



DATE: October 13, 1989
CASE NO. 88-INA-152

IN THE MATTER OF

MADELEINE S. BLOOM,
Employer

on behalf of

LUZ ANGELA BERNAL BARNEY,
Alien

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge;
Guill, Associate Chief Judge; and Brenner, Tureck, Williams,
Murrett, Marden and Romano,
Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge:

DECISION AND ORDER

This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer Richard E. Panati's denial of a labor certification application pursuant to 20 C.F.R. §656.26.^{1/}

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

^{1/} All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of a labor certification is based on the record upon which the denial was made, together with the request for administrative - judicial review, as contained in an Appeal File ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case

Employer filed an application for alien labor certification on behalf of Luz Angela Bernal Barney on January 30, 1987 (A 23-25). The position offered was a child monitor. The duties listed on the application were daily care of a three year old child, which included preparing the child for school, preparing meals and baths, assisting the child in daily activities such as recreation, hygiene, and grooming, performing light household duties, and occasionally assisting employer in preparation for entertaining guests.

Employer listed the job requirements as fluency in English, possession of a valid driver's license, and swimming ability (A 23).

The Notice of Findings ("NOF") was issued on June 29, 1987. The CO found that Employer's rejection of applicant Susan Steven for lack of a valid driver's license was unacceptable absent evidence that the Alien possesses a valid driver's license (A 13).

No rebuttal was filed by Employer. Therefore, the CO denied Employer's application pursuant to §656.25(c)(3)(i) for failure to submit a timely rebuttal to the NOF.

Employer filed a timely request for review of the denial of certification. Employer argued that this case should be reopened because her attorney negligently failed to send the rebuttal evidence to the CO. Employer asserted in her request for review that she had responded promptly to the NOF by hand-delivering a letter with a copy of the Alien's driver's license to her attorney. A copy of the letter and the driver's license were attached to the request for review (A 5). Employer stated that on two occasions her attorney indicated to Employer that the license had been mailed to DOL via certified mail (A1). Notwithstanding her attorney's assurance that he mailed the license, the CO apparently never received it, and therefore denied Employer's application for labor certification.

After receipt of the denial, Employer attempted to contact the attorney on numerous occasions, but he did not respond to any of her letters or repeated phone calls (A 1-2, A 6). In fact, in an attempt to locate him at his office, Employer was told that he had moved to California (A 2-4). According to the attorney who referred Employer to the attorney representing her in

regard to the labor certification application, his membership in the Virginia Bar had been suspended, and it appears that he is not currently admitted to any bar (A 3-4).

Discussion

The issue presented in this case is whether an employer's failure to file a rebuttal in a timely manner in violation of §656.25(c)(3)(i) and (e)(2) precludes the Board from considering that Employer's request for review.

These regulations clearly state that an employer's failure to file a timely rebuttal shall constitute a failure to exhaust available administrative and administrative appellate remedies, and the NOF shall automatically become the final decision of the Secretary of Labor denying labor certification. The regulations on their face appear to be mandatory since they state that, if a timely rebuttal is not filed, "[t]he Notice of Findings shall automatically become the final decision of the Secretary denying the labor certification ..." §656.25(c)(3)(i).^{3/}

However, the courts have drawn a distinction between statutory time limits, which generally are considered to be jurisdictional and not subject to waiver or tolling, and rules of courts or administrative agencies, which are subject to waiver and tolling. See, e.g., Schacht v. U.S., 398 U.S. 58 (1970); Brown v. Director, 864 F.2d 120 (11th Cir. 1989). In Schacht, supra, Justice Black, writing for a unanimous Court, held that the Court's rule specifying that petitions for certiorari "shall be deemed in time when ... filed with the clerk within thirty days after the entry of [a] judgment ..." is not jurisdictional and can be waived by the Court. (Schacht, supra, at 63). Justice Black went on to note that:

It must be remembered that this rule was not enacted by Congress but was promulgated by this Court under authority of Congress to prescribe rules concerning the time limitations for taking appeals and applying for certiorari in criminal cases. The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require.

(Id. at 64).

In a concurring opinion, Justice Harlan elaborated on the Court's holding:

Nor do I find it all anomalous that this Court on occasion waives the time limitations imposed by its own Rules and yet treats time requirements imposed by statute as jurisdictional. As a matter of statutory interpretation, the Court has not presumed the right to extend time limits specified in statutes where there is no indication of

^{3/} See also §656.25(c)(3)(iii), which precludes review by this Board where certification is denied because a timely rebuttal has not been filed.

congressional purpose to authorize the Court to do so. Because we cannot "waive" congressional enactments, the statutory time limits are treated as jurisdictional. On the other hand, for the time requirement of Rule 22(2), established under a broad statutory delegation, it is appropriate to apply the "general principle" that "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." American Farm Lines v. Black Ball, 397 U.S. 532, 90 S.Ct. 1288, 1292, 25 L.Ed.2d 547 (1970), quoting from N.L.R.B. v. Monsanto Chemical Co., 205 F.2d 763, 764 (C.A. 8th Cir. 1953).

(Id. at 68 -- emphasis added). While Justice Harlan left open the possibility that:

the Court might promulgate a rule that expressly provided that untimeliness could not be waived even for "excusable neglect" -- in other words a "jurisdictional rule" ...

(id. at 67 -- emphasis added), the Court had not done so in its rule governing the filing of petitions for certiorari.

On some occasions, the Supreme Court and other courts have gone even further, holding specific statutory deadlines to be discretionary. In Bowen v. City of New York, 476 U.S. 467 (1986), the Court relaxed a statutory filing deadline under 42 U.S.C. §405(g) by holding that the time period required to file an appeal is not jurisdictional. The Court permitted appeals by claimants seeking disability benefits under the Social Security Act despite their being received by the clerk of the court after the expiration of the 60 day period for filing.^{4/} The majority concluded that due to the unique facts in the case, the equities were in favor of extending the filing period. Id. at 2024.^{5/} Many courts support the conclusion in Bowen by finding that similar statutory requirements are discretionary.^{6/}

Conversely, in Brown v. Director, supra, the court held that the period to file an appeal with the U.S. Court of Appeals under 33 U.S.C. §921(c) is jurisdictional.^{7/} However, that section

^{4/} The Court also waived the exhaustion of administrative remedies requirements as to those claimants whose time to pursue further administrative appeals had lapsed, as well as those claimants who still had time to seek review.

^{5/} The majority reasoned that the 60-day filing period should be tolled because the government's secretive conduct which led to routine denials of benefits to eligible claimants prevented them from knowing a violation of their rights existed.

^{6/} See, e.g., Dana Corp. v. I.C.C., 703 F.2d 1297 (D.C. Cir. 1983) (construing the timely filing requirements under I.C.C. Rules 98(c)(3), (c)(7)(i) as discretionary); Health Systems Agency v. Norman, 589 F.2d 486 (10th Cir. 1978) (interpreting the deadline for submission of an application for designation as health systems agency as discretionary).

^{7/} Other courts have reached a similar result in regard to 33 U.S.C. §921(c). See, e.g., Bolling v. (continued...)

of the Longshoremen's and Harbor Workers' Compensation Act explicitly makes the timely filing of a petition for review a prerequisite to the vesting of the court's jurisdiction.

In the instant case, the 35 day period to file a rebuttal to the NOF is not mandated by the Act, which fails to set out any specific procedures for the Secretary's review of certification applications. Nor does §656.25(c)(3) expressly state either that the 35 day rebuttal deadline is jurisdictional in nature or that the rebuttal deadline cannot be waived. Although we recognize the importance of compliance with procedural deadlines, it is not the purpose of the Act or the regulations to require a mechanical adherence to filing requirements when the ends of justice will not be served. It is clear from the facts in this case that the ends of justice will not be served by allowing Employer to suffer the consequences of its attorney's negligence.^{8/} The case law indicates that, absent a specific intent to treat regulatory deadlines as jurisdictional and unwaivable they may be waived in appropriate instances. We hold that this is such an instance.^{9/}

Finally, the NOF raised only a single issue -- whether the Alien had a driver's license. The evidence submitted with the request for review clearly establishes that the Alien has a valid driver's license in the State of Maryland, and remanding the case to the CO for his initial consideration of this evidence would only delay the inevitable grant of certification.

^{7/}(...continued)

Director, 823 F.2d 165 (6th Cir. 1987); Butcher v. Big Mountain Coal, Inc., 802 F.2d 1506 (4th Cir. 1986).

^{8/} In this regard, although the general rule may be, as the dissenters indicate, that the acts and omissions of an attorney are attributable to his or her client, this rule

is not absolute, but it has to be applied rationally, with a fair recognition that justice to the litigants is always the polestar. Accordingly, the general rule that the acts and omissions of an attorney are attributable to his client is subject to the special circumstances of each case, and generally the client should not be penalized if his counsel chooses not to recognize the amenities which the tenets of his profession establish, or be prevented from having his day in court by the failure of his attorney to conform to the requirements of customary procedure and professional courtesy. The interest of a client should not be jeopardized in order to discipline his attorney.

7A CJS §181, at 284-85 (citations omitted). See also Pond v. Braniff Airways, Inc., 453 F.2d (5th Cir. 1972); Flaksa v. Little River Marine Construction Co., 389 F.2d 885 (5th Cir. 1968).

Moreover, the dissenters' reliance on a malpractice suit against Employer's attorney as justification for holding Employer liable for its attorney's failure to act appears to be misplaced. For it may be impossible to measure in dollars the damages either to Employer or the Alien beneficiary resulting from a failure to obtain certification. In fact, there may have been no monetary damages incurred. Thus a malpractice suit may not benefit either the Employer or Alien.

^{9/} Notwithstanding the outcome of this case, we note that it is not the intent of this Board to ignore or disregard the filing deadlines contained throughout Part 656 of the regulations. Rather, the holding in this case will be limited to those rare instances in which failing to toll regulatory deadlines would result in manifest injustice.

Therefore, the CO's Final Determination is reversed.

ORDER

The Final Determination denying certification is reversed, and certification is granted.

JEFFREY TURECK
Administrative Law Judge

JT/jb

In re Madeline S. Bloom, 88-INA-152

Judge Romano, with whom Judge Marden joins, dissenting.

The majority decision turns on three central considerations: (1) that procedural rules may be modified or relaxed to prevent manifest injustice, (2) that statutory deadlines, although discretionary in cases involving unique facts, should be afforded greater weight as against agency regulations, and (3) that absent specific intent, filing deadlines should not be treated as jurisdictional in nature.

The unique facts underlying the Bowen Court's relaxation of the statutory filing deadline, i.e., the government's secretive conduct resulting in denial of benefits to eligible claimants, however, are not nearly approximated in this case. The manifest injustice prevented here by the majority result is the suffering by Employer of the consequence (i.e., denial of certification) of her absconding former counsel's uncontradicted and presumed misfeasance. To raise Employer's prospective damage here to the level of public damage anticipated by the Bowen Court, is, at the least, unfocused. For one thing, remedies specifically designed to make Employer whole, e.g., a malpractice suit against her former counsel, are available, unlike the unknowing Social Security claimants presumably at risk of unrecoverable damage but for Bowen's intervention. Perhaps even more dramatic in dimension is the majority's implication (apparently unintended but nonetheless identifiable) that the irresponsible behavior of a lawyer may be indirectly forgiven in "appropriate instances," since presumably the majority's result here would serve as a bar to recovery in any action by Employer for malpractice against her former counsel.

Of utmost importance, in my opinion, is the unequivocal jurisdictional displacement contained at 20 CFR § 656.25(c) (3)(iii) and (e)(2) which sections the majority, despite its admission that relaxation of filing deadlines is permissible only upon the absence of "specific intent" to the contrary, reduces to footnote status only.

In Schacht, upon which the majority principally relies, the Supreme Court decided to waive its self-imposed deadline rules for filing certiorari petitions. But here we are not dealing with any rules self-imposed by the Board. No analogy may be drawn even to the corresponding filing deadlines for request for review to the Board (20 CFR § 656.26(b)(1)), as those deadlines

are not self-imposed by the Board, but enjoy regulatory status as does 20 CFR § 656.25 (c)(3)(iii) and (e)(2).

That an agency must adhere to its own regulations, and ad hoc departures, even to achieve laudable aims (itself not present in this case), not to be sanctioned by the courts, is a "precept which lies at the foundation of the modern administrative state . . ." Reuters Ltd. v. Federal Communications Comm., 781 F.2d 946 (D.C. Cir. 1986).

Moreover, American Farm Lines, indirectly cited in support of the majority's holding that the subject procedural deadlines do not preclude Board jurisdiction, is clearly inapplicable to the instant case, as the Supreme Court at the outset noted that the ICC rules there involved ". . . do not involve 'jurisdictional' problems . . ." (at 537).^{1/} To the contrary, in fact, the Supreme Court has held, on point, that courts must respect the "plain meaning" of the interpretation (in this case, the clear wording of the regulations)" . . . of the agency to which Congress has delegated the responsibility for administering the statutory program." INA v. Cardoza-Fonseca, 107 S.Ct. 1207 (1987).

A more "plain" meaning of 20 C.F.R. § 656.25(c)(3)(iii) and (e)(2), than straightforward divestiture of Board jurisdiction upon the late filing of rebuttal, is nowhere to be found.

In my view, the Board's majority re-writes, ironically, the very regulations with respect to which, pursuant to its mandate, it regularly admonishes the public and government to comply.

Judge Murrett, J., with whom Judge Marden joins, dissenting.

I would affirm the decision of the C.O. While it would be difficult to find an instance where the effect is less harsh on the alien applicant, there has been no showing of any misfeasance or malfeasance by anyone but the authorized attorney for the employer and the alien. On this subject, the Court, in Universal Film Exchanges, Inc. v. Bernard Lust, 479 F.2d 573, 576 (4th Cir. 1973), citing the U.S. Supreme Court in Link v. Wabash Railroad Co., 370 U.S. 626, 633-634 (1962) said, "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in this action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the act of his lawyer-agent and is considered to have notice of all facts, notice of which can be served upon the attorney Smith v. Ayer, 101 U.S. 320, 326, 25 L.Ed. 955."

^{1/} The majority's additional citation (at footnote 6 to Dana Corp. v. I.C.C.) is also inapposite as, unlike 20 C.F.R. § 656.25(c)(3)(iii) and (e)(2), the regulation there involved contained no specific sanction for non-compliance. Similarly, in Health Systems Agency, only agency notice published in the Federal Register was involved, as against a regulation as in this case.

"Where damages are inflicted upon innocent clients by other professions, such as doctors or dentists, the remedy is a suit for malpractice. The same is true where damage is inflicted upon a client by a lawyer's professional negligence. Indeed, as the Supreme Court explicitly pointed out in Link, supra, 370 S. Ct. 626 at n. 10, that if a lawyer's conduct was substantially below what was reasonable under the circumstances, the client's remedy was a suit for malpractice. See also Schwartz v. United States, 384 F.2d 833 (2d Cir. 1967).