

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 27 August 2013**

**BALCA Case No.: 2011-PER-01939**  
ETA Case No.: A-08332-09861

*In the Matter of:*

**SARAN INDIAN CUISINE,**  
*Employer*

*on behalf of*

**SANDEEP SINGH,**  
*Alien.*

Certifying Officer: Atlanta National Processing Center

Appearances: Mumtaz A. Wani, Esquire  
Falls Church, Virginia 22043  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, D.C.  
*For the Certifying Officer*

Before: **Avery, Romero, and Price**  
Administrative Law Judges

**DECISION AND ORDER**  
**REMANDING FOR REVERSAL OF**  
**DENIAL OF LABOR 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 November 29, 2008, the Certifying Officer (CO) accepted for processing Employer's Application for Permanent Employment Certification (ETA Form 9089) for the position of "Indian Vegetarian Cook." (AF 38-47).<sup>1</sup> On May 12, 2009, the CO notified Employer that its ETA Form 9089 was selected for audit. (AF 35-37). Among the requested documentation, the CO directed Employer to submit its written, notarized statement signed by Employer attesting to Employer's sponsorship of the foreign worker. (AF 37). Specifically, the audit notification letter requested Employer provide answers to the following questions: 1) Are you the owner or do you work for SARAN INDIAN CUISINE?, 2) Are you aware that an Application for Permanent Employment was filed by your company on behalf of a foreign worker for employment?, 3) Do you have an opening for an Indian Vegetarian Cook?, 4) Are you sponsoring SANDEEP SINGH for this position? (AF 37).

The CO received Employer's response to the audit notification letter on June 9, 2009. (AF 10-34). On December 12, 2010, the CO denied certification of Employer's application because it found Employer failed to provide documentation requested in the audit notification letter as required by C.F.R. § 656.20(b). (AF 8-9).

Employer filed a request for reconsideration on January 26, 2011. (AF 2-7). Employer argues that the CO erred in denying certification based on a failure to provide a written notarized attestation in response to the audit notification letter. (AF 2-7). Employer further asserts that by signing and submitting the ETA Form 9089 it was in fact attesting it had a job opportunity available and was aware an application for permanent employment was filed on behalf of the foreign worker for the job opportunity. (AF 2).

On July 7, 2011, the CO issued a letter of reconsideration. (AF 1). The CO determined the Employer's request did not overcome the deficiency stated in the determination letter because Employer's notarized sponsorship attestation accompanying the motion for reconsideration constituted new evidence not in the record on which the denial was based. (AF 1). The CO also determined that denial was proper because Employer failed to provide the notarized sponsorship attestation with the audit response as requested in the audit notification letter. (AF 1). Therefore, the CO determined that the reason for denial was valid pursuant to 20 C.F.R. §§ 656.24(g)(2)(i), 656.24(g)(2)(ii), and 656.20(b) and thus forwarded the case to BALCA on July 7, 2011.

On November 2, 2011, BALCA issued a Notice of Docketing. Employer filed a statement of intent to proceed on November 7, 2011.

## **DISCUSSION**

Under 20 C.F.R. § 656.20(b), a substantial failure by an employer to provide the required documentation in the audit process will result in the application for permanent labor certification being denied. By its very terms, Section 656.20(b) limits the denial of certification to a "*substantial failure* by the employer to provide required documentation." Although the

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<sup>1</sup> In this decision, AF is an abbreviation for Appeal File.

regulation itself does not specify what types of omissions constitute a “substantial failure . . . to provide required documentation,” the use of the word “substantial” indicates that not every failure to provide “required documentation” will necessarily result in a denial. *SAP America, Inc.*, 2010-PER-01250 (April 18, 2013) (*en banc*). Therefore, the meanings of “substantial violation” and “required documentation” are critical to the resolution of this case.

BALCA has consistently affirmed denials under Section 656.20(b) when the “required documentation” an employer fails to produce in response to an audit notification is specifically identified in the regulations as the evidence necessary to document a particular attestation, *i.e.* the “supporting documentation” an employer is required to retain under Sections 656.10(f) and 656.17(a)(3)). *See, e.g., Yakima Steel Fabricators*, 2011-PER-1289 (July 5, 2012) (failure to provide proof of print advertisements, as required by Section 656.17(e)(1)); *Gotham Distribution*, 2011-PER-1352 (Aug. 2, 2012) (failure to provide a Notice of Filing, as required by Section 656.10(d)); *Marlenny’s Haircutters*, 2009-PER-13 (Jan. 29, 2009) (failure to produce a recruitment report, as required by Section 656.17(g)). Accordingly, in *A Cut Above Ceramic Tile*, 2010-PER-224 (Mar. 8, 2012) (*en banc*), the Board vacated a denial based on the petitioning employer’s “fail[ure] to provide proof of publication of the job order from the State Workforce Agency (SWA) containing the content of the job order, as requested in the Audit Notification letter.” *Id.* at 3. After examining the plain language of the regulation governing SWA job orders, which stated that “the start and end dates of the job order entered on the application serve as documentation of this step,” as well as the regulatory history preceding the Department’s implementation of the PERM program, the Board held: “[P]roof of publication of the SWA job order is not ‘required supporting documentation,’ and therefore, the CO’s denial of certification under Section 656.20(b) was improper.” *Id.* at 12-13.

In *SAP America Inc.*, the Board provided further guidance regarding “substantial failures to provide required documentation” when it wrote:

It is thus not unfair to presume that the omission of “supporting documentation”<sup>2</sup> constitutes a “substantial failure by the employer to provide required documentation.” This is not the case, however, when omitted “required documentation”<sup>3</sup> is merely “supplemental documentation” that is not specified in the regulations. In this latter situation, absent a sufficient explanation by the CO, we are left to guess why the omission constitutes a “substantial failure by the Employer to provide required documentation.” We thus decline to summarily affirm denials issued under Section 656.20(b) when the documentation an employer fails to produce is “supplemental documentation.” Rather, in such cases, we must find that (1) the CO reasonably requested the omitted documentation (*i.e.*, the documentation should have been readily, or at least reasonably, available to the employer, and tailored to the CO’s review of the employer’s application); and (2) the omission of this documentation is material enough to constitute a “substantial failure . . . to provide required documentation.”

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<sup>2</sup> *i.e.*, documentation an employer is required by the regulations to have retained in its audit file.

<sup>3</sup> *i.e.*, the documentation required through an audit notification.

In the present matter, the audit notification letter included an attachment indicating two reasons for the audit, one of them being that Employer has a responsibility for filing an application. The CO requested the Employer attest in a supplemental notarized statement that an application was filed on its behalf and that the foreign worker named in the application is being sponsored by Employer. (AF 35-37). Such a notarized statement is not documentation Employer is required by regulation to maintain in anticipation of a possible audit. While this may have been a reasonable request for “supplementation documentation”, the CO provided no explanation on reconsideration as to why the omission materially affected review of Employer’s application. The CO did not provide further justification on reconsideration for summarily denying certification under Section 656.20(b) other than the fact Employer simply failed to submit the requested notarized statement in its audit response.<sup>4</sup>

The CO’s initial denial purported to require the notarized statement to verify sponsorship, but we find that verification of sponsorship was sufficiently satisfied by the attestation in Section N of Employer’s ETA 9089 submitted in response to the audit notification. In its response to the audit notification, Employer submitted a copy of the originally filed ETA Form 9089 with Ravinder Hazrah’s<sup>5</sup> signature in Section N, constituting a sworn statement under penalty of perjury certifying to the conditions of employment outlined in 20 C.F.R. § 656.10(c).<sup>6</sup> (AF 23). BALCA has held that the mailed-in ETA Forms including Employer’s sworn statement under penalty of perjury certifying as to the conditions of employment offered are sufficient to verify sponsorship of the foreign worker. *See Pickering Valley Contractors Inc.*, 2010-PER-01146 (Aug. 23, 2011); *John E. Richardson Jr. Inc.*, 2010-PER-01014 (Aug. 29, 2011); *Gunness Randolph*, 2011-PER-01281 (Aug. 23, 2012). Consequently, we find that Employer has

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<sup>4</sup> In the request for reconsideration Employer provided a notarized sponsorship attestation. (AF 2-4). Nevertheless, we acknowledge that although Employer is permitted to request reconsideration of a denied certification, such request may include only (i) documentation that the Department actually received from Employer in response to the request from the CO to the Employer, or (ii) documentation that Employer did not have an opportunity to present previously to the CO, but that existed at the time the Application was filed, and was maintained by Employer to support the application for permanent labor certification. 20 C.F.R. §§ 656.24(g)(2)(i), (ii). Therefore, BALCA has held that the CO will consider additional documentation submitted with an Employer’s request for reconsideration only if Employer did not have the opportunity to submit it previously and if it was maintained to support the application for labor certification. *Denzil Gunnels d/b/a Gunnels Arabians*, 2010-PER-00628 (Nov. 16, 2008); 20 C.F.R. §§ 656.24(g)(2)(i), (ii). In this case, Employer should have submitted the requested notarized statement in the response to the audit. Therefore, the CO properly refused to consider the notarized sponsorship attestation submitted with Employer’s motion for reconsideration, and it cannot be considered by this panel either. Nevertheless, there is still sufficient evidence present to satisfy the CO’s purported concerns regarding verification of sponsorship. See discussion, *infra*.

<sup>5</sup> Along with his signature, Section N notes that Ravinder Hazrah’s title is “President”.

<sup>6</sup> This version of Employer’s ETA 9089 also included the signature of the foreign worker and the agent who is representing the Employer.

sufficiently attested that the application was filed on its behalf and that the foreign worker named in the application is being sponsored by the Employer. Therefore, based on its signed statement in Section N of the ETA 9089 (AF 23), we find that Employer already provided documentation that in effect answers the sponsorship questions the CO requested Employer attest to in the additional notarized statement required in the audit notification letter. As a result, we find Employer's omission of this requested notarized statement is not material enough to constitute a substantial failure to provide requested documentation under Section 656.20(b).

Thus, in this case, Employer did *not* "substantially fail to provide required documentation" as the requested notarized statement was not documentation the Employer was required by regulation to maintain on file nor did the omission of the documentation materially affect the CO's review of the application. Employer provided an otherwise complete audit response, evincing its awareness of and intent to file an application and sponsor the foreign worker. Therefore, denial of certification based on Section 656.20(b) is improper.

Based on the foregoing, we find that the CO erred in denying Employer's application. We thus reverse the CO's denial and remand the matter to the CO for certification.

### **ORDER**

**IT IS HEREBY ORDERED** that the denial in this matter is **REVERSED** and **REMANDED** to the CO to grant labor certification.

For the Panel:

**C. Richard Avery**  
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. 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.