



Issue Date: 21 October 2016

BALCA Case No.: 2013-PER-00193

ETA Case No.: A-11338-21700

In the Matter of:

APTEK SOLUTIONS INC.,

Employer,

on behalf of

SINHA, SUSANTHO,

Alien.

Certifying Officer: William Carlson, Ph.D.
National Certifying Officer

Appearance: Nadeem Yousaf, Esquire
Fremont, California
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza and
Morris D. Davis, *Administrative Law Judges*

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

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

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

BACKGROUND

The Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) sponsoring the Alien for permanent employment in the United States in Doylestown, Pennsylvania. The occupational title listed in Form 9089, Section F-3 was “Computer Systems Analyst,” Standard Occupational Classification Code 15-1051.00. (AF 144).²

The Certifying Officer (“CO”) issued an Audit Notification letter. (AF 139-142). In addition to the usual boilerplate in an audit documentation request, in this instance the CO included three additional specific audit requests. The third specific request was:

Please provide declarations from the employer and the foreign worker, each signed by the respective individual under penalty of perjury, stating whether the employer received payments of any kind by the foreign worker or a third party for any activity related to obtaining permanent labor certification, including payment of the employer’s attorney’s fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing a permanent labor certification application. Such payments include but are not limited to legal fees; administrative fees; advertising costs and/or any other costs or fees related to the filing of the application; wage concessions, such as deductions from wages, salary, or benefits; kickbacks, bribes or tributes; in-kind payments; free labor; and/or any other form of payment for services essential to the labor certification process. Note that any payment of fees by the foreign worker or third party *for the benefit of the employer* constitutes a “receipt of payment” by the employer, despite the fact that such payments may have been made directly to a party other than the employer - e.g., the employer’s attorney, Department of State, etc.

If any such payments were made, please provide a list outlining the payment amount, who made the payment, to whom payment was made, dates, and the purpose of the payment.

If payments were received from a third party to whose benefit work to be performed in connection with the job opportunity would accrue, please provide documentation explaining both the business relationship between the employer and the third party and the benefit of the work performed, or to be performed, in accordance with the Department’s regulations at 20 CFR § 656.12(c).

If payments were made to the employer by the foreign worker as a result of an agreement/contract entered into prior to July 16, 2007, please provide documentation evidencing both that an agreement existed and that it was entered into prior to July 16, 2007. Examples include the contract, the agreement or a declaration signed by both the employer and the foreign worker under penalty of perjury, in the case of oral agreements.

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

Knowingly furnishing false information in the preparation of this form (ETA 9089) and any subsequent thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine, imprisonment up to five years or both (18 USC [§] 1001)[.]

(AF 142) (italics as in original).

The Employer submitted a 123 page audit response. (AF 15-137). The CO, however, denied certification under 20 C.F.R. § 656.20(b) because that audit response did not include declarations addressing the third specific audit request. (AF 13-14).

The Employer filed a request for reconsideration contending that the Audit Notification it received was only three pages long, and that the fourth page was missing. (AF 3-12). The Employer's President submitted an affidavit declaring under penalty of perjury that this statement was true. (AF 5). The Employer also submitted affidavits from the Alien and the Employer's President attesting that no improper payments had been made. (AF 6-9).

The CO reconsidered, but stated that "Departmental records show the Audit Notification letter dated April 27, 2012 was mailed to the employer address of record" and that since the Employer had failed to file the requested documentation with its audit response, the ground for denial was valid. (AF 1).

On appeal, the Employer filed a statement confirming its intention to proceed with the appeal. Neither the Employer nor the CO filed appellate briefs.

DISCUSSION

The regulation at 20 C.F.R. § 656.20(b) provides, in pertinent part, that "[a] substantial failure by the employer to provide required documentation [pursuant to an Audit Notification from the CO] will result in that application being denied under § 656.24...." Here, the question is whether the Employer can be found to have substantially failed to provide required supplemental documentation³ where it denies having received the last page of the CO's Audit Notification letter.

A presumption of regularity may be afforded a CO when he mails documents; however, it is a weak presumption that may be rebutted by credible evidence. *See, e.g., Biohorizons Implant Systems, Inc.*, 2012-PER-01150 (Feb. 8, 2016), citing *Gentis, Inc. v. Oates*, 2011 U.S. Dist.

³ In *SAP America, Inc.*, 2010-PER-01250 (Apr. 18, 2013) (*en banc*), the Board held that it will affirm denials under § 656.20(b) when the "required documentation" an employer fails to produce 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 §§ 656.10(f) and 656.17(a)(3)). When the omitted "required documentation" is merely "supplemental documentation" that is not specified in the regulations, BALCA will not summarily affirm denials issued under § 656.20(b). Rather, it will assess whether "(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.'"

LEXIS 7020, 2011 WL 93851, slip op. at 9-10 (E.D. Pa. Jan. 11, 2011). Although an employer has the ultimate burden of proof to establish entitlement to a labor certification, an employer's evidence is not afforded less probative value merely because it is presented by an employer. *Dove Homes, Inc.*, 1987-INA-00680 (May 25, 1988) (*en banc*). Where the regulations do not mandate a specific manner of documentation, statements provided by an employer constitute documentation which must be considered and given the weight they rationally deserve. *Gencorp*, 1987-INA-00659 (Jan. 13, 1988) (*en banc*).

In the instant case, the Employer's President provided an affidavit attesting that he had not noticed that the Audit Notification letter may have continued beyond the third page, and that this was the reason that the audit response had not addressed the third specific documentation request. That the Employer was not aware of a third specific request is supported by the fact that the cover letter to the audit response specifically addressed the first two specific document requests, but was silent as to the third request. Moreover, we note that the Employer's audit response was otherwise thorough and substantial. The Employer evidently had no motive not to respond to the third documentation request given that it was able to provide material affidavits addressing that third documentation request with its motion for reconsideration.

The Employer's President conceded that perhaps he should have noticed that the Audit Notification letter's text suggested that there was an additional page, and asked the CO for the fourth page. Thus, the Employer was negligent in failing to read the Audit Notification closely enough to notice a potential problem.

Nonetheless, the preponderance of the evidence in this case warrants a finding that the reason the Employer did not provide a timely response to the Audit Notification was largely due to a missing page from the Audit Notification letter. This is not a substantial failure to provide required supplemental documentation within the meaning of § 656.20(b).

Because the CO in this case never reviewed the Employer's audit response materials, it is necessary to return this case to the CO to complete processing of the application on the merits.

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 that this matter is **REMANDED** to the CO to consider whether the audit response materials, as supplemented by the affidavits on the motion for reconsideration, were sufficient to permit the CO to grant certification.

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.