



**Issue Date: 28 October 2008**

**BALCA Case No.: 2008-PER-00064**  
ETA Case No.: C-05229-24073

*In the Matter of:*

**WWM, INC.**  
**d/b/a**  
**ANTONIO'S HACIENDA,**  
*Employer,*

*on behalf of*

**MARTHA ALICIA CEBREROS-AYALA,**  
*Alien.*

Certifying Officer: Dominic Pavese  
Chicago Processing Center

Appearances: Kevin M. Tracy, Esquire  
*For the Employer and the Alien<sup>1</sup>*

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*

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<sup>1</sup> The Employer was owned by Antonio Lopez at the time the ETA 9089 was submitted to the CO (AF 45), but was owned by Francisco J. Sifuentes as of October 1, 2005. (AF 17). Mr. Tracy was listed as the attorney for the Employer when it was owned by Antonio Lopez. (AF 46). Since the change in ownership, Mr. Tracy has continued to file documents relating to the labor certification application. Thus, it appears that Mr. Tracy also represents the new owner. (See also AF 38, listing Susan Jeannette of No. County Legalization Services as the Employer's agent on the ETA 9089, and AF 44 listing Ms. Jeannette as a legal assistant to Mr. Tracy).

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

## **DECISION AND ORDER**

**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.

On August 17, 2005, the Certifying Officer ("CO") accepted the Employer's PERM application for processing.<sup>2</sup> (AF 23). The Employer is sponsoring the Alien for a position as a restaurant cook. (AF 28). On November 4, 2005, the CO issued an Audit Notification because the CO had not been able to verify the Employer as a bona fide business entity. (AF 26). Among other documentation, the CO directed the Employer to submit proof of its Federal Employer Identification Number (FEIN). (AF 26).

In response, the Employer's attorney submitted the FEIN of a different entity, stating that "[t]he reason this number has changed is because a new owner has taken over and he is willing to continue sponsoring the Alien." (AF 13; see also AF 15).

On June 8, 2006, the CO issued a letter denying certification on the ground that the FEIN supplied on the ETA Form 9089 was not valid. (AF 9-10). By letter dated June 16, 2006, the Employer's attorney requested reconsideration on the same ground stated in the audit response – that a new owner had taken over and is willing to continue sponsoring the Alien. (AF 5-6).

On May 15, 2008, the CO denied reconsideration finding that original sponsoring Employer no longer existed based on the Employer's own statement, and on information the CO had received from the California Secretary of State. (AF 1-2). The CO found that it was not a matter of dispute that the employer listed on the ETA Form 9089 did not

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<sup>2</sup> The PERM application appears to have been a conversion from a March 30, 2004 pre-PERM application. (AF 47-50).

have a valid FEIN at the time of the filing of the application, and that a new owner must file its own application.

The CO forwarded the matter to BALCA, which docketed the appeal on May 20, 2008, and issued a Notice of Docketing that same day. The Employer's attorney thereafter filed a letter confirming the Employer's intent to proceed with the appeal. The Employer, however, did not file an appellate brief. The CO filed a letter brief dated July 7, 2008 in which it is argued that the CO's denial of reconsideration was correct.

### **DISCUSSION**

In *Maria Gonzalez*, 2007-PER-24 (Apr. 24, 2007), the panel held that the requirement in ETA Form 9089 requiring submission of a FEIN was fully supported by the regulations, and by the policy stated in the regulatory history of the PERM regulations to use the FEIN as a means of verifying whether an employer is a "bona fide business entity." See 20 C.F.R. § 656.3 ("an employer **must** possess a valid Federal Employer Identification Number (FEIN)" (emphasis added)); 69 Fed. Reg. 77326, 77329 (Dec. 27, 2004) (preamble to the PERM regulations stating that the FEIN will be used to verify whether an employer is a "bona fide business entity.").

In *Maria Gonzalez*, the Employer was a private household that had failed to list a FEIN in its application. After the CO denied the application based on the missing FEIN, the Employer requested reconsideration, attaching thereto a revised ETA 9089 containing the Employer's Social Security Number, but not a FEIN. The panel affirmed the CO's denial of certification, holding that a Social Security Number was not a substitute for a FEIN.

Subsequently, in *Joan M. Bugajski-Lang*, 2007-PER-00079 (Dec. 17, 2007), a private household attempted to cure its failure to list a FEIN in its application by obtaining a FEIN after being notified of the deficiency with the application, and asserting that the failure was harmless error. The panel rejected this contention, holding that:

[F]ailure to have a FEIN at the time of application for labor certification was not a mere typographical or clerical error or innocent oversight. Rather, at the time of the application the Employer was not in compliance with the substantive requirement that she possess a FEIN, but in fact had employed the Alien for the past six years without a FEIN. Private households are not exempt from the requirement of possessing a FEIN when engaging domestic workers. Thus, Section C-7 served its purpose as intended – by exposing a deficiency in the Employer’s application of not employing a domestic worker in compliance with applicable law.

Based on the foregoing, we find that the CO did not abuse his discretion in declining to permit the Employer to remedy the deficiency in her application by obtaining a FEIN after being notified of the deficiency. The CO correctly denied certification, and the Employer’s remedy is to re-file the application now that she has obtained a FEIN.

Slip op. at 4-5.

The situation in instant case is similar to that presented in *Joan M. Bugajski-Lang* in that the sponsoring Employer apparently did not have a valid FEIN when the application was filed, and attempted to remedy that failure when it was exposed by substituting the sponsoring Employer with an employer who has a valid FEIN. In this regard, the Employer did not dispute that the FEIN listed on the original application was not valid, but instead relied upon the assertion that the successor employer’s FEIN was valid. The issue of whether a sponsoring employer can be substituted with a successor employer after the PERM application has been filed has not been briefed, and we need not reach that issue. Rather, we hold that where an application is deficient when filed because the sponsoring employer does not have a valid FEIN, the CO is not required to permit the application to be perfected based on a change in ownership.

## **ORDER**

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **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.