

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 08 May 2009**

**BALCA Case No.: 2009-PER-00187**  
ETA Case No.: C-07309-92448

*In the Matter of:*

**ROBERTO'S MEXICAN FOOD, INC.,**  
*Employer,*

*on behalf of*

**EDITH LUCINA GARCIA-PEREZ,**  
*Alien.*

Certifying Officer: Dominic Pavese  
Chicago Processing Center

Appearances: Kevin M. Tracy, Esquire  
Del Mar, California  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Jonathan R. Hammer, Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: **Chapman, Wood and Vittone**  
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.

## **STATEMENT OF THE CASE**

On November 5, 2007, the Certifying Officer accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Cook." (AF 29). On November 21, 2007, the CO notified the Employer that the application had been selected for audit. (AF 26-27). The audit notification directed the Employer to submit documentation supporting attestations made on the application, including among other items, the Notice of Filing required by 20 C.F.R. § 656.17(h), the recruitment report required by 20 C.F.R. § 656.17(g)(1), the prevailing wage determination for the position obtained from the State Workforce Agency ("SWA"), and documentation of recruitment as outlined in 20 C.F.R. § 656.17(e).<sup>1</sup> The notice also required the Employer to provide a business necessity justification if certain conditions applied, such as if the job requirements exceeded those defined for the job in O\*Net and the Occupational Title supplied by the SWA.

The Employer's attorney filed a response to the audit notification by letter dated January 9, 2008. (AF 10-25). Rather than provide any of the documentation required by the audit notification, the attorney pointed out that "in September, 2006, I submitted an ETA 9089 for a Cook with the exact same requirements as this case" which was approved and certified. (AF 10).<sup>2</sup> The attorney requested that the application be certified based on the fact that this prior application had been certified, and asked that if the current application was denied, the CO "provide to my office a cogent and precise explanation why one case was approved and another denied." (AF 11). Attached to the audit response was a copy of an approved application filed by Chili Coast Burgers. (AF 15-25).

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<sup>1</sup> The audit notification also requested "documentation listed on the following attachment supporting the attestations made on the application." (AF 26). No attachment appears in the file transmitted by the CO.

<sup>2</sup> The Employer referenced a "Page 3 captioned 'Audit Reasons,'" a copy of which does not appear in the file transmitted by the CO.

On January 22, 2008, the CO denied the application for failure to provide the documentation requested in the audit notification. (AF 7-9).

On February 11, 2008, the Employer's attorney filed a request for review. (AF 5-6). The request for review purportedly quotes a sentence from the CO's January 22, 2008 denial letter to the effect that the application was denied because the application stated a minimum requirement that exceeded the Specific Vocational Preparation level assigned to the occupation. We note, however, that this sentence does not appear in the CO's denial letter, and does not accurately reflect the reason given by the CO for denying the application – which was failure to submit the documentation specified in the audit notification. The remainder of the appeal letter argues generally that the CO's decision was arbitrary and unfair.

On February 2, 2009, the CO issued a letter on reconsideration finding that the Employer's failure to provide the requested audit documentation was a valid basis for denial of the application, and that the Employer's request for review failed to address this issue. (AF 1-2).<sup>3</sup>

On appeal, the Employer submitted a Brief which queried why one cook application may be approved but another denied. The Brief, however, did not address the issue of failure to provide audit documentation.<sup>4</sup> The CO filed a brief noting that failure to provide documentation requested by an audit notification is grounds for denial of an application pursuant to 20 C.F.R. § 656.20(b).

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<sup>3</sup> The denial letter also included a paragraph stating that the CO accepted the Employer's reasoning regarding the failure to provide proof of business necessity, but that "reconsideration of this specific denial reason does not cure the [failure to provide the audit documentation]." (AF 1).

<sup>4</sup> The brief is signed by the Employer's agent rather than its attorney. The brief appears, however, to have been mailed from the attorney's office, and is mostly verbatim from the request for review earlier filed by the attorney.

## DISCUSSION

Under the PERM regulations, applications may be selected for audit based on the CO's review of the application. They also may be selected for audit randomly. 20 C.F.R. § 656.20(a). Section 656.20(b) provides that a "substantial failure by the employer to provide required documentation will result in that application being denied under § 656.24 ...." In the instant case, the Employer provided none of the documentation specified in the CO's Audit Notification but instead merely argued that if a cook application is certified in one case, other similar applications must also be certified. Such a contention is meritless. The PERM system is grounded in employers making attestations that they must be prepared to back up with documentation if the application is selected for audit. *See* 20 C.F.R. §§ 656.10(f) and 656.17(a)(3). That similar applications have been certified in the past does not in any way excuse an employer from producing documentation in response to an Audit Notification. *See also Tedmar's Oak Factory*, 1989-INA-62 (Feb. 26, 1990) (findings of a CO in one case are not binding on future cases handled by the CO).

In its request for review and appellate brief, the Employer made no effort to explain why it did not supply the documentation requested in the CO's audit notification other than to make an argument about the business necessity of its experience requirement and to accuse the CO of inconsistency and unfairness in processing applications. Accordingly, we affirm the CO's denial of certification. *See Marlenny's Haircutters*, 2009-PER-13 (Jan. 29, 2009) (denial affirmed based on employer's failure to provide recruitment report required by section 656.17(g) and specifically requested in the Audit Notification). *See also Mildred Swartz*, 2008-PER-115 (Oct. 28, 2008) (where employer provided no explanation or excuse for its failure to submit its recruitment report as directed in an Audit Notification, and therefore the BALCA panel found that the audit response was not timely, further administrative review was not available pursuant to 20 C.F.R. § 656.20(a)(3)).

## **ORDER**

**IT IS ORDERED** that the denial of labor certification in this matter 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.