

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 31 August 2011

BALCA Case No.: 2010-PER-01035
ETA Case No.: A-09238-61724

In the Matter of:

KEYNOTE SYSTEMS, INC.,
Employer

on behalf of

RAJENDRA PRASAD SHEELA,
Alien.

Certifying Officer: William Carlson
Atlanta Processing Center

Appearances: Caroline Tang, Esquire
American Services Network, PC
Chicago, Illinois
For the Employer

Gary M. Buff, Associate Solicitor
Vincent C. Costantino, Senior Trial Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Colwell, Johnson and Vittone**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
VACATING DENIAL OF LABOR CERTIFICATION
AND REMANDING FOR FURTHER PROCESSING

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 August 27, 2009, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of software engineer. (AF 15-28).¹ The Employer stated that as part of its mandatory recruitment of U.S. workers, it placed two Sunday newspaper advertisements in the “Bay Area News Group.” (AF 18). On March 26, 2010, the CO denied the Employer’s application, finding that the Bay Area News Group is not a newspaper. (AF 13-14).

On April 15, 2010, the Employer filed a request for review, titled “GOVERNMENT ERROR QUEUE.” (AF 1-12). The Employer’s letter was addressed to Mr. William Carlson and requested that the DOL reopen the matter. (AF 1-2). In its request, the Employer argued that the “Bay Area News Group” is the publishing entity for multiple newspapers, including the San Jose Mercury News, where the Employer’s advertisements appeared. (AF 1-2). The Employer stated that “Bay Area News Group” is the name displayed on the newspaper in the classified section, and therefore, the Employer presumed that the ETA Form 9089 should reflect that name. (AF 2). The Employer submitted copies of the newspaper advertisements, showing the name “Bay Area News Group,” and a letter from the Bay Area News Group’s Classified Advertising Department stating that the Employer’s advertisements were printed in the San Jose Mercury News. (AF 5, 8-9).

The CO forwarded the case to the Board, and BALCA issued a Notice of Docketing on September 2, 2010. The Employer filed an appellate brief, arguing that it listed the name “Bay Area News Group” on the ETA Form 9089, rather than the San Jose Mercury News, on the good faith belief that the ETA Form 9089 should reflect the name

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

of the publishing entity displayed on the newspaper advertisements. The CO filed a brief asserting that the documentation that the Employer submitted with its request for review could not be considered by the Board.

DISCUSSION

The PERM regulations restrict BALCA's review of a denial of labor certification to evidence that was part of the record upon which the CO's decision was made. *See* 20 C.F.R. §§ 656.26(a)(4)(i) and 656.27(c); *Eleftheria Restaurant Corp.*, 2008-PER-143 (Jan. 9, 2009); *5th Avenue Landscaping, Inc.*, 2008-PER-27 (Feb. 11, 2009); *Tekkote*, 2008-PER-218 (Jan. 5, 2008). While the PERM regulations permit the CO to treat a motion for reconsideration as a motion for review, given limited scope of the Board's review, BALCA has found that fundamental fairness places certain restrictions on that discretion. In *Denzil Gunnels d/b/a Gunnels Arabians*, 2010-PER-628 (Nov. 16, 2010), BALCA determined that the CO abuses his discretion when he treats an employer's ambiguously worded request for reconsideration as a request for review when it has the effect of preventing an employer the opportunity to present evidence that it otherwise would have been able to present on reconsideration.²

The reconsideration regulation at 20 C.F.R. § 656.24(g)(2) provides that an employer's request may include only:

- (i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or
- (ii) Documentation that the employer did not have an opportunity to present previously to the Certifying Officer, but that existed at the time the Application for Permanent Labor Certification was filed, and was maintained by the employer to support the

² The Board noted, however, that when an employer unambiguously requests BALCA review, it makes a tactical decision to have the Board rather than the CO review the denial of certification, and the employer is deemed to understand the consequence of that decision. *See Denzil Gunnels*, 2010-PER-628, slip op. at 14 (Nov. 16, 2010).

application for permanent labor certification in compliance with the requirements of § 656.10(f).

- (iii) Paragraphs (g)(1) and (2) of this section notwithstanding, the Certifying Officer will not grant any request for reconsideration where the deficiency that caused denial resulted from the applicant's disregard of a system prompt or other direct instruction.

In other words, if an employer's supplemental evidence would have been barred under § 656.24(g), the CO does not abuse his discretion by treating an employer's request for reconsideration as a request for review.

In this case, the Employer's request is titled, "GOVERNMENT ERROR QUEUE," is addressed to the CO, and requests the CO "reopen" the case. (AF 1-2). Therefore, we find that the Employer was seeking reconsideration, rather than direct BALCA review.³

³ We note that while the CO refers to an Office of Foreign Labor Certification "Best Practices" FAQ response in support of its determination that the Employer sought BALCA review, the Employer's titling of its request is entirely consistent with the OFLC FAQs regarding government error. The two pertinent FAQs provide:

I received a decision of my labor certification application for what I believe is a Department error. How should I file an appeal claiming a Department error?

In general, a Department error may be a denial due to a data entry error or a denial for failure to respond to an audit where the employer has proof of its audit response or proof it never received an audit request letter. If you believe your application was inadvertently denied on this type of basis, the employer's cover letter must clearly state that the basis for the appeal is an alleged Department error. The Department suggests a brightly colored cover sheet stating that the appeal is being filed because the employer believes that the Employer error is the sole reason for the denial. If accepted as a Department error, the appeal will go to the Department error appeals queue and be processed accordingly.

What happens to my Department error appeal if the Department does not agree that it made an error in its decision?

The Department determines what constitutes a Department error. It is possible that the Department denial will list several reasons for a denial, with only one that is based on a Department error. Each ground for appeal is viewed by the Department individually. If the decision contains additional grounds that are not based on Department error, or if the Department does not agree there is a Department error, the Department will process the appeal as a request for reconsideration and place the appeal in the NPC reconsideration appeals queue.

http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#perm_appeals9 (last visited August 4, 2011). Based on these FAQs, it appears that when an employer requests review based on government error, the

Because the Employer's request actually sought reconsideration, rather than BALCA review, we must determine whether forwarding the appeal prevented the Employer from presenting evidence that it did not previously have the opportunity to present before the CO. We find that the request for reconsideration was the first opportunity that the Employer had to explain why it listed "Bay Area News Group," rather than San Jose Mercury News on its ETA Form 9089. Like the situation in *CVS Rx Services*, 2010-PER-1108 and 1275 (Nov. 16, 2010), we find that the Employer was seeking to explain an answer on its ETA Form 9089 on reconsideration, and find that the CO abused his discretion by forwarding this matter to BALCA without first considering the Employer's argument and documentation. *See also Contract Interiors, Inc.*, 2010-PER-993 (July 28, 2011).

Accordingly, procedural due process requires that we remand this matter to allow the CO to consider the Employer's argument and supporting documentation.

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's denial of Employer's application for labor certification in the above-captioned matter is **VACATED** and **REMANDED** for further processing consistent with this opinion.

For the panel:

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WILLIAM S. COLWELL
Associate 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

CO will review the case in a "government error" queue, and if it does not find government error, it will place the employer's appeal in the reconsideration queue, rather than sending it to BALCA.

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.