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Issue Date: 27 September 2004

BALCA Case No.: 2003-INA-237
ETA Case No.: P2002-DC-03379112

In the Matter of:

HOUSTON'S RESTAURANT,
Employer,

on behalf of

BERNADO ESTRADA,
Alien.

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Appearances: Issac Kunnirickal, Esquire
Falls Church, Virginia
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from an application for labor certification¹ filed by a Restaurant for the position of Cook. (AF 30-31).² The following decision is based on the record

¹ Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² "AF" is an abbreviation for "Appeal File."

upon which the Certifying Officer (“CO”) denied certification and the Employer’s request for review, as contained in the Appeal File (“AF”). 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 12, 2001, the Employer, Houston’s Restaurant, filed an application for alien employment certification on behalf of the Alien, Bernado Estrada, to fill the position of Cook. Minimum requirements for the position were listed as two years of experience in the job offered. (AF 30-31). The Employer requested a Reduction in Recruitment (“RIR”).

A Notice of Findings (“NOF”) was issued by the CO on September 19, 2002,³ questioning the existence of a *bona fide* job opportunity. Noting that the Employer’s attorney had reported that Houston’s Restaurant was no longer open for business at 1065 Wisconsin Avenue, N.W. in Washington, D.C., the CO concluded the facts as presented indicated the position no longer exists and hence, this is not a *bona fide* job opportunity clearly open to U.S. workers. The Employer was instructed to rebut with documentation of the existence of Houston’s Restaurant at the Wisconsin Avenue address and the current existence of the position for which the petition was filed. In addition, the CO questioned the Employer’s minimum requirements and instructed the Employer to document the Alien’s qualifications for the position. In the NOF, the Employer was instructed that failure to file a rebuttal by certified mail on or before October 24, 2002 would result in the NOF becoming the final decision of the Secretary denying certification. (AF 12-13).

In Rebuttal, dated January 22, 2003, and stamped February 10, 2003, counsel for the Employer advised the CO that the Houston’s restaurant in Washington, D.C. closed and the Alien transferred to the Houston’s location in Bethesda, Maryland. The

³ A NOF was initially issued on August 8, 2002. That NOF was discovered to have a blank second page and to have the wrong address for the Employers' attorney. Hence, the August 8, 2002 NOF was rescinded and a new NOF was issued on September 19, 2002. (AF 13).

Employer noted that the ETA 750A had to be redone and sent to the new Employer for signature and that this was the reason for the delay in submission of the rebuttal. The Employer submitted a new ETA 750A and B signed by the new Employer at a Bethesda address, dated December 31, 2002. (AF 7-11).

A Final Determination ("FD") denying labor certification was issued by the CO on April 10, 2003 based upon a finding that the Employer had failed to timely or adequately rebut the findings cited in the NOF. (AF 4-6). The CO noted that the NOF had alerted the Employer that it had to respond by October 24, 1992 -- yet the Employer responded with a letter dated January 22, 2003, and not mailed until February 8, 2003. Certification was also denied on the basis that the Employer had provided no evidence that the two Houston's restaurants are the same employer.

The Employer filed a Request for Review by letters dated May 13 and 14, 2003, and the matter was docketed in this Office on July 18, 2003. (AF 1-3).

DISCUSSION

This case was filed as a Reduction in Recruitment request. According to 20 C.F.R. § 656.21(i), if the employer files a request for an RIR, the CO shall review the documentation and decide whether to grant the RIR. If the CO does not completely grant the RIR, he shall remand the application to the state agency for recruitment. 20 C.F.R. § 656.21(i)(5). If the CO decides to completely grant the RIR, he shall proceed to decide whether to grant or deny the application under the procedures found in 20 C.F.R. § 656.24.

In the instant case, the CO made no ruling on the RIR request, but went straight to the familiar "NOF-Rebuttal-Final Determination" schema of 20 C.F.R. § 656.25 based on questions he had about whether a *bona fide* job opportunity existed given that the restaurant location stated in the application had closed.

We do not rule today on whether a CO can skip ruling on an RIR request and go straight to the ultimate question of whether the labor certification should be denied where the application is apparently fundamentally flawed.⁴ This is because we find that, regardless of whether this case was in the posture of an RIR ruling or the ultimate entitlement to labor certification ruling, the failure of an employer to timely respond to the CO's reasonable request for additional information is itself grounds for denial of the labor certification. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*) (where the CO requests a document or information which has a direct bearing on the resolution of the issue and is obtainable by reasonable effort, the employer must produce it).

In the instant case, the NOF was issued by the CO on September 19, 2002 and the Employer was advised that if the rebuttal was not mailed by certified mail on October 24, 2002, the NOF would become the final decision denying certification. (AF 12). The Employer, in failing to respond timely to the NOF, has essentially failed to prosecute his case. The CO had the authority to request additional information from the Employer and to establish a deadline for providing such information, regardless of whether the CO was technically in the process of considering whether to grant an RIR or was deciding the ultimate question of whether to grant or deny the application. The Employer failed to comply with this deadline and submitted a response over three months past the deadline. Despite clear and unequivocal notification, the Employer did not timely submit its rebuttal response. The Employer's Rebuttal, due October 24, 2002, was dated January 22, 2003, and stamped February 10, 2003. The Employer's response is clearly untimely, despite the Employer's argument that it needed to have additional paperwork signed. The Employer did not request an extension for this purpose. We find the CO did not abuse his discretion in refusing to consider the untimely rebuttal. *Augusta Bakery*, 1988-INA-297 (Jan. 12, 1989)(*en banc*).

We note that the CO's denial of labor certification was based, not on a denial of the merits of the RIR request, but on the failure to comply with a reasonable time

⁴ Such a procedure may make sense where the perceived flaw in the application is grounded in reasons unrelated to whether the pre-application recruitment efforts were sufficient.

deadline. In this situation, we find that the CO may properly deny the application outright rather than remanding to the SWA for regular processing, even if the case is currently before the CO in the posture of an RIR request. *Compare Compaq Computer Corp.*, 2002-INA-249-253, 261 (Sept. 3, 2003) (where the CO denies an RIR, only the RIR and not the labor certification should be denied at that point).

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the panel:

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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 of Labor unless within 20 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 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, D.C. 20001-8002

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, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.