



Issue Date: 29 October 2009

BALCA Case No.: 2009-PER-00040
ETA Case No.: A-06186-35331

In the Matter of:

BEN PUMO,

Employer,

on behalf of

GERMANA DECASTRO,

Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Mayra L. Gonzalez, Esquire
International Immigration and Labor Services
Ft. Lauderdale, Florida
For the Employer

Gary M. Buff, Associate Solicitor
Frank P. Buckley, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Chapman, Colwell and Johnson**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION

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 June 5, 2006, the Certifying Officer ("CO") accepted for filing the Employer's Application for Permanent Employment Certification for the position of "Household Assistant." (AF 22).¹ On September 20, 2006, the CO denied the application because several required selections on the Form 9089 had not been made by the Employer. (AF 8-10). By letter dated October 31, 2006, the Employer asked for a reconsideration. (AF 3-4). The Employer's attorney acknowledged that the request for reconsideration was tardy, explained that she had never received the CO's denial determination, and stated that she had only learned of it from one of the Employer's representatives on October 27, 2006. The attorney provided responses to the omissions listed by the CO's denial determination "in the event that you will accept it even after the 30 day deadline."

On reconsideration, the CO accepted the Employer's explanations for several of the selections, but found that the denial was valid because four of the omitted selections were only explained as an oversight and because the Employer still did not provide information on what should be completed for the omitted selections. (AF 1-2). Specifically, the Employer failed to provide information on Section 1-11 (advertisement type placed in newspaper or journal); I-8 (Sunday edition of newspaper in the area of intended employment); M-1 (declaration of preparer); and N-2 (employer's title).

On October 30, 2009, the Board issued a Notice of Docketing. On appeal, the Employer noted that the CO had not been given the opportunity to provide additional information about the omission, and had "believed that the request for reconsideration was to determine that the 30 day deadline had not elapsed." The Employer argued that each of the omissions was not material to

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

adjudication of the application, and that the allegedly missing information was contained in the answers that were given.

The Employer conceded that it did not check the box listing the advertisement type (as a newspaper or journal) but noted that it had provided the name of the newspaper it advertised in – the *Miami Herald* – which is well known, and self-evidently a newspaper. The Employer conceded that it did not check the box stating whether a Sunday newspaper edition was available, but noted that it provided the dates of the advertisements, which were two Sundays seven days apart. The Employer conceded that it did not check the box asking whether the application was completed by the Employer, but noted that its attorney had fully completed and signed the section certifying that she had prepared the application at the request of the employer. Finally, the Employer conceded that a title had not been listed for the Employer, but noted that this application was for an individual rather than a corporation or legal entity, so at most, the answer to this part of the application would have been “none.”

On appeal, the CO moved to dismiss the appeal on the ground that it was not timely. The CO did not brief the substantive issue of the omissions. The Employer filed a response opposing the CO’s motion to dismiss,

DISCUSSION

Motion to dismiss based on timeliness

The CO’s only argument on appeal is that the motion for reconsideration was not timely. But the CO in fact reconsidered the denial. The denial of reconsideration was not based on a finding that the motion for reconsideration was not timely, but the rejection of the Employer’s explanations for the omissions. As such, we find that the CO waived the issue of timeliness.

Lack of request for additional explanations

As noted, the Employer argued on appeal that it thought the motion for reconsideration was going to be about the issue of the timeliness of the motion, noting that the CO had not asked for additional information about the omissions. We interpret this as an argument that the

Employer was blindsided by the CO's having ruled on the merits of the Employer's explanation for the omissions. But this contention is untenable. The Employer clearly stated in the motion that it was providing reasons for omissions in the event that the CO accepted the motion despite its lack of timeliness. Moreover, it is the Employer's burden to establish eligibility for a labor certification. Thus, the fact that the CO did not ask for additional information about the omissions is immaterial. *See Alpine Store Inc.*, 2007-PER-00040 (June 27, 2007) (the CO is under no obligation to gather the information needed to perfect an application).

Materiality of omissions

The regulations at 20 C.F.R. § 656.17(a) require that an "employer who desires to apply for a labor certification on behalf on an alien must file a completed 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 "[i]ncomplete applications will be denied." 20 C.F.R. § 656.17(a).

This panel -- while emphasizing that the regulations clearly require that petitioning employers submit complete applications -- has nonetheless recognized that some omissions may not be material to the review of the substance of an application. *Yasmeena Corp.*, 2008-PER-3 (Nov. 14, 2008). Thus, in certain circumstances we may find that a denial of reconsideration absent an explanation by the CO as to why omissions are material was arbitrary and capricious. In the instant case, the Employer has made reasonable arguments as to why, in context, the omissions all were not material because other information that was provided on the Form answered the essential question posed by the form. In contrast, the CO has proffered no explanation for why the omissions prevented a complete review of the application. Thus, under the circumstances of this particular case, we decline to affirm the CO's denial of certification. We expressly reserve judgment on whether the omissions were, in fact, material to the CO's review of the application, but only find that such materiality is not apparent on the record before us. We also wish to emphasize, as we did in *Yasmeena Corp.*, that failure to file a complete application is itself a ground for denial of the application -- an employer who fails to fully answer all of the Form's questions run the peril of having the application denied.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **REVERSED**. This matter is hereby returned to the Certifying Officer for the issuance of a labor certification.

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.