

**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: 12 October 2010**

**BALCA Case No.: 2010-PER-00683**  
**ETA Case No.: A-07235-68746**

*In the Matter of:*

**IL CORTILE RESTAURANT,**  
*Employer,*

*on behalf of*

**ISNIJA HASANDJEKAJ,**  
*Alien.*

Certifying Officer: William Carlson  
Atlanta Processing Center

Appearances: Steven Elias, Esquire  
New York, New York  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Vincent C. Costantino, Senior Trial Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

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

**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

**DECISION AND ORDER**  
**VACATING 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 (“C.F.R.”).

**BACKGROUND**

On August 23, 2007, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Chefs and Head Cooks.” (AF 55-64).<sup>1</sup> The Employer stated that the position required the ability to speak Italian and Spanish. (AF 57). On May 5, 2008, the CO denied certification because the Employer’s sponsorship of the foreign worker could not be verified. (AF 52-55). On June 2, 2008, the Employer requested reconsideration, stating that the Employer’s contact person was its Executive Chef, who was no longer working for the Employer. (AF 45-46). The Employer provided a new contact person. *Id.*

On December 23, 2009, the CO issued an Audit Notification, instructing the Employer to file its Notice of Filing documentation, its recruitment documentation, and documentation justifying business necessity for the foreign language requirement. (AF 42-44). On January 15, 2010, the Employer submitted the requested documentation. (AF 14-37). The Employer’s Notice of Filing stated that it was placed at the Employer’s worksite from May 14, 2007 to May 24, 2007. (AF 34).

On February 9, 2010, the CO denied certification, stating that the Employer’s Notice of Filing was posted for fewer than 10 consecutive business days in violation of 20 C.F.R. § 656.10(d)(1)(ii). (AF 8-9). The Employer submitted a request for reconsideration to the CO on February 25, 2010, stating that the Employer is open seven

---

<sup>1</sup> In this decision, AF is an abbreviation for Appeal File.

days a week, and therefore it did post the Notice of Filing for ten consecutive business days. (AF 2-3). The Employer explained that because it is a restaurant, Saturdays and Sundays are its busiest days, and it requires a full employee workload on the weekends. (AF 2-3). On April 28, 2010, the CO determined that the Employer's request for reconsideration did not overcome the deficiency stated in the determination letter. (AF 1). The CO stated that "[f]or the purposes of the Permanent Labor Certification program, business days as related to the posting of the NOF are defined as Monday through Friday, excluding weekends and Federal holidays." (AF 1).

The CO forwarded the case to BALCA on May 5, 2010, and BALCA issued a Notice of Docketing on June 17, 2010. The Employer filed a Statement of Intent to Proceed on June 30, 2010, but did not file an appellate brief. On August 2, 2010, the CO filed a Statement of Position, stating that Saturdays, Sundays, and legal holidays are not traditionally interpreted as business days. The CO argues that defining business day according to the actual days the employer is open would make administration of the Notice of Filing provision unfeasible.

## **DISCUSSION**

The regulation at 20 C.F.R. § 656.10(d) requires an employer to post a Notice of the Filing of the permanent labor certification application. The Notice of Filing is required to be posted for at least 10 consecutive business days. 20 C.F.R. § 656.10(d)(1)(ii). The regulations do not define "business day."

Here, the CO denied certification based on the Employer's failure to post the Notice of Filing for ten consecutive business days. With the Employer's request for reconsideration, it argues that it is a restaurant open for business on the weekends, and therefore the weekend days should be considered business days for the purposes of the Notice of Filing requirement. (AF 4-9). On appeal, the CO argues that a "business day"

within the context of the Notice of Filing requirement excludes the weekends and legal holidays.

We disagree with the CO. BALCA has never found that business days can only ever be Monday through Friday.<sup>2</sup> The purpose of the Notice of Filing requirement is to ensure that an employer's employees and other interested persons are notified that it is filing an application for permanent alien labor certification. *See* 69 Fed. Reg. 77326, 77339 (Dec. 27, 2004) (noting the reasonableness of the change from 10 consecutive days in the proposed rule to 10 consecutive business days in the final rule because it maximizes viewing by U.S. workers). If the Notice of Filing is posted for ten consecutive days when employees are on the worksite and able to see the Notice of Filing, the purpose of the Notice of Filing requirement is fulfilled. As long as an employer has employees working on the premises on a Saturday, Sunday, or holiday, those days are business days for the purposes of complying with the Notice of Filing posting.<sup>3</sup>

Based on the foregoing, we find that denial of labor certification on the ground that the Employer did not post the Notice of Filing for ten consecutive business days was improper. In light of our decision, we find that principles of fundamental fairness require

---

<sup>2</sup> The CO cites our decision in *Fanous Brothers Jewelers*, 1990-INA-34 (July 18, 1991) to support its argument that the Board has already interpreted the meaning of "business day." The CO's argument is misplaced. In *Fanous Brothers*, we interpreted the Administrative Rules of Practice and Procedure Before the Office of Administrative Law Judges to determine whether evidence was timely filed, given that the date the evidence was due fell on a Saturday. Interpreting 29 C.F.R. § 18.4(a), we stated that if the last day of a filing period fell on a Saturday, Sunday, or a federal holiday, the next business day would be included in the filing period. What is relevant from that case is that Saturdays, Sundays, and federal holidays are not business days for the Office of Administrative Law Judges; however, that decision made no sweeping statements about the meaning of "business day."

<sup>3</sup> We are not convinced by the CO's assertion that administration of the Notice of Filing provision will become unfeasible if the CO must actually consider whether the Employer was open on the day that it purported to be a business day. A blanket rule that only weekdays are business days is not only inconsistent with the reality of today's economy, but could also undermine the purpose of the Notice of Filing requirement. Certainly, businesses like restaurants, supermarkets, and retail stores often conduct more business on Saturdays and Sundays than any other day of the week, and therefore would likely have more employees and other interested persons on the premises on those days. By the same token, if an employer is closed on Mondays, that employer should not be permitted to count Mondays as business days for the purposes of § 656.10(d)(1)(ii), because no employees or other interested persons could have viewed the Notice of Filing on that day.

that the Employer to be given the opportunity to demonstrate that it complied with the Notice of Filing requirement because it is open for business on Saturdays and Sundays.<sup>4</sup> Therefore, we vacate the denial and remand this case to permit the Employer the opportunity to present evidence that Saturdays and Sundays are business days for the Employer.

### **ORDER**

**IT IS ORDERED** that the denial of labor certification in this matter is hereby **VACATED** and this matter is **REMANDED** for further proceedings consistent with this decision.

For the panel:

A

**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

---

<sup>4</sup> Twenty C.F.R. § 656.24(g)(2)(ii) presents no obstacle to the Employer's ability to submit additional evidence to this effect, because the CO's audit request did not specify that an Employer should submit evidence to show that Saturday and Sundays are business days, and no reasonable employer could have anticipated that the CO would disallow days the employer was open for business merely because one or more of the days fell on a weekend or holiday. The Employer is reminded, however, that a bare assertion that it is open on the weekends, without either supporting reasoning or evidence, will generally be insufficient to carry an employer's burden of proof. *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc). Moreover, an employer that is relying on a Saturday, Sunday, or holiday as a business day for purposes of § 656.10(d)(1)(ii) would be well served by including proof that it was open for business on those days as part of its audit response to avoid the need to file a motion for reconsideration later.

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.