

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 22 November 2010**

**BALCA Case No.: 2011-TLN-00002**

ETA Case No.: C-10273-51114

*In the Matter of:*

**ELLSWORTH MANAGEMENT COMPANY,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Before: **WILLIAM S. COLWELL**  
Associate 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 ("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 30, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Ellsworth Management

Company (“the Employer”). AF 51.<sup>1</sup> The Employer requested certification for 14 grounds maintenance workers from December 1, 2009 to May 31, 2010. *Id.*

By letter dated October 4, 2010, the Employer stated that it requests 14 grounds maintenance workers from December 1, 2010 to March 31, 2011. AF 31. Additionally, the Employer submitted a corrected application on October 8, 2010. AF 19-30. On October 5, 2010, the CO issued a *Request for Further Information* (“RFI”), which required the Employer to submit its ETA Form 9141 and Prevailing Wage Determination (“PWD”) by October 12, 2010. On October 8, 2010, the Employer submitted a response to the RFI, but did not submit the PWD for the job opportunity that was requested in the original RFI. AF 18. The Employer submitted two PWDs for the position of Landscaping and Groundskeeping Workers, but from two employers other than the Employer. AF 18. One PWD named “Exterior Decorator” as the employer, and the other PWD listed “Lawns Plus LLC” as the employer. AF 18, 34-43. Therefore, the CO denied certification based on the Employer’s failure to follow the H-2B pre-filing requirements under 20 C.F.R. § 655.10. AF 18. On October 25, 2010, the Employer appealed the denial, arguing that it inadvertently sent other companies’ prevailing wage determinations to the CO. The Employer also stated that the “[c]orrect prevailing wage determination was sent,” although no other prevailing wage determination was enclosed with its brief.

### Discussion

The regulations for temporary labor certification under the H-2B program require an employer to request a prevailing wage determination from the National Processing Center. 20 C.F.R. § 655.10(a)(1). 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 of Labor. 20 C.F.R. § 655.10(a)(2).

Here, the Employer did not submit a copy of the prevailing wage determination that it requested from the National Processing Center. Although the Employer asserts that it later sent the “correct prevailing wage determination,” its prevailing wage determination is not part of the record. Further, even if it was, the scope of BALCA’s review is limited to evidence before the CO at the time of the final determination. 20 C.F.R. § 655.33. As the Employer failed to submit the proper prevailing wage

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<sup>1</sup> Citations to the 60-page appeal file will be abbreviated “AF” followed by the page number.

determination, it did not comply with the pre-filing requirements, and I find that the CO properly denied temporary labor 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