

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 03 June 2009**

**BALCA Case No.: 2009-TLN-00064**  
ETA Case No.: C-09103-45033

*In the Matter of:*

**GLOBAL MANAGEMENT ENTERPRISE, LLC,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

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

**DECISION AND ORDER**

This case arises from a request for review of a United States Department of Labor Certifying Officer's denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2008) (effective until Jan. 17, 2009); 20 C.F.R. Part 655, Subpart A, available at 73 Fed. Reg. 78,020 (Dec. 19, 2008) (effective Jan. 18, 2009).<sup>1</sup>

**Statement of the Case**

On April 13, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Global Management Enterprise, LLC ("the Employer"). *See* AF 63.<sup>2</sup> The Employer requested certification for 15 "food preparation and serving related workers" from May 1, 2009, through March 1, 2010. AF 128. In Item F.a.5 of ETA Form 9142, which directs the petitioner to describe the duties that the requested workers would perform, the Employer wrote the following:

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<sup>1</sup> Citations to the regulations that became effective January 18, 2009, will contain only the provisions as they will appear when codified.

<sup>2</sup> Citations to the 333-page Appeal File will be abbreviated "AF" followed by the page number.

- Bartenders to greet and take food and beverage orders from guests while accommodating special needs and requests
- Check patrons' I.D. to ensure that they meet the minimum age requirement.
- Prepare drink orders.
- Receive proper payment from guest and ensures accuracy of guest's check and method of payment in order to safeguard customer and company
- Cooks to prepare fresh ingredients for cooking.
- Wash and peel fresh fruits and vegetables, measure, and mix ingredients.
- Prepare and cook food according to recipes, quality standards, presentation standards, and good preparation checklist.
- Operate ovens, stoves, grills, microwaves and fryers.
- Wash and disinfect kitchen area, table, tools, knives, and equipment.
- Test foods to determine if they have been cooked sufficiently and monitor food quality while preparing food.
- Wait staff to take orders from customers at tables and assure orders are filled correctly.
- Set up cafeteria tray line at steam tables, in dining rooms, and at side service stands with hot and cold food items and dishes, silverware, napkins, condiments, salads, desserts, bread and beverages.
- May also work at assembly stations on the tray lines reading tray assembly tickets and placing the correct food on trays as customers pass along the line.
- Load trays on delivery carts and deliver meals, snacks, etc. from kitchen and bar to guest rooms.
- Check customers' I.D. to ensure they meet minimum age requirements for consumption of alcoholic beverages.

AF 130. In recruiting domestic workers, the Employer advertised separately and required different levels of experience for cooks, waiters, and bartenders. AF 175-78. The application stated that the Employer required between six months and one year of experience. AF 131. Likewise, in Item H.2 of ETA Form 9142, the Employer listed three different state workforce agency job order identification numbers. AF 132. The Employer also obtained separate prevailing wage determinations and job orders from the state workforce agency for cooks, waiters, and bartenders. AF 203, 205, 207, 179, 188, 204.

On April 21, 2009, the Certifying Officer ("CO") issued a *Request for Further Information* ("the RFI"). AF 122; see 20 C.F.R. § 655.23(c)(1). In the RFI, the CO stated that the Employer "had not complied with all requirements of the H-2B program." AF 122. In particular, the CO explained that the Employer submitted a single ETA Form 9142 for workers in three separate occupations. AF 124. Citing 20 C.F.R. § 655.20(d), the CO directed the Employer to "submit a separate ETA Form 9142 Application for Temporary Employment Certification for each individual job opportunity for which it is seeking Temporary Employment Certification." AF 124.

On April 23, 2009, the Employer responded to the RFI by submitting three ETA Form 9142 applications: one for ten waiters; one for two bartenders; and one for three cooks. See AF 91-121. On May 1, 2009, the CO issued a letter informing the Employer that its applications had been denied and were "being returned." AF 63-66. The CO explained that the Employer's response to the RFI was deficient because each application was incomplete in several respects. AF 66. First, the CO found that

the Employer failed to complete Item B.9 of ETA Form 9142 in that the Employer wrote, “See attached letter,” but attached no letter. *Id.* Second, the CO found that the Employer left blank Item C.14 of ETA Form 9142 when it should have indicated its status as a job contractor therein. *Id.* Third, the CO found that the Employer did not “provide the appropriate signed Appendix (B.1) with attestations.” *Id.* Fourth, the CO found that the Employer did not provide an individual statement of recruitment results for each application. *Id.*

On May 4, 2009, ETA’s Chicago National Processing Center sent the Employer a letter explaining that its application was “being returned because it is incomplete.” AF 62. The letter stated that Appendix B.2 to the application and the Employer’s final recruitment report were “Missing or Incomplete.” *Id.* The letter instructed the Employer to submit these documents with the ETA Form 9142, which was listed as an enclosure. *Id.* The letter concluded, “We look forward to processing your Application for Temporary Labor Certification once it is properly completed and submitted.” *Id.*

On May 6, 2009, the Employer faxed the CO what appears to be a response to the May 4, 2009, letter. AF 3-61. The response included, *inter alia*, a cover letter explaining that the Employer enclosed Appendix B.1 in accordance with ETA Form 9142’s instructions along with a final recruitment report. AF 5. On May 8, 2009, the Employer filed a request for review with the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). AF 1-2. In the letter, the Employer reported that it had complied with the CO’s May 4, 2009, letter. AF 1. On May 12, 2009, I issued a *Notice of Docketing* permitting the parties to file briefs and requiring the parties to confer regarding resolution of this matter. The notice also stated that, if the parties file any briefs, they must provide a status report regarding their conference at that time. The Employer did not file a brief, and the CO’s brief contained no such report.

### Discussion

The record and the CO’s brief raise questions about the current status of the Employer’s application. It is unclear why ETA sent the May 4, 2009, letter after the CO’s May 1, 2009, denial.<sup>3</sup> While the CO’s brief, in urging affirmance, suggests otherwise, ETA may have intended that this letter function as a second RFI, thereby implicitly revoking the May 1, 2009, denial letter. *See* 20 C.F.R. § 655.23(c)(2)(iii) (permitting the CO to issue additional RFIs if “unusual circumstances warrant” it).<sup>4</sup> Furthermore, despite urging affirmance, the CO wrote in his brief that, on May 8, 2009, the Employer “resubmitted three separate applications for the three occupations” that “*are currently under review.*” (emphasis added).<sup>5</sup> Based on the record, I find that BALCA review would be premature at this time. Accordingly, I will remand this matter to the CO under 20 C.F.R. § 655.33(e)(3). Upon remand, the CO should clarify the procedural posture to the Employer and complete any ongoing review of the application.

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<sup>3</sup> 20 C.F.R. § 655.32(e)(3) requires that, when denying an application, the CO must offer an employer the opportunity to file a new application in the determination letter. The May 1, 2009, denial letter contains this offer, and therefore it does not appear that ETA issued the May 4, 2009, letter in an attempt to comply with § 655.32(e)(3)’s requirement.

<sup>4</sup> Even if ETA intended the letter to function as a second request, the letter lacked several of 20 C.F.R. § 655.23(c)(2)’s requirements for requests for further information.

<sup>5</sup> In his brief, the CO incorrectly stated that he denied the Employer’s application because it failed to comply with 20 C.F.R. § 655.20(d).

**Order**

In light of the foregoing, it is hereby **ORDERED** that this matter is **REMANDED** to the Certifying Officer for further action consistent with this decision.

For the Board:

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**JOHN M. VITTON**

Chief Administrative Law Judge