

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 August 2004

BALCA Case No.: 2003-INA-149
ETA Case No.: P2000-CA-09508418

In the Matter of:

MORICI BROTHERS FRESH FISH DAILY,
Employer,

on behalf of

JUAN FERNANDO VAZQUEZ,
Alien.

Appearance: Gregory J. Boulton, Esquire
Los Angeles, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Juan Fernando Vazquez (“the Alien”) filed by Morici Brothers Fresh Fish Daily (“the Employer”) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (“the Act”), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer (“CO”) of the United States Department of Labor, San Francisco, California, denied the application, and the

Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On October 6, 1998, the Employer, Morici Brothers Fresh Fish Daily, filed an application for labor certification to enable the Alien, Juan Fernando Vazquez, to fill the position of Manager, which the Job Service classified as Boatswain, Otter Trawler under *Dictionary of Occupational Titles* code 441.132-010. The job duties for the position included supervision and coordination of crews of fishing vessels engaged in deploying, retrieving, and repairing otter trawlnets to catch fish. The only stated requirement for the position was four years of experience in the job offered. (AF 25).

In a Notice of Findings ("NOF") issued on October 2, 2002, the CO proposed to deny certification because the Employer failed to establish that there is a bona fide, current, permanent, full-time job opportunity to which qualified U.S. workers can be referred, and because advertising the petitioned position under the listing of manager was misleading, as it is unlikely that skilled boatswains would look for work under that job heading. (AF 21-23). The CO stated that there was a question as to the bona fide nature of the job opportunity because the Employer did not appear to have an active business and had no employees or boats.

By letter dated October 21, 2002, the Employer's counsel requested an extension until December 6, 2002 to produce documentation for rebuttal. (AF 20). The CO granted the extension and noted that the rebuttal "shall be mailed, on or before December 11, 2002." (AF 19). The Employer's counsel submitted the rebuttal documentation under cover letter, dated December 9, 2002; the rebuttal is stamped as received on December 13, 2002. (AF 8-18). The Employer's rebuttal consisted of a cover letter signed by the Employer's counsel, an untitled, unsigned, undated form, appearing to be Jack Morici's

application for various fishing licenses, a copy of Mr. Morici's signed 2001 Form 1040 federal tax return and Schedule C and IRS forms displaying Mr. Morici's wages for the years 1998 through 2000. (AF 8-18).

By letter, dated December 16, 2002, the CO summarily rejected the rebuttal, stating that the Employer failed to sign the rebuttal, and thus, it was considered non-responsive. (AF 6-7). The CO did not consider the merits of the rebuttal and accordingly, the NOF became the final decision denying certification.

On January 13, 2003, the Employer filed a Motion for Reconsideration; Alternatively Request for Administrative-Judicial Review. (AF 2-5). The Employer's counsel stated that the regulations do not include a requirement that the Employer sign the rebuttal. The Employer cited *La Roma Pizza*, 1993-INA-229 (Apr. 8, 1994), arguing that a denial cannot be based solely on the employer's failure to sign the rebuttal, as the employer's counsel has authority to present argument and evidence on the employer's behalf. (AF 4). The Employer noted that counsel had signed the rebuttal and was authorized to represent the Employer in these proceedings.

The CO summarily denied the request for reconsideration on the grounds that it did not raise an issue which could not have been addressed in the rebuttal. (AF 1). The matter was docketed in this Office on April 10, 2003 and the Employer filed a brief on May 8, 2003.

DISCUSSION

A mere assertion by an employer's counsel may, in some cases, be accorded little weight. This is particularly true where an employer's attorney makes statements which involve issues of credibility of which he or she lacks personal knowledge. However, in the present case, the cover letter by the Employer's counsel does *not* involve a question of credibility; it simply refers to various attached documents and specifies that the Employer is willing to readvertise the job opportunity under the heading Boatswain

instead of Manager. (AF 8-9). Furthermore, the 2001 Form 1040 is signed by Jack Morici, as well as by a tax preparer, and lists Mr. Morici's occupation as Fisherman. (AF 12-13). Therefore, contrary to the CO's determination, at least part of the rebuttal was signed by the Employer, not its attorney.

As noted by the Employer, the Board has held that the denial cannot be based solely on the employer's failure to sign the rebuttal. *La Roma Pizza, supra*. In this case, the CO failed to consider the merits of the Employer's rebuttal and instead denied certification based solely on the failure to sign the rebuttal. The CO's failure to consider the merits of the Employer's rebuttal simply because the Employer's counsel signed the rebuttal for the Employer is faulty. The denial of certification cannot be based solely on this procedural ground. The attorney is the Employer's representative and is therefore allowed to present evidence on his behalf. The attorney has signed the rebuttal as the Employer's agent and certification cannot be denied on this ground.

Furthermore, the CO's denial of the motion for reconsideration was in error, as it was denied because the CO found that the motion did not raise an issue that could not have been addressed in rebuttal. As the CO denied the application not on the merits but on the Employer's failure to sign the rebuttal, this issue could not have been addressed in rebuttal. Therefore, the CO abused his discretion when denying the motion for reconsideration. *See Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (*en banc*); *Copper Range Co.*, 1994-INA-316 (June 27, 1995).

Accordingly, this case is remanded; on remand, the CO is to address the merits of the rebuttal, as certification cannot be denied based solely on the Employer's failure to sign the rebuttal.

ORDER

The CO's denial of labor certification is hereby **VACATED** and the matter is **REMANDED** for proceedings consistent with the foregoing.

For the Panel by:

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JOHN M. VITTON
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 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 Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.