



Issue Date: 07 July 2010

BALCA Case No.: 2010-TLN-00064

ETA Case No.: C-10105-49895

In the Matter of:

GOOSE DOWNS FARMS,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

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

**DECISION AND ORDER AFFIRMING DENIAL OF
CERTIFICATION**

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the CO") 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 (2009).

Statement of the Case

On April 15, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Goose Down Farm ("the

Employer”). AF 67-166.¹ The Employer requested certification for one “Animal Trainer” from June 14, 2010, until November 21, 2010. AF 67. On April 19, 2010, the CO issued a *Request for Further Information* (“RFI”). AF 59-66. In the RFI, the CO identified multiple deficiencies, including a failure to comply with 20 C.F.R. § 655.10. AF 64-65. Specifically, the CO stated that the National Processing Center (“NPC”) “had reason to believe that the employer [was] offering a wage which [did] not equal or exceed the highest of the prevailing wage.” AF 64. The CO noted that the Employer should have obtained a prevailing wage from the National Prevailing Wage and Help Desk Center (“NPWHC”) that was effective on the date of recruitment or on the date the application was filed. AF 65.

On April 26, 2010, the Employer submitted a response to the RFI. AF 31-58. The Employer stated in its response that the Employer submitted its request for a prevailing wage to the NPWHC, but the paperwork was “lost by government officials.” AF 33. The Employer further noted that when it sent an inquiry to the NPWHC, the “service officials [stated] they have no record of receipt.” *Id.* Also attached to the response was a FedEx receipt showing a tracking number, which confirmed that the Employer had submitted a package to the NPWHC on February 11, 2010. AF 35. The tracking information for the package indicated that it was delivered to the NPWHC on February 16, 2010. AF 36.

The RFI response also included a series of emails between the Employer and the NPWHC. AF 37-38. The Employer initially sent an inquiry to the NPWHC, according to the emails, on February 18, 2010. AF 38. The NPWHC responded on March 18, 2010, requesting additional information from the Employer in order to provide status information. AF 37. On March 22, 2010, the Employer provided the requested information to the NPWHC. *Id.* On April 1, 2010, the NPWCH responded: “After searching our database using the employer name you provided, we were unable to locate your application. If you have a mail delivery receipt, would you please e-mail it to us?”

On May 21, 2010, the CO issued a *Final Determination* denying the Employer’s request for labor certification. AF 21-25. Citing to 20 C.F.R. § 655.10, the CO determined that the Employer failed to submit a prevailing wage determination. AF 24. The CO noted the correspondence between

¹ Citations to the 166-page appeal file will be abbreviated “AF” followed by the page number.

the NPWHC and the Employer, but stated “the employer did not provide documentation as requested by the NPWHC in order to obtain a prevailing wage determination.” AF 25. As a result, the CO determined that the Employer did not provide sufficient evidence to prove that a prevailing wage had been obtained, and as a result, the CO denied certification. The Employer’s appeal followed.

Discussion

In order to obtain a labor certification,

- (1) The employer must request a prevailing wage determination from the NPC in accordance with the procedures established by this regulation.
- (2) The Employer must obtain a prevailing wage determination that is valid either on the date recruitment begins or the date of filing a complete Application for Temporary Employment Certification with the Department.
- (3) The employer must offer and advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPC.

20 C.F.R. § 655.10

The regulations require that the Employer obtain a prevailing wage from the NPWHC, which must be valid at the time recruitment begins or at the time the application is filed. The record is clear that the Employer failed to submit a prevailing wage that was effective on either the recruitment date or on the date the application was filed, and therefore, it failed to comply with the H-2B regulations.

However, the Employer argues that it submitted a prevailing wage to the NPWHC, and it only failed to comply with the regulations due to government error on the part of the NPWHC. Certainly, the NPWHC is required to issue the prevailing wage within 60 days, and had the NPWHC failed to issue a prevailing wage after a receipt of a prevailing wage request, then some type of equitable remedy might be in order. In the present case, however, the Employer is not entitled to an equitable remedy and the CO properly denied certification for two reasons.

First, while the Employer has submitted a receipt showing that a package was delivered to the NPWHC on February 16, 2010, it is impossible to determine from the record what documentation was

actually submitted to the NPWHC. Although an administrative review is limited to the record before the CO, the Employer submitted further documentation showing that after submitting a new prevailing wage request on May 24, 2010, along with documentation regarding the original tracking number and the denial letter from the CO, the NPWHC issued a timely wage determination.² The Employer also submitted, *inter alia*, a receipt from the NPWHC showing that the prevailing wage request had been received. What becomes clear after a comparison between the record and the new submission to the NPWHC is that the record before the CO does not contain a receipt for the submission of the February 16, 2010 prevailing wage request nor does it contain a copy of the prevailing wage application that the Employer claims it sent to the NPWHC. Though not by itself dispositive, it seems somewhat telling that the Employer did not question the lack of receipt confirmation from the NPWHC, nor did it submit a copy of the prevailing wage request to the CO as part of the original application or in response to the RFI. Moreover, although it is clear that the Employer submitted something to the NPWHC, the Board has no way of determining if the information submitted was accurate or sufficient enough for the NPWHC to create a case file and issue a prevailing wage.

Regardless of whether the Employer submitted an accurate request to the NPWHC, the dispositive issue in the case turns on the emails exchanged between the NPWHC and the Employer. After several exchanges between the Employer and the NPWHC, on April 1, 2010, the NPWHC requested that the Employer provide the “mail delivery receipt.” The Employer did not respond until April 21, 2010. This lack of response is important for two reasons. First, the Employer cannot now claim government error when the NPWHC requested information in an effort to help locate the prevailing wage request and assist the Employer, and the Employer simply failed to respond, especially since the Employer clearly had a record of the requested information and later used it in this appeal and before the CO. The requested information was obviously accessible, but the Employer chose not to assist the NPWHC in locating the prevailing wage. Secondly, the prevailing wage needed to be effective either at the beginning of recruitment, which the Employer had started sometime ago, or on the date the application was filed, which did not occur for another two weeks. The Employer still had time to obtain a valid wage, and the NPWHC was assisting the Employer in locating the wage request. Had the Employer properly responded to the NPWHC, the prevailing wage might have been issued prior to

² The prevailing wage determination issued to the Employer on May 28, 2010, required the Employer to pay a higher wage than it used in its recruitment. Therefore, even if the Employer had obtained the wage in a timely manner, the Employer’s application would have been denied.

the application filing, and thus, the Employer would have complied with regulations. Instead, the Employer chose to not respond to the NPWHC and subsequently file the application without a prevailing wage. It is also interesting to note that the NPWHC has 60 days to issue the prevailing wage. The 60 day deadline did not pass until *after* the Employer filed his application. Moreover, even assuming the NPWHC had lost the prevailing wage request, which has not been proven, it still had time, especially as of the April 1, 2010 email, to issue a prevailing wage determination. Ultimately, the Employer chose neither to wait for the 60 days nor to respond to the NPWHC in an effort to locate the prevailing wage request, which was to the Employer's detriment. The Employer failed to comply with the H-2B regulations by obtaining a prevailing wage, 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