U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 23 August 2011

BALCA Case No.: 2010-PER-01146
ETA Case No.: A-08163-60532

In the Matter of

PICKERING VALLEY CONTRACTORS, INC.,
Employer,

on behalf of

LUIS ALBERTO CALLE-MEDINA,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Ephraim Tahir Mella, Esquire
Philadelphia, Pennsylvania
For the Employer

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: **Colwell, Johnson, and Vittone**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
VACATING DENIAL OF LABOR CERTIFICATION
AND REMANDING FOR FURTHER PROCESSING

This matter involves an appeal of the denial of permanent alien labor certification 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.

BACKGROUND

On December 7, 2007, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of Landscaping and Groundskeeping worker. (AF 18, 31-42).[1] The Employer mailed its application to the CO, and Keith Grant, the Employer's President, signed a declaration under penalty of perjury certifying to the conditions of employment listed in 20 C.F.R. § 656.10(c). (AF 39). On July 15, 2008, the CO denied the Employer's application because it could not verify the Employer's sponsorship of the foreign worker. (AF 18-20). The CO stated that unsuccessful attempts were made to contact the Employer's contact, Keith Grant, on June 17, 2008, June 18, 2008, July 2, 2008, July 8, 2008, and July 15, 2008. (AF 20). The denial letter does not state whether telephone messages were left for the Employer's contact. *Id*. The CO determined that sponsorship and the Employer's awareness of the application could not be verified, and therefore denied certification under 20 C.F.R. § 656.10(c)(1)-(5). *Id.*

On August 13, 2008, the Employer requested reconsideration of the denial and included a letter from the Employer's President and contact, Keith Grant. (AF 3-17). Mr. Grant's letter stated, in relevant part:

> I attest that my office did not receive any calls from the U.S. Department of Labor on those dates indicated in the Denial. At any rate, I would like to provide my mobile phone number […] as my alternate contact information. Should you wish to contact me at my office number of […], I would request that you look for Ms. Cassey, my personal assistant. She would know where to reach me soonest. However, I prefer that I be contacted through my mobile phone number to ensure that I personally receive the call and therefore be able to verify our sponsorship of the application.

[1] In this decision, AF is an abbreviation for Appeal File.

(AF 4). On July 8, 2010, the CO again denied the Employer's application, acknowledging Mr. Grant's letter, but stating that the DOL already made five attempts to contact the Employer in June and July 2008, and the Employer did not respond to any of the messages that the DOL left at that time. (AF 1). The CO found that the Employer's request for reconsideration "does not satisfy the specific conditions of sponsorship verification. Since the employer's filing of the application could not be verified, per 20 CFR 656.10, the Certifying Officer has determined that this reason for denial [w]as valid." *Id*.

The CO forwarded the case to BALCA, and a Notice of Docketing was issued on August 13, 2010. The Employer filed a Statement of Intent to Proceed on August 25, 2010 and an appellate brief on September 1, 2010. In its brief, the Employer reiterates that it intends to sponsor the Alien for permanent employment. The CO filed a Statement of Position on September 3, 2010, arguing that the CO properly denied certification because it could not reach the Employer's contact at the telephone number provided in the Employer's application.

DISCUSSION

The sole issue before us is whether the CO properly denied certification based on an inability to verify the Employer's sponsorship of the foreign worker. The regulation cited in denying the Employer's application is 20 C.F.R. § 656.10(c). Under Section 656.10(c), the employer must certify to the conditions of employment in the Application for Permanent Employment Certification under penalty of perjury. Failure to attest to any of the conditions listed under 20 C.F.R. § 656.10(c) results in denial of the application.

When the CO receives an application, the application is first screened. 20 C.F.R. § 656.17(b)(1). As part of that screening, the CO may conduct checks to ensure that the employer is aware that the application was filed on its behalf. ETA, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326, 77329, 77341 (Dec. 27, 2004). Although not specifically provided for in the regulations or regulatory history, the CO

may call the individual designated as the employer's contact in Section D of the Employer's application in an effort to verify that the employer is aware of the application for permanent labor certification.

We find that the CO's denial on the basis that it was unable to verify sponsorship to be improper. The Employer's application was mailed-in to ETA and included the Employer's sworn statement under the penalty of perjury certifying to the conditions of employment outlined in 20 C.F.R. § 656.10(c). (AF 39). This signed statement alone places the Employer in full compliance with the regulatory requirements listed at 20 C.F.R. § 656.10(c). The regulatory history notes that the CO may conduct checks as part of its screening to ensure that an employer is aware that an application has been filed on its behalf. We recognize that this practice has been implemented with the intent to reduce the number of non-meritorious applications that are filed. 69 Fed. Reg. at 77329. However, verification of sponsorship by telephone is not a regulatory requirement, but rather a tool that the CO has utilized as part of its preliminary screening. We have no issue with the CO continuing this practice. We disagree, however, with the CO's inconsistent practice of making a negative inference regarding an employer's awareness of an application where the CO was unable to successfully make contact with an employer *and* that employer has signed the declaration in Section N of the application attesting to the conditions of employment.

This brings us to our next issue regarding this practice. That "verification of sponsorship" is not a regulatory requirement but is used as a basis for denial raises concerns that this "requirement" may be arbitrarily applied. We note that the CO has requested remands for further processing in several cases where denial of certification was based on an inability to verify sponsorship by telephone. *See Dr. Steven Batash*, 2010-PER-473 (July 20, 2010) (CO accepted employer's affidavit attesting that the employer was not aware that DOL had attempted to call him and verifying that he intended to sponsor the foreign worker); *Precision Marble & Tile*, 2009-PER-323 (June 26, 2009) (CO accepted the employer's documentation of sponsorship and requested that application be remanded for continued processing); *John Shoe Repair*, 2009-PER-234 (May 8, 2009) (CO stated that it would no longer pursue "the fact that the application

may have been withdrawn" and requested remand for further consideration). In two other cases, the CO conceded the issue of verification of sponsorship on appeal after reviewing the employers' documentation and requested that the Board issue a decision directing the CO to grant certification. *See Joyeria Di Carlo*, 2009-PER-90 (Feb. 19, 2009); *MGA-Ajax, Inc*., 2009-PER-38 (Dec. 15, 2008). In *Alexandria Granite & Marble*, 2009-PER-373 (May 26, 2010), the CO's original ground for denial was an inability to reach the employer to verify sponsorship, but the CO accepted the employer's explanation that it had been unable to respond to a DOL questionnaire due to technical problems with the on-line system, and the case was reopened. It is not clear why the CO accepted documentation in the aforementioned cases but not in the case presently before us. The inconsistent manner in which the CO handles this non-regulatory based ground for denial reveals an additional reason that denial of applications on the basis of the CO's inability to verify sponsorship by telephone is problematic.

When an employer has mailed in its ETA Form 9089 and attested to the conditions of employment as required by Section 656.10(c), but the CO has not received a response to its phone calls or emails from the employer, a finding that the CO has been unable to verify sponsorship is tantamount to a finding that the application has been fraudulently filed. Because the employer has already attested to the conditions of employment under penalty of perjury, denial under § 656.10(c)(1)-(5) is inappropriate. Rather, if the CO suspects that an application has been filed fraudulently, the CO should follow the specific guidelines under the PERM regulations that were designed to investigate possible fraud. *See* 20 C.F.R. § 656.31(b). Alternatively, the PERM regulations also give the CO the authority to ask for supplemental information or documentation through the audit procedures outlined at Section 656.20(d)(1), which could be utilized to confirm an employer's sponsorship of a foreign worker.

We note that other BALCA panels have affirmed denials of certification under Section 656.10(c) where the CO was unable to verify sponsorship. *See Good 4 US*, 2010-PER-71 (Feb. 11, 2011) (denial appropriate because calls to the number provided for the employer's contact were unsuccessful because the number reached a fax machine); *Diamond Valley Contracting, LLC*, 2009-PER-121 (June 23, 2009) (denial appropriate

where the CO called the number provided for the employer's contact, but the name on the answering machine did not correspond to the name provided for the employer's contact on the application); *Robert Stefanelli*, 2009-PER-295 (March 30, 2010) (denial appropriate where the employer's contact did not respond to either phone calls or an email from the CO). Regrettably, it is not clear from any of these cases whether the employers mailed in their applications, certifying to the requirements at Section 656.10(c), as the Employer did in the case at bench. While this important fact is not included in *Good 4 US* or *Robert Stefanelli*, if the employers in those cases did in fact mail-in signed applications, we disagree with the other BALCA panels.[2]

In this interest of administrative efficiency, we will consider whether the Employer has demonstrated that it is aware of the application and intends to sponsor the foreign worker. We find the record contains sufficient evidence to demonstrate the Employer's intent to file the application. As we previously mentioned, the Employer mailed in a signed ETA Form 9089, attesting to the conditions of employment, and this is a factor which is to be given substantial weight in determining whether the Employer was aware of the application. Secondly, upon receipt of the CO's first denial letter in July 2008, the Employer's request for reconsideration included a letter from the Employer's President and contact, who stated that he did not receive any calls from the DOL but that he intends to sponsor the foreign worker. (AF 4). The Employer's contact provided his cellular telephone number to ensure that he could be reached to verify sponsorship of the foreign worker. (AF 4). Based on the information in the CO's second denial letter, there

[2] Several decisions affirming denials of certification based on an inability to verify sponsorship are distinguishable from the case before us. In *Diamond Valley Contracting, LLC*, the CO was presented with evidence that the telephone number provided for the employer's contact was not the individual identified on the application as the employer's contact. This fact reasonably led the CO to find that the employer was not aware that the application was filed. Additionally, we point out that our decision today is entirely consistent with the panel decisions affirming denial of certification in *Montessori Child Care Center*, 2010-PER-520 (Feb. 4, 2011) and *Jimmy Crystal (New York) Company, Ltd*., 2010-PER-1023 (Oct. 27, 2010). In *Montessori Child Care Center*, the employer failed to actually provide a contact at the employer's place of business on its ETA Form 9089, and instead provided the employer's attorney's phone number and email address. In that case, the CO properly found that the failure to provide the requisite contact information prevented the CO from obtaining confirmation of the conditions of employment as required by 20 C.F.R. § 656.10(c). Similarly, in *Jimmy Crystal (New York) Company, Ltd*., the employer listed the foreign worker's email address as the email address for the employer's contact, and the CO properly denied certification under 20 C.F.R. § 656.10(c)(8), because the job opportunity was not clearly open to any U.S. worker.

was no other attempt made to verify sponsorship in the two years that elapsed between the CO's first denial letter and the CO's second denial letter.

Based on the foregoing, we find that the Employer has demonstrated its intent to sponsor the foreign worker and has fully complied with 20 C.F.R. § 656.10(c). Accordingly, we must vacate the denial and return this matter to the CO for further processing.

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's denial of Employer's application for labor certification in the above-captioned matter is **VACATED** and **REMANDED** for further processing consistent with this opinion.

For the panel:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

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.