



**Issue Date: 09 November 2009**

**BALCA Case No.: 2010-TLN-00007**

ETA Case No.: C-09252-46421

*In the Matter of:*

**HAMPTON INN,**  
*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 September 9, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Hampton Inn ("the Employer").

AF 82-102.<sup>1</sup> The Employer requested certification for 15 cleaners from October 1, 2009, until May 15, 2010. *Id.* Although the application included copies of job postings listed in the *News-Record* of Gillette, Wyoming, the Employer failed to include information about the job order placed with the local state workforce agency (“SWA”). *Id.* The Employer also failed to include the prevailing wage determination. *Id.*

On September 15, 2009, the CO issued a *Request for Further Information* (“RFI”). AF 78-81. In the RFI, the CO requested, *inter alia*, evidence of the job order, including evidence of the prevailing wage determination obtained for recruitment in support of this application. *Id.*

On September 18, 2009, the Employer submitted a response to the RFI. AF 54-86. The Employer attached the prevailing wage determination, which listed the appropriate wage as \$7.42 per hour. AF 55-60. The Employer also included a copy of the job order placed with the local SWA. AF 76. The job order indicated that the job pays \$7.25 per hour rather than the \$7.42 per hour listed on the prevailing wage determination.

On October 9, 2009, the CO issued a *Final Determination* denying the Employer’s application on a single ground. 39-42. Citing 20 C.F.R. § 655.22(e)(2), the CO found that the Employer “must offer a wage that equals or exceeds . . . the prevailing wage.” AF 41. More specifically, the CO wrote, “The employer’s maximum wage on the job order was listed at \$7.25 per hour. The prevailing wage and the offered wage on the ETA Form 9142 Application and newspaper advertisement was \$7.42 per hour.” *Id.* Since the wage listed in the job order with SWA was lower than the prevailing wage determination, the CO denied the Employer’s application. *Id.* The Employer’s appeal followed.

### **Discussion**

When conducting domestic recruitment under the H-2B program, the Employer must “offer a wage that equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and local minimum wage, and the employer must pay the offered wage during the entire period of the approved H-2B labor certification.” 20 C.F.R. § 655.22(e). Furthermore, the job

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<sup>1</sup> Citations to the 102-page appeal file will be abbreviated “AF” followed by the page number.

posting listed with the local SWA must contain all the requirements for newspaper advertisements, including the offered wage. 20 C.F.R. §§ 655.15(e)(2) and 655.17(g)

In its request for review, the Employer acknowledges that the job posting with the SWA initially listed a wage lower than the prevailing wage but notes that the Employer realized the error and had it corrected prior to filing the application for certification. The Employer also admits that it sent in the original job order in response to the RFI, rather than the second job order showing the corrected amount. The Employer attributes this to a clerical error. In its request for review, the Employer also attached a copy of a second job posting listed with the SWA<sup>2</sup> and writes, “The attached evidence clearly supports that we notified the SWA [that] the wage for the position was \$7.42, and that was the wage to be placed in the job order. . . . It was by inadvertent error of the Wyoming SWA that the job’s wage was incorrectly stated as \$7.25. . . . A corrected job order with the correct wage of \$7.42 was placed by the SWA.”

The CO responds in his brief that “at the time of his final determination, the only job order the CO had ever seen from this Employer was the one listing a wage lower than the prevailing wage.” The CO also incorrectly asserts that “the Employer’s appeal letter does not demonstrate that a job order listing the correct wage was ever posted by the SWA—the corrected job order submitted in the appeal letter was printed on October 16, months after the Employer’s pre-filing recruitment had been completed.” However, a close inspection of the second job posting reveals that while the posting was *printed* on October 16, 2009, the date on the job posting listed July 27, 2009, as the *closing* date for the job order. October 16, 2009, was merely the date the Employer printed off a copy of his second submission to the SWA.

Unfortunately, the Employer failed to submit the second job order to the CO in response to the RFI, thereby demonstrating that it had conducted a proper test of the job market. I cannot consider the documentation showing that the denial originated from a third party’s clerical error or that the error was ultimately corrected before the application for certification was filed.<sup>3</sup> Because BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination,

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<sup>2</sup> The Employer also attached a letter from the Program Manager of the Wyoming SWA. The letter indicated that the Employer was not at fault for the misprint in the original job posting, and the SWA incorrectly used the wrong wage.

<sup>3</sup> According to the Employer’s notice of appeal, the original job posting was sent to the CO rather than the corrected version. Therefore, the CO did not see the job posting listing the wage as \$7.42 until after the Final Determination was made.

see *Clay Lowry Forestry*, 2010-TLN-00001, slip op at 3 (Oct. 22, 2009), only the CO has the ability to accept documentation *after* the Final Determination and ultimately alter his findings. As was pointed out in *Clay Lowry Forestry*, “while this may seem a harsh result, the standard of review leaves me no other option when. . .it appears that the CO is unwilling to accept documentation submitted after the final determination’s issuance.” *Id.* Because the documentation submitted to the CO indicated the Employer recruited at a wage below that required by regulations, the CO properly denied certification because it appeared that the Employer did not obtain an appropriate test of the labor market.

**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