALJ.

December 17, 2010 and signed for by someone with the last name of “LIMPER.” AF 7. The Employer requested that “someone please look into this....” AF 7.

The January 4, 2011 email was, in effect, a motion for reconsideration of the denial. The CNPC responded on that same day that “[a]ccording to the regulations CPNC cannot reconsider the denial. Once a denial has been issued, the employer has two options. The employer may appeal the denial per the instructions provided in the Notice of Denial or the employer has the option of filing a new application.” AF 8.³

In an appeal arising under the permanent alien labor certification regulations, *Meriko Tomaki Wong*, 1990-INA-407 (Jan. 27, 1992), the panel held that “if a timely motion for reconsideration is filed, the full time for filing a request for review by this Board pursuant to section 656.26(b) shall run from the date of the CO's order denying the motion for reconsideration or decision on reconsideration.” In this regard the panel noted that tolling of the period for requesting appellate review pending a ruling on a motion for reconsideration was consistent with Rule 4(a)(4) of the Federal Rules of Appellate Procedure Rule, and the rules governing appeals to the Department of Labor’s Benefits Review Board at 20 C.F.R. § 802.206.

In the instant case, the CO denied the motion for reconsideration on January 4, 2001. Ten calendar days thereafter was January 15, 2011. The appeal was received by the Board on January 13, 2011. Thus, if *Wong* applies, the Employer’s request for administrative review of the denial was timely.

I find that the reasoning of the panel in *Wong* is persuasive. For *Wong* to apply, however, I must first determine whether the CPNC was correct in its assertion that the regulations prevent the CO from reconsidering a denial.

³ Although the CNPC eventually did look into the matter, and concluded that the problem was that the Employer put the wrong ETA Case Number on its response to the RFI, it still refused to reconsider the denial based on the theory that the CO did not have the authority to reconsider a denial. AF 12-13.

-- *Whether motions for reconsideration are permitted under the H-2B regulations*

The statute and regulations are silent on the question of motions for reconsideration of H-2B labor certification determinations by the Department of Labor. Nor does the regulatory history of the current H-2B regulations speak to the question of motions for reconsideration.⁴ See Final Rule, Labor Certification Process and Enforcement (H-2B Workers), 73 Fed. Reg. 78020 (Dec. 19, 2008); Proposed Rule, Labor Certification Process and Enforcement (H-2B Workers), 73 Fed. Reg. 29942 (May 22, 2008).

In *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (en banc), an appeal decided under the “pre-PERM” version of the permanent alien labor certification regulations, the CO had denied certification based on a finding that the employer had not filed rebuttal to the CO’s Notice of Findings.⁵ In response, the employer contended that it had, in fact, timely submitted the rebuttal, and provided a cover letter to the response as proof. The CO forwarded the matter to BALCA without considering or ruling on the employer’s response. Like the instant case, the pre-PERM regulations did not expressly address motions for reconsideration. The Board, observing that in this situation the employer obviously would have had no opportunity prior to a motion for reconsideration to contend that it filed a timely rebuttal to the NOF, held that the CO both had the authority to reconsider, and should have done so:

Under the circumstances noted above, it was error for the CO to fail to reconsider his denial of certification. Although 20 C.F.R. Part 656 does not specifically confer authority to reconsider determinations or

⁴ Prior to the 2008 revision of the H-2B regulations, appeals of denials of H-2B temporary labor certifications were made to the Department of Homeland Security, and there was no right of appeal within DOL.

⁵ The “PERM” regulations which became effective in 2005 substantially revised the procedures for permanent alien labor certification applications. The pre-PERM regulations included a Notice of Filing-Rebuttal-Final Determination procedure that was eliminated in the PERM regulations. See generally *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc).

decisions on either Certifying Officers (see §656.25) or BALCA (see §656.27), the power to reconsider is inherent in the power to decide. See Trujillo v. General Electric Co., 621 F.2d 1084, 1086 (10th Cir. 1984), citing Albertson v. FCC, 182 F.2d 397, 399 (D.C. Cir. 1950). It appears that most jurisdictions permit administrative agencies to reconsider decisions except as restricted by statute or regulation. See, e.g., 2 AM. JUR. 2d Administrative Law §525; 73A C.J.S. Public Administrative Law and Procedure §161. Moreover, in Exxon Chemical Company, 87-INA-615 (July 18, 1988) (en banc), BALCA, by granting a motion to reconsider, implicitly held that it possesses such authority. We hold that the Certifying Officer has this authority as well. In addition, since CO's have the authority to reconsider their decisions, in any case where a motion for reconsideration of a Final Determination is filed, a ruling shall be issued by the CO stating whether the motion is granted or denied.

This does not mean that the CO must reconsider a denial of certification whenever such a motion is filed. Nor must the CO accept the validity of evidence submitted on reconsideration and change the outcome of the case. But at least where, as here, the motion is grounded in allegations of oversight, omission or inadvertence by the CO which, if credible, would cast doubt upon the correctness of the Final Determination, and the Employer had no previous opportunity to argue its position or present evidence in support of its position, the CO should reconsider his or her decision. Further, as the initial fact-finder in alien labor certification cases, it is the CO's job, not BALCA's, to weigh the evidence in the first instance. Since the evidence regarding the timeliness of its rebuttal submitted by Employer on reconsideration obviously is probative, and BALCA would be required to remand the case to him for initial consideration of it in any event, having the CO evaluate this evidence on reconsideration rather than through a remand following an appeal to BALCA will shorten the certification process by many, many months.

Therefore, we hold that Certifying Officers have the authority to reconsider Final Determinations prior to their becoming final. Further, we find that the CO should have done so in this instance. Accordingly, the CO's denial of certification is vacated, and the case will be remanded for consideration of Employer's evidence regarding the timeliness of its rebuttal to the NOF. Should the CO find Employer's rebuttal to have been timely, then he shall decide the case on the merits.

Tancredi, USDOL/OALJ Reporter at 1-2 (footnotes omitted). The United States Department of Labor's Administrative Review Board, which hears appeals on a wide variety of cases adjudicated by the Department, including some immigration related

matters, has similarly ruled that it has inherent authority to reconsider its decisions, so long as that authority has not been limited by a statute or regulatory provision. *See, e.g., Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)*, ARB No. 04-111, ALJ No. 2004-AIR-19 (ARB Dec. 21, 2007) (decision on “whistleblower” appeal on reconsideration).

Thus, I find that the fact the H-2B regulations are silent on the question of motions for reconsideration does not mean that the CO is precluded from reconsidering a denial. I find that the CNPC was mistaken that it had no authority to consider the Employer’s request for an inquiry into its contention that it had timely responded to the RFI.

Based on the foregoing, I find that the Employer’s request for administrative review of the denial was timely filed within 10 calendar days after the CO denied reconsideration.

Remand for Consideration of the Employer’s Motion for Reconsideration

The chain of email correspondence between the Employer and the CNPC following the CO’s December 29, 2010 denial establishes that the CNPC took the position that it would not consider the Employer’s argument that it had, in fact, timely submitted a response to the RFI unless an appeal was taken to BALCA. The CNPC, however, indicated that it would consider whether to request a remand after an appeal was taken to BALCA. AF 10 (January 5, 2011 email from the CNPC to the Employer).

In his appellate brief, the CO did not address the question of whether the Employer’s failure to place the correct ETA Case Number on the RFI response causing the otherwise timely RFI response to be misfiled was a valid ground for denying certification. Rather, the CO’s appellate brief focused entirely on the argument that the Employer’s request for BALCA review was not timely. The CO’s appellate brief also requested that if BALCA did not agree that the appeal should be dismissed, the matter be

remanded “so that Coastal’s response to the RFI can be fully evaluated and a prior decision can be made on that response.” (CO’s Appellate Brief at 3). Thus, it is not clear from the CO’s brief whether the alternative request for remand was predicated on the possibility that the Board would find that the appeal was timely, or that the Board would find both that the appeal was timely and that the Employer presented sufficient grounds to establish that its response to the FRI should be considered despite it being mislabeled with the wrong ETA Case Number.

Prior to the implementation of the current H-2B regulations, DOL determinations on H-2B applications were advisory only, and applicants could appeal the DOL determination by submitting countervailing evidence to the Department of Homeland Security (“DHS”). The regulations published in the Federal Register in December 2008, however, provided instead for an appeal within DOL to BALCA. In explaining the new administrative review process, the Employment and Training Administration responded to commenters who objected to elimination of the opportunity to submit “countervailing evidence” by stating:

With regard to matters directly related to the Department's proposal, a number of commenters objected to the provision that precluded the submission of new evidence to the BALCA. We believe these commenters do not recognize the totality of the proposal. The NPRM provides that before a CO can deny an H-2B application, the CO must issue an RFI that apprises the employer of the grounds for the proposed denial and provides an opportunity to submit additional information. The Department does not see any reason to provide another opportunity to submit necessary information. In addition, providing such an opportunity would inevitably delay issuance of final decisions from the BALCA.

73 Fed. Reg. at 78045.

In *Caballero Contracting & Consulting LLC*, 2009-TLN-15, slip op. at 12 (Apr. 9, 2009), the presiding judge held that the lack of opportunity to submit new evidence before BALCA could be addressed by appropriate remands to the CO. Like the employer in *Tancredi*, *supra*, the Employer in this case would not have had an opportunity to

submit evidence to respond to the CO's finding that it had not submitted its response to the RFI until it learned that a purported lack of response was the ground for denial. Thus, I find that this is a case in which a remand for consideration of the Employer's response to the RFI is appropriate. As the Board noted in *Tancredi*, it should be the CO, and not BALCA, who initially considers a motion for reconsideration and determines whether to grant it.

For future reference, I note that the CO's position that he can only consider the substance of a motion for reconsideration after a request for BALCA review has been filed, and then ask for a remand if the CO determines that the grounds for reconsideration of the denial are found to be meritorious, is not compelled by the statute or regulations, or any other rule of law of which I am aware. Rather, both BALCA and ARB caselaw indicate that a CO has full authority to entertain motions for reconsideration at the time they are filed.⁶

⁶ As the Board explained in *Richard Clarke Associates*, 1990-INA-80 (May 13, 1992) (en banc), the fact that the CO has the inherent authority to reconsider a decision does not mean that a CO is required to engage in extensive review of a prior denial. The Board in *Richard Clarke* stated:

In sum, the CO is required to state clearly whether he has denied an employer's request for reconsideration, *Harry Tancredi*, [19]88-INA-441 (Dec. 1, 1988) (en banc), or has granted the request and, upon reconsideration, affirmed his denial of certification. But we find no requirement of a statement of reasons for the denial of a motion for reconsideration which merely lets a prior denial stand. Moreover, we think it ill-advised to depart from general practice and impose on certifying officers the additional burden of responding in detail to arguments presented by motions for reconsideration, even though where a motion is predicated on extrinsic grounds a brief explanation would be helpful on review.

ORDER

In light of the foregoing, it is hereby **ORDERED** that this matter is **REMANDED** to the Certifying Officer for further proceedings consistent with the above.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge