

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 11 February 2008**

**BALCA Case No.: 2008-INA-00044**  
ETA Case No.: P-05020-34922

*In the Matter of:*

**GENE R. McHAM,**  
*Employer,*

*on behalf of*

**ERNESTO MONJE,**  
*Alien.*

Certifying Officer: Barbara J. Shelly  
Philadelphia Backlog Elimination Center<sup>1</sup>

Appearances: John Kuhn Bleimaier, Esquire  
Princeton, New Jersey  
*For the Employer and the Alien*

Before: **Chapman, Wood and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor

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<sup>1</sup> The Backlog Elimination Centers closed effective December 21, 2007. All further correspondence to the Certifying Officer about this application should be directed to the Chicago Processing Center.

certification. 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.”).<sup>2</sup>

## **BACKGROUND**

On April 27, 2001 the Employer, a private household, filed an application for alien labor certification for the position of “Day Worker.” (AF 26).

On January 30, 2007, the CO issued a Notice of Findings (NOF) questioning whether the application was for a bona fide job opportunity because she could not verify the Employer’s residential address. The NOF also directed the Employer to submit documentation to prove that the Employer had the ability to pay the wages offered. (AF 11-17).<sup>3</sup>

In rebuttal, the Employer submitted a copy of a February 2007 utility bill showing an address for the Employer. (AF 6-9).<sup>4</sup>

The CO issued a Final Determination on August 9, 2007. (AF 2-5). The CO concluded that the utility bill verified the Employer’s residential address, but found that the Employer’s rebuttal was deficient in that it did not address the issue of sufficiency of funds to pay the Alien’s salary. The CO also faulted the Employer’s application for not

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<sup>2</sup> This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

<sup>3</sup> The NOF also raised other issues which the CO found in the Final Determination to be adequately addressed in rebuttal. Accordingly those issues are not before the Board on appeal.

<sup>4</sup> The rebuttal also included other information not relevant to the issues on appeal.

establishing full-time employment, observing that the ETA 750B indicated that the Alien had been working for the Employer since 1996 on an 8 hour per week basis and that there was no evidence presented to establish that the circumstances of the household had changed so as to require a full-time position. The CO stated that the Employer's attorney's office had been contacted after receipt of the rebuttal to give the Employer a fair opportunity to address these problems, but that the Employer did not avail himself of that opportunity. Thus, the CO denied certification.

The Employer requested BALCA review of the denial by letter dated September 12, 2007. (AF 1). The Employer's attorney wrote:

It is respectfully suggested that the certifying officer failed to take into consideration that this is a domestic service position in a private home. The nature of the material requested by the certifying officer is inappropriate for such employment. Business tax returns, quarterly reports, lists of employees and yellow pages listings simply do not relate to in home domestic service situations. On the basis of the foregoing it is respectfully requested that the denial of certification in this case be reversed and that labor certification be granted.

(AF 1).

The Board docketed the appeal on October 25, 2007, and issued a Notice of Docketing on November 1, 2007.<sup>5</sup> The Employer's attorney filed a letter stating that the grounds for appeal were contained in the request for review.

## **DISCUSSION**

An application for labor certification must clearly show that the employer has enough funds available to pay the wage or salary offered to the alien. 20 C.F.R. §

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<sup>5</sup> The copy of the Notice of Docketing mailed to the Alien was returned by the U.S. Postal Service as undeliverable.

656.20(c)(1). A CO may make reasonable requests for information showing the ability to pay the wage offered, and failure to comply with a CO's reasonable request for such information constitutes a ground for denial of certification. *The Whislers*, 1990-INA-569 (Jan. 31, 1992).

In the instant case, the Employer's rebuttal did not supply any documentation or argument on the ability to pay issue. On appeal, he justifies this failure with the argument that the NOF's documentation request was inappropriate for a domestic household.

The NOF in this case obviously used boilerplate language in its request for documentation on the issue of ability to pay that was principally designed with a commercial enterprise rather than a private household in mind. We find, however, that the issue of ability to pay was squarely and unambiguously raised, and that it would not have been possible to miss the implication of the documentation request – that the CO was directing the Employer to prove, with supporting evidence, that he had sufficient funds available to pay the Alien's salary. Moreover, the NOF expressly stated: "NOTE: If the employee is to be employed in a private home, you should provide your most recent household Federal tax return along with a utility bill in your name."<sup>6</sup> (AF 12).

It might have been reasonable for the Employer not to submit some of the documentation requested in the NOF which was not applicable to a domestic household. It was not reasonable, however, to ignore the documentation request entirely. Thus, we find that the Employer's failure to produce any documentation showing sufficiency of available funds to pay the wage offered to the Alien supports the denial of certification.<sup>7</sup>

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<sup>6</sup> The reference to the utility bill probably was related to the residential address issue rather than the ability to pay issue.

<sup>7</sup> Because we affirm the denial of certification based on the Employer's failure to document his ability to pay the Alien's salary, we do not reach the issue of whether the Employer failed to document whether he could offer "full-time" as opposed to "part-time" employment.

## **ORDER**

The Final Determination of the Certifying Officer denying labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

**A**

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 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.

