



Issue Date: 14 July 2016

BALCA Case No.: 2012-PER-02800
ETA Case No.: A-11166-85714

In the Matter of:

GLOBAL EMPIRE LLC,
Employer,

on behalf of

GHUGE, NARENDRA APPARAO,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Sherry L. Neal, Esquire
Hammond Law Group, LLC
Cincinnati, Ohio
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; William T. Barto,
and Morris D. Davis, *Administrative Law Judges*

DECISION AND ORDER
DIRECTING GRANT OF CERTIFICATION

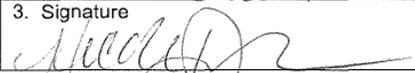
PER CURIAM. This matter arises under § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the “PERM” labor certification regulations at 20 C.F.R. Part 656.¹

BACKGROUND

The Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) sponsoring the Alien for permanent employment in the United States for the position of

¹ “PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005.

“Sales Manager.” (AF 256-266).² The Employer listed its president, Aruna Kendre, as its signatory on the Form 9089. (AF 264). The Certifying Officer (“CO”) audited the application and directed the Employer to submit, among other documents, “[a] copy of the submitted ETA Form 9089, with original signatures in ... Section N (Employer Declaration).” (AF 252). The Employer Declaration section of the Form 9089 submitted in response to the CO’s audit request was modified to list Nikki Dreikorn, Director of Healthcare Services as the Employer’s signatory:

1. Last name Kendre	First name Aruna	Middle initial
DREIKORN		
NIKKI		
2. Title President	DIRECTOR OF HEALTHCARE SERVICES	
3. Signature	Date signed	
		
Oct 6, 2011		

(AF 188).

The CO subsequently denied certification pursuant to 20 C.F.R. § 656.20(b), finding that the Employer substantially failed to respond to the audit because the individual who signed the Form 9089 on behalf of the Employer was not the same individual listed on the application at the time of filing. (AF 133). The Employer filed a request for reconsideration and explained that its authorized signatory changed during the period between filing the application and responding to the audit. (AF 5-6). The Employer explained that the new signatory “was working with [the Employer] while the recruitment for Sales Manager ... was conducted and she can attest to the accuracy of the documents.” (AF 5). The Employer submitted documents to support its assertion that the company’s authorized signatory changed between the time when the Employer filed its application and when it responded to the audit. (AF 7-9).

In the determination on reconsideration, the CO barred the Employer’s documents from the record pursuant to § 656.24(g)(2). (AF 1). According to the CO, the Employer should have provided its explanation and documentation regarding the signatory change with its audit response. *Id.* The CO affirmed the denial of certification, finding that the Employer substantially failed to respond to the audit because the Form 9089 contained a different authorized signatory. *Id.* Neither party submitted a brief on appeal.

DISCUSSION

A substantial failure by an employer to provide documentation in response to an audit request will result in the denial of the application. § 656.20(b). If the CO requests documentation that an employer is required by regulation to maintain in its audit file, the employer’s failure to submit such documentation is presumptively a substantial failure to respond. *SAP America, Inc.*, 2010-PER-01250 (Apr. 18, 2013) (*en banc*). If the CO requests and the employer fails to provide documentation whose retention is not mandated by the regulations:

² Citations to the Appeal File are abbreviated as “AF” followed by the page number.

We must assess whether: (1) the CO reasonably requested the omitted documentation (i.e., the documentation was readily, or at least reasonably available to the employer); and (2) the omission of this documentation is material enough to constitute a “substantial failure...to provide required documentation.”

Accent-Media Productions, Inc., 2012-PER-00712 (Sept. 23, 2015) (citing *SAP America, Inc.*).

While the regulations do not require an employer to maintain a signed Form 9089 in the audit file, a previous panel has held that a signed Form 9089 is both reasonably available and material such that a failure to include the document in an audit response is presumptively a substantial failure to respond. *IT Cats, LLC*, 2012-PER-01762 (Apr. 6, 2016). The reasoning for this conclusion is that PERM is an attestation based program and the CO has a strong interest in ensuring the employer is bound to its attestations. *Id.*

This case does not involve the wholesale omission of a signed Form 9089, however. Rather, the CO argues that the Employer substantially failed to respond because a different authorized signatory executed the Form 9089 on the Employer’s behalf. The CO’s logic is unpersuasive. We find that the Employer has put forth evidence that establishes its authorized signatory changed between the filing of the application and the submission of the audit response. Therefore, the CO’s demand that the Employer submit a signature from an individual who lacked authority to sign on behalf of the company is both unreasonable and immaterial for the purposes of binding the Employer to its attestations.

The CO argues that the documentation supporting the Employer’s explanation of its changed signatory is barred from the record pursuant to § 656.24(g)(2). This argument is also unpersuasive. For applications submitted after July 16, 2007, a request for reconsideration submitted on behalf of an application may only include: (1) documentation the CO actually received from the employer in response to a request from the CO; or (2) documentation the employer did not have an opportunity to present to the CO, but which existed at the time the application was filed. § 656.24(g)(2)(i)-(ii). However, when “the circumstances of an audit may not be specific enough to put an employer on notice of the potential deficiency with its application [and] where the type of documentation at issue is not the standard documentation submitted in response to an audit,” the CO may not prohibit an employer from putting forth relevant evidence. *Denzil Gunnels*, 2010-PER-00628 (Nov. 16, 2010). We find that the circumstances of the audit did not put the Employer on notice that its change in authorized signatories could be a potential deficiency; we also find that evidence of a change in authorized signatories is not standard documentation submitted in response to an audit. Accordingly, the CO improperly barred the evidence from the record and it is proper for us to consider it on appeal. *See* 20 C.F.R. §§ 656.26(a)(4)(i) and 656.27(c); *Eleftheria Restaurant Corp.*, 2008-PER-00148 (Jan. 9, 2009); *5th Avenue Landscaping, Inc.*, 2008-PER-00027 (Feb. 11, 2008).

Based on the forgoing we find that the CO’s determination in this matter is not supported by the regulations.

ORDER

Based on the foregoing, **IT IS ORDERED** that the denial of labor certification in this matter is **REVERSED** and that this matter is **REMANDED** for certification pursuant to 20 C.F.R. § 656.27(c)(2).

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

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 en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc 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 en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.