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Issue Date: 16 March 2004

BALCA Case No.: 2003-INA-60
ETA Case No.: P2002-NY-02477379

In the Matter of:

WILLIAM & MELISSA GILDIN,
Employer,

on behalf of

YVONNE BOATSWAIN,
Alien.

Certifying Officer: Delores Dehaan
New York, New York

Appearance: Daniel C. Gallagher, Esquire
New York, New York
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification on behalf of Yvonne Boatswain (“the Alien”) filed by William and Melissa Gildin (“the Employer”) for the position of domestic cook.¹ (AF 89).² The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification. (AF 1-104).

¹ Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² In this decision, AF is an abbreviation for Appeal File.

STATEMENT OF THE CASE

On April 30, 2001, the Employer filed an application for alien employment certification on behalf of the Alien for the position of Domestic Cook. (AF 22-27). On February 14, 2002, the CO issued a Notice of Findings (“NOF”) stating the intent to deny the application. (AF 35-38). The NOF provided remedial steps that the Employer could take to correct and/or rebut the basis for denial by the CO. (AF 35-38). The NOF also stated that Employer had until March 21, 2002 to rebut the findings or to remedy the defects, or the NOF would become the final decision of the Secretary denying labor certification. (AF 38).

The Employer submitted a letter on October 9, 2002, in which it asserted that its response to the NOF was submitted on March 12, 2002, but it never received an adjudication. (AF 101). The CO responded on October 10, 2002, and reported that it did not receive the Employer’s rebuttal and requested copies of the materials sent together with evidence of date of mailing.

The Employer submitted its rebuttal evidence and a certified mail receipt on October 22, 2002. (AF 39–102). The Employer’s cover letter submitted with its documentation stated, “[i]t appears that the response was misplaced since it was sent along with another case which has already been certified.” (AF 102).

The CO responded on November 2, 2002, with the following statement:

The evidence of certified mail submitted was for another alien & for case # 02475012. Therefore since employer failed to rebut the NOF by the due date of March 21, 2002, the NOF became the final decision of the Secretary denying labor certification.

(AF 103).

The Employer requested, by a letter submitted on November 22, 2002, that the CO reconsider her decision and grant the certification. (AF 104). The Employer asserts that cases numbered 02475012 and 02477379 were forwarded in the same envelope, and case 02475012 was received and certified. (AF 104). The Employer argues that the rebuttal for this case was received in a timely manner, as evidenced by the certified mail return receipt it provided. (AF 104). The Employer's November 22, 2002 letter also requested that if reconsideration was not granted, it would like the matter forwarded to the Board of Alien Labor Certification for review. (AF 104).

The CO responded with the following statement, dated December 10, 2002:

A review of case # 475012 contains information that's relevant solely to that case. It does not show any evidence that the employer in case #477379 (William Gildin) submitted a rebuttal to our NOF dated 2/14/04. Therefore, since neither you, as the employer's representative or the employer rebutted the NOF by the due date of March 21, 2002, the NOF became the final decision of the Secretary denying labor certification.

(AF 104). Therefore, the CO reported that it had denied the Employer's request for reconsideration, and would forward the Employer's application to this Board. (AF 105).

The Board issued a Notice of Docketing and Order Requiring Statement of Position or Legal Brief, on February 5, 2003. That Order directed the Employer to file a statement or brief explaining its grounds for appeal, if not already stated in its request for review. No such statement or brief was received.

DISCUSSION

Where the FD is based on untimely rebuttal and the employer obviously has had no prior opportunity to submit evidence to support a contention that it filed a timely rebuttal, it is an abuse of discretion for the CO not to reconsider. *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (*en banc*); *see also Computer Horizons Corp.*, 1993-INA-506 (Sept. 26, 1994) (remanding for CO to consider evidence when the employer contended

that its attorney submitted additional timely rebuttal evidence, and employer supplied a copy of such evidence along with certified mail receipts documenting such timeliness in its request for review). However, in *Harry Tancredi*, the Board also wrote that:

This does not mean that the CO must reconsider a denial of certification whenever such a motion is filed. Nor must the CO accept the validity of evidence submitted on reconsideration and change the outcome of the case. But at least where, as here, the motion is grounded in allegations of oversight, omission or inadvertence by the CO which, if credible, would cast doubt upon the correctness of the Final Determination, and the Employer had no previous opportunity to argue its position or present evidence in support of its position, the CO should reconsider his or her decision.

(footnote omitted). In this case, it is clear from the CO's notes that she considered the Employer's assertion that the rebuttal information for this case was sent with another case, as the CO stated that she checked case number 475012, and it does not contain information relevant to this matter. (AF 104). Therefore, there has been no abuse of discretion by the CO in her decision to deny the Claimant's Motion for Reconsideration.

In order to prove timely mailing of the rebuttal, an employer must present the certified mail receipt, with postmark. *Andrea Foods*, 1994-INA-309 (Sep. 21, 1994); *see also Vicki Mizell*, 1994-INA-488 (Sept. 21, 1994); *Hankins & Tegenborg, LTD.*, 1994-INA-600 (Sept. 23, 1994) (finding that a hand dated certified mail receipt was not adequate, objective evidence of date of mailing). In the instant case, the Employer provided a certified mail receipt that is postmarked on March 13, 2002.³ (AF 100). However, the Employer and CO disagree as to whether the rebuttal information that is relevant to this case was contained in the same envelope that corresponds to the certified mail receipt and postcard in the record. Based on a review of the evidence, it is impossible to determine from the certified mail receipt what the actual contents of the envelope were.

³ The certified mail postcard is signed by recipient, and it also has the handwritten notation of "Y. Boatswain and Adelina Taopo" on the bottom. (AF 100). The certified mail receipt bears the handwritten name "Adelina Taopo" on it. (AF 100).

Twenty C.F.R. § 656.25(c) directs the CO to advise the employer in the NOF that rebuttal evidence or argument must be mailed to the CO, by certified mail, before a specified date thirty-five calendar days from issuance of the NOF. The requirement for submitting documentation by certified mail is not a mere technicality, but rather an important provision designed to prevent disputes over whether a rebuttal was timely mailed. *Park Woodworking, Inc.*, 1990-INA-93 (Jan. 29, 1992) (*en banc*). The intended safeguards of the certified mail requirement are circumvented if the submission of rebuttal evidence is sent in the same envelope that contains documentation for another unrelated labor certification. The regulations did not contemplate this unusual occurrence. Therefore, we find that in this circumstance, a certified mail receipt could not be objective proof of mailing since it is alleged that the contents of the envelope corresponded with more than one case. Thus, the Employer in this case would need to provide something more than the certified mail receipt to corroborate its assertion of timely submission of its rebuttal.

In the case of *Cardenas Markets, Inc.*, 2002-INA-236, 237 (August 15, 2003), the Employer's attorneys submitted sworn affidavits to support the credibility of their assertion that the rebuttal information was timely sent. The Board found the affidavits and other corroborative evidence as proof of timely submission, and remanded the matter. In the instant matter, the Employer has not submitted a sworn affidavit to corroborate the assertion that the rebuttal information relevant to this case was contained in the envelope with the documentation for case number 475012. Additionally, the handwritten name of the Alien which appears on the certified mail postcard is not objective corroborative evidence of the contents of the envelope. *See* n. 3, *supra*. This being the case, the Employer has not established that it timely submitted its rebuttal to the NOF and labor certification was properly denied.

ORDER

The CO's 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 of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. 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, D.C. 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, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.