



Issue Date: 28 October 2008

BALCA Case No.: 2008-PER-00115
ETA Case No.: C-06100-05842

In the Matter of:

MILDRED SCHWARTZ,
Employer,

on behalf of

ELIA GARCIA FERNANDEZ,
Alien.

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Larry W. Smith, Esquire
*For the Employer and the Alien*¹

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

DECISION AND ORDER

¹ The Employer was represented by Amy Ghosh, Los Angeles, California, while the matter was before the Certifying Officer. Mr. Smith filed a G-28 Entry of Appearance once the matter was referred to BALCA.

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" regulations found at Title 20, Part 656 of the Code of Federal Regulations.

The Employer, a private household, filed a labor certification application for the position of Domestic Servant. (AF 29-41). The Certifying Officer ("CO") accepted the application for processing on April 10, 2006. On December 18, 2006, the CO sent the Employer's attorney an Audit Notification. (AF 25-28). The application was selected for audit to investigate why the Alien resided with the Employer. (AF 28). The CO specifically asked for documentation relating to this issue. (AF 28). However, the Audit Notification letter also directed the Employer to submit other documentation, including the Recruitment Report that is required under the regulation at 20 C.F.R. § 656.17(g)(1).

By letter dated February 7, 2007, the Employer submitted an explanation as to why the Alien lives with the household, and a copy of a tax return. (AF 22-24). On March 22, 2007, the CO issued a letter denying certification. (AF 19-21). A handwritten note on the letter states: "The recruitment report, (and advertisements) is missing." (AF 21).

The CO received a motion for reconsideration from the Employer's attorney on April 20, 2007. (AF 5-16). The attorney recited circumstances that led to miscommunication between her and her client, and which resulted in all of the necessary information requested in the Audit Notification not reaching the CO by the due date. Attached to the motion is a letter dated April 18, 2007, in which the Employer stated that her February 7, 2007 letter was intended to be sent to the household's attorney rather than directly to the CO. (AF 9). Attachments to the motion included a copy of the tax return that was earlier submitted, newspaper advertisements, the CALJobs job order, and a prevailing wage determination. (AF 11-16).

On July 15, 2008, the CO issued a letter denying reconsideration because the Employer still had not provided a copy of its Recruitment Report. (AF 1). The CO then

forwarded an Appeal File to BALCA. BALCA issued a Notice of Docketing on July 23, 2008. The Employer's new attorney filed an entry of appearance and the Employer's statement of intent to proceed with the appeal. However, the Employer did not file an appellate brief. On September 10, 2008, the Board received a letter brief from the CO. The CO argued that the Recruitment Report is an essential requirement of the labor certification program as set forth in the regulation at 20 C.F.R. § 656.17(g). Moreover, the CO noted that the audit regulations make BALCA review unavailable if an employer fails to comply with an audit request.

DISCUSSION

Although the focus of the CO's Audit Notification letter was the live-in nature of the application, it clearly and specifically directed the Employer to submit its Recruitment Report. Such a report is mandated by the regulation at 20 C.F.R. § 656.17(g).

The Employer did not submit the report either with its response to the Audit Notification or with its motion for reconsideration. The Employer has provided no explanation or excuse on appeal addressing this failure. Thus, we find that the Employer failed to timely submit documentation specifically requested in the CO's audit letter.

Under the PERM audit regulation at 20 C.F.R. § 656.20(a)(3), if the employer fails to provide documentation required to be submitted by the date specified in the audit letter, the application is automatically denied, the employer is considered to have refused to exhaust available administrative remedies, and administrative-judicial review before BALCA is not available.

In its appellate brief, the CO argued that 20 C.F.R. § 656.20(a)(3) is jurisdictional. The pre-PERM regulations at 20 C.F.R. § 656.25(e)(2) (2004) contained a similar regulation indicating that BALCA review would not be available if a rebuttal was not timely filed. In *Madeleine S. Bloom*, 1988-INA-152 (Oct. 13, 1989) (*en banc*), *recon.*

den. (Dec. 20, 1989) (per curiam), the Board held that the regulatory requirement of filing a rebuttal within thirty-five days was neither jurisdictional nor unwaivable, and did not preclude it from considering a request for review in appropriate circumstances. As we read the audit response regulation at 20 C.F.R. § 656.20(a)(3), it appears that BALCA has subject matter jurisdiction to review whether an employer was properly found to have failed to timely supply documentation requested in a PERM audit letter. If so, the denial resulting from such a failure is unreviewable.

Because we have determined that the Employer failed to timely submit the recruitment report as directed in the Audit Notification letter, we have no authority to further review the denial. Accordingly, we dismiss the appeal.

ORDER

Based on the foregoing, **IT IS ORDERED** that the appeal in the above-captioned matter is **DISMISSED**.

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.