

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 August 2010

OALJ Case No.: 2010-TLC-00097

ETA Case No.: C-10175-24533

In the Matter of

TROY FRUGE,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER

On July 26, 2010, Troy Fruge (“the Employer”) filed a request for review of the Certifying Officer’s determination in the above-captioned temporary agricultural labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.164(B) (2010). On July 30, 2010, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). In administrative review cases, the administrative law judge has five working days after receiving the file to “review the record for legal sufficiency” and issue a decision. § 655.171.

Statement of the Case

On July 1, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Troy Fruge (“the Employer”), for

temporary labor certification. AF 123-133.¹ On June 30, 2010, the CO issued a Notice of Deficiency (“NOD”). AF 96-113. The CO, citing to 20 C.F.R. § 655.122(h), stated that the Employer must pay a minimum amount of \$10.64 per day as a “daily subsistence payment.” AF 101. Accordingly, on the Employer’s ETA 790—section 17, the Employer failed to include the subsistence payment. *Id.* However, in section 22, the Employer stated that it would pay \$9.90 per day, and as a result, the CO required the Employer to amend the form to reflect the higher amount. *Id.* On July 12, 2010, the Employer responded to the NOD. AF 34-63. The response, however, did not include ETA 790—section 17.

On July 15, 2010, the CO denied the Employer’s application. AF 26-28. In particular, the CO noted that 20 C.F.R. § 655.122(h) required the Employer to reimburse workers a minimum of \$10.64 per day for meal subsistence. AF 28. The CO asserted that the Employer failed to both include the correct amount in section 17 and to delete the incorrect amount of \$9.90 in section 22. *Id.* Since the Employer failed to correct the deficiency, the CO denied the application. The Employer’s appeal followed.

Discussion

Under the H-2A regulations, an Employer must provide daily subsistence to the worker. 20 C.F.R. § 655.122(h). If the Employer does not provide the subsistence directly to the worker, then the Employer must provide the worker with a subsistence payment that is “at least as much as the employer would charge the worker for providing the worker with three meals a day during employment (if applicable), but in no event less than the amount permitted under §655.173.” *Id.*

In the present case, the regulations require that the Employer provide a minimum subsistence payment of \$10.64 to its workers. This information must be included in the Employer’s job offer. *See generally* 20 C.F.R. § 655.122. The Employer failed to include the appropriate subsistence payment information on its job order form, even after the CO put the

¹ Citations to the 133-page Administrative File will be abbreviated “AF” followed by the page number.

Employer on notice that its form was incomplete,²² and therefore, the CO properly denied certification.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Washington, D.C.
WSC:ARH

²² The Employer has submitted a corrected ETA 790 form along with its request for review. However, the Board is limited to reviewing only the "written record" as it appeared before the CO. 20 C.F.R. § 655.171. Further, the regulations specifically preclude the Board from reviewing "new evidence." *Id.* As a result, the Employer's corrected form will not be considered.