



DATE: September 26, 1988
CASE NO. 88-INA-132

IN THE MATTER OF

DELMAR FAMILY DENTAL CENTER,
Employer

on behalf of

SALWA SAID NASHED,
Alien

BEFORE: Litt, Chief Judge, Vittone, Deputy Chief Judge, and Brenner, DeGregorio, Tureck,
Guill and Schoenfeld,
Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

ORDER OF DISMISSAL

On July 6, 1987, Certifying Officer Paul R. Nelson denied Employer's application for alien labor certification [Administrative File ("AF") at 2]. Employer filed a request for review with the Certifying Officer by letter dated August 11, 1987 (AF 1), and the file was docketed in this Office on December 28, 1987. Employer filed a brief in support of its position on February 19, 1988.

Subsequently, the Certifying Officer filed a motion to dismiss, alleging that Employer's request for review of the Final Determination was untimely. Employer failed to respond to this motion. For the reasons set out below, the motion is granted, and this case is dismissed.

The section of the regulations governing appeals of a Certifying Officer's denial of certification is 20 C.F.R. §656.26, which states in pertinent part as follows:

§656.26 (a) If a labor certification is denied, a request for review of the denial may be made:

- (1) By the employer; and
- (2) By the alien, but only if the employer also requests such a review.

(b)(1) The request for review shall be in writing and shall be mailed by certified mail to the Certifying Officer who denied the application within 35 calendar days of the date of the determination, that is, by the date specified on the Final Determination form

(2) Failure to file a request for review in a timely manner shall constitute a failure to exhaust available administrative remedies. (Emphasis added).

The regulations governing alien labor certification (20 C.F.R. Part 656) do not contain a provision regarding time computations. Therefore, this Office's Rules of Practice and Procedure ("Rules"), 29 C.F.R. Part 18, will be applied. In this regard, first, counting from the day following the date of the Final Determination [see 29 C.F.R. §18.4(9)], the 35th day would be Monday, August 10, 1987. Thus, Employer's request for review, dated August 11, 1987, was mailed no earlier than the 36th day following the Final Determination, and appears to be untimely. But §18.4(c)(3), if applicable, would add five days to the time limit for filing a request for review, since Employer presumably was notified of the Final Determination by mail [see 20 C.F.R. §656.25(g)]. The outcome of the motion of dismissal therefore depends on whether §18.4(c)(3) applies since, if the deadline for filing a request for review is extended by five days, this request is timely.

Section 18.1(a) of the Rules, after noting that the Rules are "generally applicable to adjudicatory proceedings" before this Office, states that

To the extent that these rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling.

Section 656.26(b)(1) is a "rule of special application" which would take precedence over the Office's general procedural rules in the event of a conflict. Since §656.21(b)(1) specifies both the time period in which to file a request for review as well as how that time period should be calculated, and that time period is of sufficient duration to allow for mailing delays, we hold that applying §18.4(c)(3) to extend the deadline for filing requests for review to 40 days after the date of the Final Determination would be inconsistent with the 35 day deadline specified in §656.26(b)(1). Therefore, §656.26(b)(1) is controlling; and Employer's request for review was untimely.

Finally, the Certifying Officer urges the Board to adopt the position that it has no jurisdiction over untimely requests for review, *i.e.*, that the 35-day time limit set out in §656.26(b)(1) cannot be waived regardless of cause.¹ However, since Employer has made no

¹ In arguing that the timeliness of a request for review is jurisdictional and cannot be waived, the Associate Solicitor (representing the Certifying Officer) failed to refer to DOL's Technical Assistance Guide No. 656 ("TAG"), which states:

(continued...)

attempt to justify or explain its untimely filing, and thus has not established good cause for failing to comply with the 35-day deadline in any event, there is no reason to reach this issue in this case.

ORDER

The request for review of the denial of alien labor certification is dismissed as untimely.

JEFFREY TURECK
Administrative Law Judge

JT/jb

¹(...continued)

Only Administrative Law Judges may determine that the request for review was not timely or may excuse the untimely filing and consider the appeal on its merits.

Id. at 87 -- emphasis added). This statement indicates that the 35-day deadline to file a request for review should be viewed as a procedural deadline which can be waived for good cause. It would be helpful for the Associate Solicitor's office to consider the TAG in framing its arguments in alien labor certification cases.