U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE ISSUED: December 20, 1989
CASE NO. 88-INA-152

IN THE MATTER OF THE APPLICATION
FOR AN ALIEN EMPLOYMENT CERTIFI-
CATION UNDER THE IMMIGRATION AND
NATIONALITY ACT

MADELINE S. BLOOM,
Employer

on behalf of

LUZ ANGELA BERNAL BARNEY,
Alien

ORDER DENYING RECONSIDERATION

The Certifying Officer ("CO") has moved for reconsideration of our en banc decision granting alien labor certification issued on October 13, 1989, contending that it is inconsistent with our earlier decision in In re Augusta Bakery, 88 INA 297 (January 12, 1989) (en banc).[1]

In both Bloom and Augusta Bakery, the employer filed a rebuttal of the Notice of Findings more than 35 days after its issuance, in contravention of 20 C.F.R. §656.25(c)(3)(i). Although in Bloom we held for the first time that the 35-day time limit for filing a rebuttal may be waived in appropriate instances (i.e., to prevent manifest injustice), our earlier decision in Augusta Bakery was premised on the assumption that this deadline could be waived. That we held that the filing deadline would be waived in Bloom, whereas in Augusta Bakery the CO's refusal to consider the untimely rebuttal was affirmed, is not an inconsistency. Rather, the difference in outcome is due to the difference in the facts surrounding the untimely filings in these cases.[2]

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[1] The CO also contends that Bloom is inconsistent with our decision in In re Alabama Reweaving Co., 88 INA 294 (June 2, 1989). However, the basis of this inconsistency is not clearly stated, and since in that case a timely rebuttal had been filed (see Alabama Reweaving, supra, at 2), there is no basis for such a contention.

[2] In Bloom, the employer gave the appropriate rebuttal evidence to her attorney, who failed to file it with the CO and then apparently withdrew from the practice of law and moved across country without informing the employer. The employer was unaware that a timely rebuttal had not been filed until she received the Final Determination denying certification.

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Further, the CO's suggestion that the Board applied different standards in Augusta Bakery and Bloom, i.e., an "abuse of discretion" standard in Augusta Bakery and a "manifest injustice" test in Bloom, is incorrect. Rather, these standards are related, not separate. Simply stated, a CO's refusal to waive or extend a nonjurisdictional regulatory deadline generally will not constitute an abuse of discretion. See Health Systems Agency of Oklahoma v. Norman, 589 F.2d 486, 491 (10th Cir. 1978); Bloom at 7, footnote 9. When, however, as in Bloom, it is apparent that the CO's refusal to waive or extend a nonjurisdictional regulatory deadline will result in manifest injustice, a determination that the CO has abused his or her discretion is appropriate.

The CO also contends there is an inconsistency between our decisions in Augusta Bakery and Alabama Reweaving, supra. To aid in this determination, it is necessary to consider the differing factual backgrounds of each matter. In Augusta Bakery, the employer neither filed rebuttal documentation, nor requested an extension of time to do so within the the time allotted for rebuttal. Subsequent to expiration of the rebuttal period, the employer submitted rebuttal but failed to offer cause for the late filing. In Alabama Reweaving, the employer, eight days prior to the expiration of the allotted time for filing rebuttal, did in fact file sufficient rebuttal documentation concerning one of the deficiencies stated in the Notice of Findings. With regard to the other deficiency, the employer informed that it was complying and would submit the required documentation upon completion of the required recruitment effort.

The Board's decisions in these matters are not inconsistent in any manner. In Augusta Bakery, there was no basis for the Board to find that the CO had acted so as to deny the employer full opportunity to foster the application process. In Alabama Reweaving, however, there was a clear basis for the Board to find that the CO had, in fact, so acted.

Since the decisions in Bloom and Augusta Bakery are not inconsistent, there is no reason to reconsider our decision in Bloom. Accordingly, the Certifying Officer's Motion for Reconsideration is denied.

For the Board:

NAHUM LITT
Chief Administrative Law Judge

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[2](...continued)
Moreover, had the rebuttal evidence been filed, certification would have been granted. Conversely, in Augusta Bakery, the employer knowingly permitted the rebuttal deadline to expire while it was in the process of obtaining rebuttal evidence, and failed to move for an extension of time prior to submitting its untimely rebuttal. Further, unlike Bloom, the rebuttal evidence in Augusta Bakery involved subjective judgments, and it is unclear whether the CO would have granted certification.

In re Madeline S. Bloom, 88-INA-152
Judge Romano, dissenting.

My views relative to the Board's assumption of jurisdiction where a rebuttal is late filed, are expressed in my dissent from that majority decision.

I am compelled also, however, to dissent from the majority's denial of the government's motion to reconsider its decision for the reason that, in my view, this denial, in its attempt to reconcile its decision with those of Augusta Bakery, 88-INA-297 (1/12/89, en banc), and Alabama Reweaving Co., 88-INA-294 (6/2/89), goes even further in the direction of obscuring the central issue involved.

In its Bloom decision, the majority addressed the Board's authority to waive the rebuttal filing deadline. In its order of denial of reconsideration, the majority relies, apparently, upon a newly found authority of the Certifying Officer (C.O.) to waive such deadline. But nowhere do the regulations provide such authority[1], and Board decisional law on this subject does not exist.[2] While the C.O. has discretionary authority to grant a request (filed before the expiration of the 35 day rebuttal period) for extension of time to file a rebuttal,[3], the C.O. is nowhere granted authority to accept by waiver an untimely filed rebuttal.

In my view, the issue in both Augusta and Alabama is identical to that in Bloom, i.e., may a late-filed rebuttal be entertained. Yet Bloom speaks of the Board's jurisdiction, while Augusta & Alabama address only the reasonableness of the C.O.'s behavior. In Bloom, the Board exercises its own self-assumed authority in order to entertain the merits of a late filed rebuttal under facts it deems appropriate for such exercise, but in Augusta & Alabama, the Board looks only to the exercise of the C.O.'s presumed choice whether to entertain the merits of the late-filed rebuttal.

But in neither Augusta nor Alabama did the C.O. deny an Employer's timely request for an extension of time to file rebuttal. Thus, as no C.O. "discretion" was ever even exercised, no issue of whether such discretion was abused or not, ever arose. What C.O. "discretionary act" was abusive in Alabama?[4] What C.O. "discretionary act" was not abusive in Augusta? If the C.O.

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[1] On the contrary, the late filing of a rebuttal results in automatic, dramatic consequences. 20 C.F.R. 656.25(c)(3)(i)(ii)(iii).; (e)(2), (3). See also 656.25(f), which provides for further application processing by the C.O. only if ". . . a rebuttal. . . is submitted on time. . . ".

[2] The order in Augusta merely assumes such authority ". . . without [so] deciding. . . ".

[3] Technical Assistance Guide No. 656, Labor Certification Program Guide.

[4] Despite the majority's assertion to the contrary, (at ftn. 1 - Order Denying Reconsideration), in Alabama a timely rebuttal was not filed. The C.O. there denied certification because of an ultimately determined late-filed rebuttal (at pg. 4), and the Board vacated this C.O.

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has any discretion at all, that discretion pertains to the question whether or not a rebuttal filing extension request is to be granted.

That Augusta did not address whether "manifest injustice" ensued (notwithstanding that C.O. action, i.e., denial of certification on the basis of a late filed rebuttal, identical to that occurring in Bloom was involved), and that Bloom did not address whether there existed an "abuse of discretion" (even though Augusta and Alabama did), demonstrates in my opinion, the present confounding status of Board law in this area of contention.

In my judgment, the decisions reached in Bloom, Augusta, Alabama, and Al-Ghazali[5], cannot be reconciled, and are not logically distinguishable on the facts.[6]

I would grant the government's motion to reconsider, and thereby revisit, for clarification purposes, our holdings in Augusta, Alabama and Al-Ghazali.

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[4](...continued)
determination citing to Al-Ghazali School, 88-INA-347 (5/31/87, en banc review in Alabama to clarify that holding to the extent that the C.O. there never invited "rebuttal" in the first place, but merely directed re-advertisement and re-recruitment, thus never triggering the 35 day rebuttal deadline. See also Ninfa's Inc., 88-INA-473, 88-INA-476 (July 17, 1989), which appears to entirely undermined the then previously rendered Alabama rationale.

[5] I would have granted the government's motion to reconsider this decision, as I would have granted the government's request for en banc review in Alabama to clarify that holding to the extent that the C.O. there never invited "rebuttal" in the first place, but merely directed re-advertisement and re-recruitment, thus never triggering the 35 day rebuttal deadline.

[6] The majority's insistence that the differing decisional results are justified by reason of the differing facts among the cases involved, ignores the legal reality that the facts in one case, however much compelling, cannot justify the application of a standard different from that applied in another case where the identical issue is involved in both cases.