

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 28 May 2013

BALCA Case No.: 2011-PER-02487
ETA Case No.: A-08275-92132

In the Matter of:

VB HOSPITALITY LLC,
Employer

on behalf of

FERNANDES, ALLEN,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearances: Gina Bhagia
General Manager, VP Hospitality LLC¹
For the Employer

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

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
VACATING DENIAL OF CERTIFICATION
AND
REMANDING FOR CONTINUED PROCESSING

This matter involves an appeal of the denial by an Employment and Training Administration, Office of Foreign Labor Certification, Certifying Officer (“CO”) of permanent

¹ The Employer was represented before the Certifying Office by Frank B. Linder, Esquire. Mr. Linder, however, did not file any pleadings with the Board.

alien labor certification 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 20 C.F.R. Part 656.

BACKGROUND

The Employer is sponsoring the Alien for permanent employment in the United States for the position of "Maid." (AF 93-114).² On October 3, 2008, the Certifying Officer (CO) denied certification on the ground that the Employer purportedly did not make a selection for Section H-1 of the Form 9089. (AF 90-92). The Employer filed a motion for reconsideration arguing that the CO's determination was in error, and that the Employer actually had completed Section H-1. (AF 74-89). The CO did not rule on the motion for reconsideration,³ but instead issued a request for information about the bona fides of the Employer's business on March 2, 2011 (AF 57) and an Audit Notification on April 28, 2011. (AF 54-56). The Audit Notification was addressed to the Employer care of its attorney, and set a due date for the audit response of May 30, 2011. (AF 55). The Audit Notification indicated that it was copied on the Employer. (AF 55). On June 9, 2011, the CO denied certification on the ground that the Employer had not responded to the audit notification. (AF 52-53). The Employer requested "redetermination" on the ground that it had not received the audit notification. (AF 2-51). In the cover letter to the request for redetermination, the Employer's attorney denied receiving a request for information or an Audit Notification. (AF 2). The Employer included a letter from its General Manager attesting that the Employer had received no documentation from the Department of Labor relating to the PERM application. (AF 6). The Employer also provided a copy of its earlier motion for reconsideration (AF 8-33) and correspondence showing that the Atlanta National Processing Center had made an email request for information about the bona fides of the Employer's business on June 16, 2008, and that the Employer's attorney had mailed a response on July 8, 2008. (AF 34-50).

In a letter dated August 12, 2011, the CO reconsidered but found that the denial was valid. (AF 1). The CO stated that the Audit Notification was mailed to the Employer's address of record, and noted that the Employer had promptly responded to the denial letters of October 3, 2008 and June 9, 2011. The CO also found no evidence of submission of a change of address for the Employer.

On appeal neither the CO nor the Employer filed an appellate brief.

DISCUSSION

The National Processing Center apparently sent its Audit Notification by regular mail, and the CO has presented no proof of actual delivery of the Audit Notification by the Employer or its attorney. Rather, the CO relies solely on the determination that the letter was purportedly

² In this Decision, "AF" is an abbreviation for "Appeal File."

³ Because the CO did not again mention the purported Section H-1 omission, we find that this ground for denial was waived by the CO. We also note that Section H-1 of the mailed-in version of the Form 9089 was completed. (AF 104).

properly addressed to the Employer,⁴ that the record contained no changes of address information, and that the Employer responded promptly to the two denial letters.

The CO is not entitled to a presumption of delivery of mail sent by the National Processing Center in the absence of proof of its internal mailing procedures. *See Gentis Inc. v. USDOL*, No. 2:09-cv-05490-LP, slip op. at 9-10 (E.D.Pa. Jan. 11, 2011) (proof of internal mailing procedures required to invoke presumption). *See also Gentis, supra* slip op. at 10 (where only regular mail used, the presumption of delivery is weak); *Michael K. Rosner*, 2011-PER-197 (June 2, 2011); *Terry Stuckey & Associates, Inc.*, 2011-PER-146 (May 29, 2011); *Cumberland Food Market*, 2011-PER-87 (May 1, 2011); *22 E. 41st Street Corp. / O'Casey's*, 2009-PER-402 (Jan. 7, 2011) (presumption of delivery is rebuttable); *Vincheer Fashion, Inc.*, 1998-INA-24, slip. op. at 5 (Sept. 23, 1998). (same). The fact that the CO had the Employer address on record and that the Employer had evidently received other mailings by the CO is not in itself proof that the law firm received the Audit Notification letter.

Even if the CO was entitled to a presumption of delivery it is only a weak presumption, and we find that it was rebutted by the Employer's attorney's and General Manager's statements denying receipt, and the circumstantial evidence of a lack of a motive to fail to respond to the Audit Notification. We have reviewed the entire record. It is clear that the Employer was endeavoring to respond promptly to the ANPC and CO's directives. It is unlikely that the Employer would have completely failed to respond to an Audit Notification if it had been received. *DGN Technologies Inc.*, 2012-PER-1208 (Mar. 20, 2013) (citing *Santana Gonzalez v. United States*, 506 F.3d 274, 278 (3d Cir. 2007) for the proposition that circumstantial evidence, such as lack of motive to fail to respond to government instruction, may support rebuttal of presumption of delivery).

Based on the foregoing, we vacate the denial. It appears that the CO never reviewed the merits of the application. Thus, we return this matter to the CO to complete processing.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **VACATED** and the matter is **REMANDED** for continued processing.

For the panel:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

⁴ More precisely, the Audit Notification was addressed to the Employer's attorney, with a copy to the Employer.

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.