U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 04 November 2015

BALCA Case No.: 2012-PER-01105
ETA Case No.: A-09219-58971

In the Matter of:

LA HACIENDA MEAT MARKET, INC.,
Employer

on behalf of

PALMA-JUAREZ, JOSE LUIS,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Arturo M. Rios, Esquire
Rios Law Firm
St. Petersburg, Florida
For the Employer and the Alien

Before: Paul R. Almanza, *Administrative Law Judge*; Stephen R. Henley, *Chief Administrative Law Judge*; and Larry S. Merck, *Administrative Law Judge*

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

PER CURIAM. 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" labor certification regulations at 20 C.F.R. Part 656.[1]

[1] "PERM" is an acronym for the "Program Electronic Review Management" system established by the regulations that went into effect on March 28, 2005.

BACKGROUND

Under cover letter dated July 30, 2009, the Employer's attorney submitted by mail the Employer's ETA Form 9089 *Application for Permanent Employment Certification* sponsoring the Alien for permanent employment in the United States in the position of "Buyer/ Produce." (AF 149-167).[2] The Certifying Officer ("CO") accepted the application for processing on August 6, 2009. (AF 110, 126).

In the cover letter to the filing, the Employer's attorney stated that "[w]e are filing the ETA 9089 by mail in order to comply with the 180 days rule as the Employer tried to pre-register electronically, but the DOL could not verify at the time the Employer as a bonafide [sic] entity." (AF 149). Attached to the application was a copy of an email exchange among the Atlanta National Processing Center ("ANPC"), the Employer, and the Employer's attorney. The first email, dated July 21, 2009, was an email forwarded by "George Garcia" to the Employer's attorney from the ANPC in which the ANPC stated that it had been unable to verify the employer as a bona fide business entity, and therefore access to the Permanent Online System could not be granted. (AF 163). The second email was from the Employer's attorney to the ANPC email helpdesk. The attorney stated that "Mr. Jorge Garcia, the President of La Hacienda Meat Market, Inc. asked me to contact your office for the purpose of annexing evidence to assist you in verifying the Employer, La Hacienda Meat Market, Inc. is a bonafide [sic] corporation doing business in Kissimmee, Florida, with gross sales in 2007 in excess of 3,000,000." A PDF document is shown as having been attached to the attorney's email. (AF 162). The attachment included a printout from the Florida Department of State, Division of Corporations, showing that La Hacienda Meat Market, Inc. had filed annual reports from 2004 to 2009, and a domestic profit report in 2003. The document displays the Employer's Federal Employer Identification Number, and lists Jorge Garcia as the Employer's President. (AF 164-165). Also included in the attachment was the first page of the Employer's S Corporation U.S. Income Tax for 2003. It shows gross sales of well over three million dollars. (AF 166).

The mailed-in Form 9089 was signed by Mr. Garcia in the Employer Declaration at Section N. However, Mr. Garcia's title was not listed in Section N, Question 2. (AF 158). Mr. Garcia was listed as the Employer's contact in Section D of the form. (AF 150).

On March 11, 2010, the CO denied certification on the ground that the Employer failed to list the Employer's title on Section N-2, Employer Declaration. The regulatory basis for the denial was that the form was incomplete in violation of 20 C.F.R. § 656.17(a). (AF 111).

On April 6, 2010, the Employer filed a Motion for Reconsideration (AF 44-109) arguing that the incomplete form was "not material to the favorable adjudication of the labor certification." (AF 51). The Employer cited the BALCA decision in *Ben Pumo*, 2009-PER-40 (Oct. 29, 2009), in which the panel overturned a denial based on omissions on the Form 9089 where it did not appear that the omissions were material and the CO had not explained why the omissions prevented a complete review of the application. The Employer noted that the background to the mailed-in filing of the instant application started with the ANPC denying

[2] Citations to the Appeal File are abbreviated as "AF" followed by the page number.

access to the Permanent Online System, and that documents showing that the Employer was a bona fide business entity had been annexed to the mailed-in filing. The Employer noted that in two of those documents, Mr. Garcia had been identified as the Employer's President. The Employer argued that zero tolerance for amendments to the application was not appropriate where the Employer was unable to take advantage of the online systems' warnings.

The Appeal File contains no indication that the CO ruled on the Employer's motion for reconsideration. Rather, on November 10, 2011, the CO issued a new denial letter on the grounds that the employer's sponsorship could not be verified. The CO based this finding on three unsuccessful attempts to contact the Employer via telephone on October 7, 2011, October 21, 2011 and November 1, 2011. The denial letter does not state whether voice mails were left. The CO stated that the Employer should know that because it is sponsoring a foreign worker, it would be contacted to verify the sponsorship. The CO cited 20 C.F.R. § 656.10 as the regulatory basis for the denial. That regulation indicates that it must be "an employer" that files the PERM application. (AF 41-43).[3]

By letter dated December 9, 2011, the Employer again requested reconsideration. (AF 4-40). The Employer's attorney averred that Mr. Garcia stated that he did not receive any calls from the ANPC, and that if such calls were made, no messages were left. The attorney noted that during rush hours, the employees are very busy taking care of customers, and consequently the Employer cannot be available at all times to answer the phone personally. The Employer's attorney stated that he had filed a Freedom of Information Act ("FOIA") request to procure documentation about the telephone calls, and requested a 60 day extension once the FOIA response was received to analyze the materials and respond. (AF 13).

The Appeal File contains a copy of a December 27, 2011 letter signed by an anonymous ANPC analyst. The letter does not indicate to whom it was addressed. The letter states that the motion for reconsideration could not be processed until the Employer submitted to the CO an original signed statement by the Employer's contact or other authorized representative, on the Employer's letterhead, indicating that the Employer was aware that it is sponsoring the alien listed on the application. The letter states that should the Employer not respond, the CO would make a decision based on the documentation contained in the Appeal File. (AF 2-3).

On January 26, 2012, the CO issued a decision on reconsideration. The CO reiterated that the three phone calls had been unsuccessful, and added that the Employer had not responded to the December 27, 2011 letter. Thus, the CO found that the Employer had not verified sponsorship of the foreign worker, and that the ground for denial was valid. The CO did not address the Employer's claim that no phone messages were left about verification of sponsorship or the Employer's request for additional time to receive the information about the phone calls from the expected response to the FOIA request, and to consider how to respond based on that information. (AF 1).

[3] We find that the CO's act of attempting verification of sponsorship indicates that it accepted the Employer's evidence and argument on the Section N omission issue, and that the sole issue before the Board on appeal is whether the CO was justified in denying certification based on the Employer's failure to verify sponsorship.

On appeal, the Employer filed a statement confirming its intention to proceed with the appeal, indicated that it would stand on the argument and evidence from its December 9, 2011 motion, and asked the Board to take judicial notice of the panel decision in *Electrex, Inc.*, 2011-PER-393 (June 6, 2012). The CO did not file an appellate brief or statement of position.

DISCUSSION

The issue before us is whether the CO was justified in denying a labor certification under 20 C.F.R. § 656.10 when the Employer certified the conditions on the signed ETA form 9089, but the CO could not confirm the sponsorship when the CO was unable to make contact with the Employer.

Under 20 C.F.R. § 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 Section 656.10(c) results in denial of the application.

During the labor certification process, the CO screens the applications. 20 C.F.R. § 656.17(b)(1). The CO may then go on to conduct a check to verify the employer's sponsorship. 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, in order to try to identify fraudulent applications, the CO will attempt to verify that the employer is aware of the application for permanent labor certification and sponsorship. 69 Fed. Reg. at 77329. The CO often conducts this check via telephone or via mail.

In the present case, the CO attempted to contact the Employer via telephone[4] and mail but was unsuccessful. The only available information regarding sponsorship then is through the ETA Form 9089. The application received by ETA was mailed and thus included the signature of the Employer certifying sponsorship of the foreign worker under penalty of perjury. The Board has held that when an ETA Form 9089 is submitted via mail and includes the employer's sworn statement under penalty of perjury certifying as to the conditions of employment offered, sponsorship is adequately verified. *See Jankin, LLC.*, 2012-PER-1049 (Aug. 27, 2013); *Pickering Valley Contractors Inc.*, 2010-PER-1146 (Aug. 23, 2011); John E. Richardson Jr., Inc., 2010-PER-1014 (Aug. 29, 2011); *Electrex, Inc.*, 2011-PER-393 (June 6, 2012); *Gunness Randolph*, 2011-PER-1281 (Aug. 23, 2012). Here, the sworn statement is present on page 158 of the Appeal File. In addition, the email exchange between the ANPC, Mr. Garcia, and the Employer's attorney clearly evidenced the Employer's knowledge of the application and intention to sponsor the Alien for labor certification.

We recognize that before deciding the second motion for reconsideration, the ANPC appears to have provided the Employer with the opportunity to supplement the record with a written and signed verification of sponsorship letter. Assuming arguendo that the letter was delivered and the Employer did not respond, the letter did not state that failure to respond would

[4] We note that these phone calls were made more than two years after the Form 9089 was filed, and about one and a half years after the Employer's first motion for reconsideration.

result in denial but only that the CO would decide the motion for reconsideration based on the record before him.[5] To reiterate, the Employer verified sponsorship when he signed the statement certifying the conditions of employment on the mailed-in application. And, the additional documents attached to the original mailed-in filing of the Form 9089 clearly evidenced Mr. Garcia's identity as President of the Employer and his company's intention to sponsor the Alien for labor certification. Thus, even without the additional letter requested by the ANPC analyst in December 2011, the record before the CO at the time he decided the motion for reconsideration was sufficient to find that the Employer was sponsoring the Alien for labor certification.

Because we find that there was adequate information in the record to verify the Employer's sponsorship of the Alien for labor certification we will vacate the CO's denial of certification. The CO, however, never reviewed the merits of the application. Thus, we must remand this application for the CO to complete processing and to render a determination on whether to grant certification.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of Employer's application for labor certification in the above-captioned matter is **VACATED** and that this matter is **REMANDED** for further proceedings consistent with the above.

Entered at the direction of the panel by:

Digitally signed by TODD R. SMYTH
DN: CN=TODD R. SMYTH, OU=LEGAL COUNSEL, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

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 en banc review by the Board. Such review is not favored and ordinarily will

[5] This letter did not indicate to whom it was mailed, what address was used, or what means were used to mail the letter. Presumably, the letter was sent by regular mail. The CO is not entitled to a presumption of delivery of mail sent by the ANPC in the absence of proof of its internal mailing procedures. *See, e.g., Shin Kenko America Inc.*, 2012-PER-365 (May 22, 2014), citing *Gentis Inc. v. USDOL*, No. 2:09-cv-05490-LP, slip op. at 9-10 (E.D.Pa. Jan. 11, 2011) (proof of internal mailing procedures required to invoke presumption).

not be granted except (1) when en banc 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 en banc 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.