



Issue Date: 06 April 2011

BALCA No.: 2010-PER-00398

ETA No.: A-09294-69967

In the Matter of:

NIDEC MOTORS & ACTUATORS USA, INC.,

Employer,

on behalf of

SEBASTIEN DE NARDI,

Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Claire DeMatteis Mager, Esq.
Detroit, Michigan
For the Employer

Gary M. Buff, Associate Solicitor
Clarette H. Yen, Esq.
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: Sarno, Malamphy, Krantz
Administrative Law Judges

DECISION AND ORDER
VACATING DENIAL OF CERTIFICATION

This matter arises under Section 212 (a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the “PERM” regulations found at Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”).

BACKGROUND

On December 10, 2009, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “North America Purchasing Director” (AF 42).¹ The CO denied certification on January 14, 2010 stating that the Employer’s sponsorship of the foreign worker could not be verified. (AF 39-40). The CO explained “Attempts to contact the employer’s listed contact; Victoria Orpinel, 915-774-2450 via phone on the following dates, 12/23/2009, 12/29/2009, 12/31/2009 and 1/11/2010 were not successful.” (AF 40).

On February 8, 2010, the Employer submitted a “Request for Review.” (AF 1-38). The Employer argued that the matter should be reevaluated due to the fact that the DOL’s attempted contacts were during a traditional time for reduced operations. The Employer was in fact closed on December 29 and 31, according to an attached holiday schedule². (AF 31). The Employer also submitted a letter signed by Ms. Orpinel along with its request. (AF 28-29). In the letter Ms. Orpinel stated that she never received any emails from the Department of Labor (DOL), nor did she receive any voicemail messages. She noted she was on vacation from December 19 to January 6. (AF 28). She wrote that the Employer was sponsoring the alien for permanent labor certification, which she would have told the DOL, had she received an email or phone call requesting conformation. (AF 30).

The CO forwarded the case to BALCA on March 2, 2010. BALCA issued a Notice of Docketing on March 29, 2010. On April 14, 2010, the Employer filed a Statement of Intent to Proceed.

¹ In this decision, AF is an abbreviation for Appeal File.

² The Holiday Schedule lists the following dates: Dec. 24 (Christmas Eve), Dec. 25 (Christmas Day), Dec. 28, Dec. 29, Dec. 30, Dec. 31 (New Year’s Eve), Jan. 1 (New Year’s Day).

On May 11, 2010, the Employer submitted a Brief in Support of Appeal. The Employer argued that the Department of Labor attempted to verify sponsorship during a time of reduced operations over the holidays. The Employer argued that its contact listed on the ETA Form 9089 neither spoke with anyone from the DOL nor received notification of such a call. Phone calls to the number listed on ETA Form 9089 at that time were connected to an automated system asking the caller to either enter an extension or press "0" for the operator. If a caller pressed "0" he would be transferred to the company's security personnel who would then transfer the call to the correct employee. A call sent to Ms. Orpinel's extension is sent to voicemail if she does not answer.

On May 17, 2010, the CO filed a Statement of Position. The CO argued that the Department was unable to confirm whether the Employer was sponsoring the alien because the Employer's contact, Ms. Orpinel, did not respond to its calls. In addition, the CO argued that Ms. Orpinel's letter and the Employer's submitted list of holidays should not be considered because it constituted evidence not in the record at the time of the denial of labor certification.

DISCUSSION

The regulation at 20 C.F.R. § 656.10(a) requires that a request for permanent labor certification be filed by an employer. The Department has made clear that it intends to conduct checks to ensure that employers know that applications have been filed on their behalf. See *Labor Certification for the Permanent Employment of Aliens in the United States: Implementation of New System; Final Rule*. Also, the employer must certify the conditions of employment outlined in the Application for Permanent Employment Certification. 20 C.F.R. § 656.10(c). It is therefore important that the employer respond to the Department's correspondence.

ETA Form 9089 listed Victoria Orpinel as the contact person for the employer. (AF 41). The Form listed both Ms. Orpinel's phone number and her e-mail address. (AF 41). The CO denied the application because Ms. Orpinel did not respond to calls on 12/23/2009, 12/29/2009, 12/31/2009, and 01/11/2010. The CO did not mention whether any voicemail messages were left after Ms. Orpinel did not answer the phone on those days or whether contact was attempted by email.

After the application was denied, Ms. Orpinel three weeks later filed a request for review that included an addendum stating that she was aware of the application and that NIDEC was sponsoring the alien. She also submitted the company's holiday schedule, which indicated that two out of the four days the CO called were company holidays when the office was closed.³ Ms. Orpinel also explained that she was out of the office for the holidays on three out of the four days that the CO called.⁴ The CO argued the holiday schedule and Ms. Orpinel's letter submitted with the Employer's Request for Review should not be considered because they constituted evidence that was not part of the record upon which the CO based his determination.

When an employer seeks reconsideration of a denial under the PERM regulations, the CO has the discretion to either reconsider the determination or treat the Employer's request as a request for review by the Board of Alien Labor Certification Appeals. 20 C.F.R. § 656.24(g)(4). It is therefore important to discern whether the Employer was requesting review or reconsideration. In *Denzil Gunnels d/b/a Gunnels Arabians*, 2010-PER-00628 (November 16, 2010), the Board held that where the employer's "request is ambiguous: if the CO exercises the discretion to treat the request as a request for BALCA review without ruling on the merits of the employer's request, the ultimate inquiry for the Board will be whether the CO abused that discretion."

In the instant case, the employer used the term "request for review" but did not make any reference to BALCA. (AF 1-2) The letter includes the Certifying Officer's address, and the letter begins "Dear Certifying Officer." (AF 1). The second sentence states "we are asking that *you* review all of the facts and continue to process the Application." (AF 1, emphasis added). In addition, the letter concludes "if *you* have any questions or require additional information, please do not hesitate to contact me." (AF 2, emphasis added). The Employer does not mention BALCA at any point in the letter. It is apparent that the Employer was not making a tactical decision to select review by BALCA, but instead expected the CO to review the decision utilizing the newly submitted evidence, including the Employer's affirmation that it is sponsoring the alien, which is the fact upon which denial is based.

³ Those days were Dec. 29 and Dec. 31.

⁴ In addition to Dec. 29 and Dec. 31, Ms. Orpinel said she was on vacation Dec. 23.

We do not need to rely on the additional evidence submitted by the Employer for the proposition that three of the phone calls were made between the day before Christmas Eve and New Year's Eve. The Employer has the responsibility to respond to the DOL's requests for additional information, however, in this case sufficient evidence was not presented by the CO that adequate attempts were made to ensure the Employer got its request, given the proximity of three out of the four calls to a time of traditional holiday closures, the lack of evidence that a voice mail message was left or a contact by other means was attempted. The Employer promptly responded when it got the denial notice in the mail from the CO, and explained why previously made calls might have been missed. Therefore, in the specific circumstances of this case, we find that the CO abused his discretion in forwarding the case to BALCA for review rather than reconsidering the denial. In the interest of fundamental fairness we vacate the denial of certification, and return this application to the CO to consider whether the certification should be granted.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **VACATED** and that this matter is returned to the CO for completion of processing.

For the Panel:

A
DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS,JR/AMC/jcb
Newport News, Virginia

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