



Issue Date: 06 October 2016

BALCA Case No.: 2012-PER-01224
ETA Case No.: A-10048-86786

In the Matter of:

ALDANA & ASSOCIATES, PSC, LTD,
Employer,

on behalf of

MONTESDEOCA, CARMEN LUCRECIA,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Ronald D. Richey, Esq.
Law Office Of Ronald D. Richey
Rockville, MD
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; William T. Barto
and Larry S. Merck, *Administrative Law Judges*

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

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 in Rockville,

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

Maryland. The occupational title listed in Form 9089, Section F-3 was “Accountants,” Standard Occupational Classification Code 13-2011.01. (AF 136-147).²

After reviewing the information submitted pursuant to an audit, the Certifying Officer (“CO”) denied the application because the Employer failed to supply copies of the web pages necessary to document of its additional recruitment steps. (AF 8). The Employer attached the missing information to its Request for Reconsideration, contending that “[w]e thought that we had enclosed them. If we didn’t it was inadvertent.” (AF 2). The CO denied the request and forwarded the case to the Board of Alien Labor Certification (“BALCA”). The CO observed that the necessary documentation had not been included in the audit response and 20 C.F.R. § 656.24(g) precluded him from considering the documentation submitted with the reconsideration request. (AF 1).

In its brief to the Board, Employer

suggests [the documentation] may have been misplaced or lost after receipt at the Department of Labor, while acknowledging the possibility that it was inadvertently left out of the response package. The Employer’s cover letter in response to the audit listing the documentation being sent, includes a line item for the web pages generated in conjunction with the newspaper ads. Also, the recruitment report included, in the response package, references the notice and dates it was placed.

Employer’s Brief at 3.

The Employer avers that Board precedent supports the principle that deadlines for submission of documents can be waived to avoid manifest injustice, citing *Madeline Bloom*, 88-INA-152 (Oct. 13, 1989) (*en banc*). The Employer also cites to *Gentis v. Oates*, No. 09-cv-5490 (Jan. 11, 2011), 2011 WL 93851, where the Court noted that the employer’s immediate action in supplying the missing documentation “dispell[ed] any inference that Gentis deliberately failed to respond to the audit to avoid having the produce such documentation.” *Id.* at 5. The CO did not file an appellate brief.

DISCUSSION

Inadvertent failures by an employer to submit required information in response to an audit cannot be cured by submission of that information along with a request for reconsideration. *Everest Production Corp.*, 2012-PER-01304 (Mar. 7, 2016); *Quemere International, LLC.*, 2012-PER-01727 (Mar. 2, 2016); *Florida Holocaust Museum*, 2011-PER-02861 (July 10, 2014). We reject Employer’s contentions that the documents at issue may have been timely submitted but then misplaced by the CO and that a reversal is necessary to avoid manifest injustice.

First, Employer raises for the first time on appeal that the documents may have been misplaced by the CO. The Board engages in de novo review of the record upon which the CO denied permanent alien labor certification, together with the request for review, and any

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

statements of position or legal briefs. *Albert Einstein Medical Center*, 2009-PER-379 (Nov. 21, 2011) (*en banc*) at 25. The Board permits general legal argument in briefs, but will not consider wholly new arguments not made before the CO. *Id.* at 8. The Board will not decide an appeal on grounds for denial not raised while the case was before the CO. *Loews Anatole Hotel*, 1989-INA-230 (Apr. 26, 1991) (*en banc*); *Mandy Donuts Corp.*, 2009-PER-481 (Jan. 7, 2011). As noted above, the Request for Reconsideration simply indicated that the Employer “thought” the document had been enclosed and that any failure to enclose them had been “inadvertent.” (AF 2).

Even if we were to consider the possibility that copies of the web pages may have been submitted, the presumption of regularity³ counsels against concluding that the CO lost the documents. While Employer correctly notes that the cover letter accompanying the audit response does indicate that “a print out from Baltimore’s Craig’s List” is included (AF 22), the response itself is not devoid of material related to the Craig’s List posting, rather it includes a communication from Craig’s List to Employer’s counsel noting that an ad had been placed. (AF 48). The presence of this document in the audit response is at least equally supportive of a conclusion that the Employer submitted the wrong document versus the contention that it submitted the correct document which the CO then lost.

Finally, the cases relied upon by the Employer to establish that a reversal is necessary to avoid manifest injustice do not support that proposition.⁴

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer’s **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

For the panel:

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

³ The doctrine of “presumption of regularity” presumes that public officers have properly discharged their official duties. *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14–15, 47 S.Ct. 1, 71 L.Ed. 131 (1926); *In re Longardner & Assocs., Inc.*, 855 F.2d 455, 459 (7th Cir.1988) (“in this case, in which notice was properly addressed, stamped and mailed, there is a presumption that Bunn received it”). The doctrine thus allows courts to presume that what appears regular is regular, the burden shifting to the attacker to show the contrary. *United States v. Roses, Inc.*, 706 F.2d 1563, 1567 (Fed.Cir.1983).” *Butler v. Principi*, 244 F. 3d 1337, 1340 (Fed. Cir. 2001).

⁴ *Madeline Bloom*, 88-INA-152 (Oct. 13, 1989) (*en banc*) involved the narrow question whether it was manifestly unjust to deny an application based on failure to time respond to a Notice of Finding which resulted from negligence of the employer’s attorney. In *Park Woodworking, Inc.*, 1990-INA-93 (Jan. 29, 1992) (*en banc*), the Board held that the *Bloom* standard would be strictly construed; equitable relief would not be mandated where there was no especially egregious factor in the case, such as the deceitful, absconding attorney in *Bloom*. No such factors are present here. *Gentis v. Oates*, No. 09-cv-5490 (E.D. Pa. Jan. 11, 2011) involved the CO’s efforts to invoke the presumption that documents mailed are deemed to have been received.

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.