



Issue Date: 03 November 2009

BALCA Case No.: 2010-TLN-00006

In the Matter of:

HANDY ANDY SNOW REMOVAL,
Employer

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

ORDER OF DISMISSAL

On October 9, 2009, the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”) received a letter from Handy Andy Snow Removal (“the Employer”) requesting review in the above-captioned temporary alien labor certification matter. In that letter, the Employer wrote that the Employment and Training Administration’s Chicago National Processing Center (“the CNPC”) had not timely issued a prevailing wage determination (“PWD”). The Employer referenced a “de facto denial” and requested a de novo hearing. On October 20, 2009, the Board issued a *Notice of Docketing* directing the Employer and the Associate Solicitor for Employment and Training Legal Services (“the Solicitor”) to file briefs on the issue of whether BALCA has jurisdiction to hear this appeal. On October 30, 2009, both parties timely filed their briefs.

Background

On August 20, 2009, the Employer filed an application for a PWD from the CNPC. RFR at 3.¹ On August 27, 2009, the CNPC issued a *Notice of Deficiency* (“NOD”) explaining that the Employer had not provided sufficiently specific information

¹ Citations to the parties’ submissions will be abbreviated as follows: SX – Exhibits attached to the Solicitor’s October 30, 2009, brief; RFR – the Employer’s October 9, 2009, Request for Review.

to allow the CNPC to process the application. SX 1.² In particular, the Employer identified the “Place of Employment” as an address in Gypsum, CO, “and worksites within a 50 mile radius.” RFR at 8. The CO returned the application and directed the Employer to “clarify whether or not work will be performed exclusively in Eagle County” and, if not, to identify any additional worksites “with as much specificity as possible.” SX 1. On October 2, 2009, counsel for the Employer sent an e-mail to the CNPC asking to be forwarded the PWD “as soon as possible” so that the Employer could file its application for temporary labor certification “without further delay.” RFR 3-4. Following the Employer’s October 9, 2009, appeal, the CNPC issued an October 15, 2009, NOD regarding the same issue identified in the August 20, 2009, notice. SX 2.

Discussion

An employer wishing to file an application for temporary non-agricultural labor certification must first obtain a PWD from the CNPC. 20 C.F.R. § 655.10(a) (2009). Upon receiving an application for a PWD, the CNPC has 30 days to issue its determination. § 655.10(b)(6). After the CNPC issues the initial PWD, the employer has 10 days to request that a Certifying Officer (“CO”) review the PWD. *See* § 655.11(a)-(d). The regulations do not provide a set period of time for the CO to issue his decision. However, once the CO has conducted his review, the employer may request BALCA review within 30 days of the date of the CO’s “final determination.” § 655.11(e). BALCA must adjudicate a PWD appeal “in accordance with” 20 C.F.R. § 655.33. § 655.11(e)(3).

In its brief, the Employer argues that the CNPC’s failure to issue a PWD within the 30 day time limit required by § 655.10(b)(6) was a de facto denial of its application for temporary labor certification because the CO’s inaction prevented it from lawfully filing its application for temporary labor certification. The Employer therefore requests that BALCA order the CO “to approve” its certification application, which it attached to the October 9, 2009, appeal letter. RFR at 10-50. The Solicitor responds by arguing that

² The notice was sent to Kristen Nelson. SX 1. Ms. Nelson, who is the Employer controller, was listed as the Employer’s point-of-contact on the PWD application. RFR at 6.

BALCA would have had jurisdiction to review the CNPC's first NOD had the Employer requested review within 30 days of August 27, 2009. Since the Employer filed its appeal letter more than 30 days after August 27, 2009, the Solicitor urges the Board to find the appeal untimely and to decline to review the CO's determination. Alternatively, the Solicitor argues that the Board's review would be limited to determining whether the CO properly issued the August 27, 2009, NOD and that the Employer's requested remedy is therefore "not appropriate."

Neither party's position is entirely persuasive. As discussed *supra*, BALCA has authority to review a CO's "final determination" on a PWD application. In this case, the CNPC never issued an initial PWD, and a CO never issued a "final determination" for BALCA to review. Without a "final determination" from a CO, BALCA cannot conduct a § 655.11(e) review. In requesting review of the CNPC's failure to issue a PWD within the 30-day window required by § 655.10(b)(6), the Employer asks BALCA to exercise review authority that the regulations simply do not confer.

Even if BALCA could review a failure to timely issue a PWD, the Employer did not follow the proper appeal procedures. In particular, the Employer first would have had to timely request a CO's review of the CNPC's inaction before appealing to BALCA. *See* § 655.11(a)-(d). The Employer instead skipped a step by appealing directly to BALCA. The Employer's failure to seek review from a CO within 10 days of either the issuance of the NOD or the expiration of the CNPC's 30-day window for issuing a PWD would foreclose a subsequent appeal to BALCA.³

Last, even if BALCA could review a failure to timely issue a PWD, and the Employer had followed the proper appeal procedures, it is not clear that the Employer would be entitled to relief. In its appellate brief, the Employer alleges that the CNPC "failed to timely respond to" its PWD application. However, the CNPC issued its first

³ Even if counsel's October 2, 2009, e-mail were treated as a request for review by a CO, it would have been untimely as it was submitted 36 days after the CNPC issued the NOD and 13 days after the expiration of the CNPC's 30-day window for issuing a PWD. *See* § 655.11(a).

NOD seven days after receiving the PWD application.⁴ Despite the Employer's contrary assertion, the CNPC timely acted on the Employer's application but was unable to calculate and issue a PWD because the Employer did not respond with more specific information about the locations of its jobsites. Assuming that that such information was necessary for calculating the PWD, it is unclear how the CNPC should have processed the application differently.

Accordingly, since BALCA lacks authority to conduct the review requested, the Employer did not follow the proper appeal procedures, and the CNPC timely acted on the Employer's application, I will dismiss the Employer's appeal.

Order

It is hereby **ORDERED** that the Employer's appeal is **DISMISSED**.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

⁴ In his filings before BALCA and his October 2, 2009, e-mail to the CNPC, the Employer's counsel never acknowledged the existence of the NOD, which raises the question of whether he received this document from the CNPC.