

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 April 2009

**BALCA Case Nos.: 2009-TLN-00054
2009-TLN-00055
2009-TLN-00056
2009-TLN-00057
2009-TLN-00058
2009-TLN-00059
2009-TLN-00060
2009-TLN-00061
2009-TLN-00062**

ETA Case Nos.: C-08310-40929
C-08310-40932
C-08318-41453
C-08311-41024
C-08310-40936
C-08311-41012
C-08311-41033
C-08311-40986
C-08311-40979

In the Matter of:

HUTCO, INC.,

Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **JOHN M. VITTON**
Chief Administrative Law Judge

ORDER OF DISMISSAL
BASED ON LACK OF JURISDICTION

BACKGROUND

On April 8, 2009, the Board of Alien Labor Certification Appeals (“BALCA”) docketed the Employer’s request for review of the Certifying Officer’s (“the CO”) determinations in the above-captioned H-2B temporary labor certification matters. The CO was directed to assemble and transmit appeal files in accordance with the regulation that will be codified as 20 C.F.R. §655.33(b), which can be found at 73 Fed. Reg. 78,063 (Dec. 19, 2008). The parties were directed to file briefs in time to reach the undersigned no later than the close of business on the fifth business day after they received the appeal files.

BALCA received its copy of the Appeal File on April 14, 2009. On April 20, 2009, the Certifying Officer filed a Motion to Dismiss for Lack of Jurisdiction.

Earlier, on April 11, 2008, the Employer filed a brief complaining that the CO was operating in unwritten internal policies and not by the authority of *Training and Employment Guidance Letter No. 21-06, Change (1), Procedures for H-2B Temporary Labor Certification in Non-Agricultural Occupations*, 72 Fed. Reg. 38622 (July 13, 2007), citing in this respect the TEGL’s provision stating that “[t]here is no provision for reconsideration or appeal of the decision with DOL.” This is apparently a reference (explained in the CO’s brief) that the CO had orally advised the Employer that it could file an appeal with BALCA even though the denial letters had advised that there was no right of review within the Department of Labor, but that the Employer could appeal to the United States Citizenship and Immigration Services (USCIS).

In its request for review, the Employer asked that these matters be consolidated for decision. In his appellate brief, the CO raised no objection to consolidation. Accordingly, I have consolidated the appeals. *See* 29 C.F.R. § 18.11.

DISCUSSION

The regulations which gave BALCA jurisdiction over denials of temporary alien labor certification applications filed under the H-2B program did not go into effect until January 18, 2009. *See* 20 C.F.R. § 655.33(a) (to be codified); 73 Fed. Reg. 78020 (Dec. 19, 2008). The applications and denials¹ in the above-captioned matters all occurred prior to that date. Accordingly, under the regulations in effect when the denials in these matters occurred, BALCA lacked jurisdiction to entertain these appeals.

Accordingly, **IT IS ORDERED** that the appeals in the above-captioned matters are hereby **DISMISSED** without prejudice.

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JOHN M. VITTON
Chief Administrative Law Judge

¹ *Compare Drenner's Carpet Gallery*, 2009-TLN-1 (ALJ Feb. 25, 2009) (BALCA has jurisdiction over H-2B application filed before the effective date of the new H-2B regulation at 20 C.F.R. § 655.33, but not denied until after that effective date).