**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
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**Issue Date: 04 June 2008**

**BALCA Case No.: 2007-PER-00104**
ETA Case No.: C-06095-04139

*In the Matter of:*

**CARMEN LEE**
*Employer,*

*on behalf of*

**CHERRY PENDON EBOJO**
*Alien.*

Certifying Officer: Dominic Pavese
Chicago Processing Center

Appearances: Miguel P. Inumerable, Esquire
Law Offices of Miguel P. Inumerable and Associates
Los Angles, California
*For the Employer and Alien*

Gary M. Buff, Associate Solicitor
Stephen R. Jones, 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.[1] The following decision is based on the record upon which the Certifying Officer (CO) denied certification and the Brief of the Certifying Officer, filed on October 1, 2007. 29 C.F.R. § 656.27(c) (2005).

## STATEMENT OF THE CASE

On February 16, 2006, Ms. Carmen Lee ("Employer") filed an Application for Permanent Employment Certification on behalf of Cherry Pendon Ebojo ("Alien") for the position of "Home Health Aide." (AF 26-37). The job duties were described as:

> To provide daily assistance, care and companionship to an elderly recovering heart transplant recipient at the latter's residence. To administer medication at the proper times, to plan, cook and prepare meals that are low sodium and meets dietary instructions, to do the grocery, clean the house, do laundry and change linens, to assist the client in moving from bed, bathe, dress and groom; to do housekeeping and routine personal care; to accompany client as guide and companion.

(AF 29). The Employer required that an applicant have two years prior experience. (AF 28). The offered wage was $7.63 per hour. (AF 28).

On June 8, 2006, the CO denied certification on four grounds. (AF13-15). The four grounds arise from the PERM regulations at 20 C.F.R. § 656.17(a), which require an employer to file a completed Department of Labor *Application for Permanent Employment Certification* form (ETA Form 9089). The Employer failed to make selections for the following questions on the ETA Form 9089: Section C-6 (Year commenced business); C-7 (Employer FEIN); F-3 (Skill level); K-5 (Job 3 Title). (AF 15).

On July 7, 2006, the Employer filed a request for reconsideration. (AF 5-12). The Employer asserted that her response for Section C-6 clearly indicated that the job offering was for a private household. The Employer argued that the CO improperly demanded a

[1] The Final PERM regulations were published on December 27, 2004, 69 Fed. Reg. 77386, and are applicable to permanent labor certification applications filed on or after March 28, 2005. The regulations were amended on June 21, 2006, 71 Fed. Reg. 35522, and May 17, 2007, 72 Fed. Reg. 28903.

selection to be made for Section C-6 of the ETA Form 9089 when the instructions themselves excused the Employer in this case from this requirement as a private household. (AF 6). Second, the Employer asserted that with regards to Section C-7 (Employer FEIN) she clearly made a selection/response when she indicated therein "None." (AF 6). For these reasons the Employer argued that the denial should be reviewed and the application should be granted.

On August 24, 2007, the CO denied reconsideration. (AF 1-2). The CO asserted that the Employer's request for reconsideration did not overcome all deficiencies noted in the determination letter. The CO determined that although the Employer's reasoning with respect to Section C-6 had been accepted based on her request for reconsideration, the Employer's reasoning with respect to Section's C-7 (Employer FEIN), F-4 (Skill level), and K-5 (Job 3 Title) had not been accepted. Accordingly, the CO concluded that the denial reasons remained valid. This matter was forwarded to BALCA on August 24, 2007 and a Notice of Docketing was issued on September 12, 2007.

## DISCUSSION

We affirm the CO's denial of certification. The Employer offered an incomplete ETA Form 9089. The regulations at 20 C.F.R. § 656.17(a) require that an "employer who desires to apply for a labor certification on behalf of an alien must file a complete Department of Labor *Application for Permanent Employment Certification* form (ETA Form 9089)." 20 C.F.R. § 656.17(a). The regulations go on to say that "incomplete applications will be denied." 20 C.F.R. § 656.17(a). In the instant case, the ETA Form 9089 omissions are material and the Employer failed to correct them by offering documentation in her request for reconsideration to establish compliance with the regulations.

The CO correctly cited 20 C.F.R. § 656.3, which defines "employer" as possessing a valid FEIN and states that "an employer **must** possess a valid Federal Employer Identification Number (FEIN)." (emphasis added). Hence for a private household filing ETA Form 9089 to be considered an employer, it also must obtain an

FEIN from the Internal Revenue Service. The preamble to the PERM regulations state that the FEIN will be used to verify whether an employer is a "bona fide business entity." 69 Fed. Reg. 77326, 77329 (Dec.27, 2004); *Maria Gonzalez*, 2007-PER-24, April 25, 2007. Thus, the requirement at Section C-7 of the ETA Form 9089 requiring submission of a FEIN is fully supported by the regulations and by the policy stated in the regulatory history of the PERM regulations. In the instant case, the application and request for reconsideration substantiated that the Employer did not qualify as an "employer" for purposes of § 656.3, because she did not have a FEIN, and therefore pursuant to the regulations, the Employer did not qualify to file the ETA Form 9089. Moreover, the Employer's request for reconsideration underscored this defect where it explained that Section C-7 was blank, not due to an inadvertent omission, but because the Employer clearly made a selection/response when she indicated "none." (AF 6).

In regards to Section's F-4 (Skill level) and K-5 (Job 3 Title), both are required entries. The Employer failed to complete these sections of the ETA Form 9089. Moreover, the Employer did not address these denial reasons in her request for reconsideration.

The Employer clearly failed to obtain a FEIN number and to complete Sections F-4 and K-5 of the application. Accordingly, the CO properly denied certification.

## 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.