

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 26 February 2013

BALCA Case No.: 2013-TLN-00032
ETA Case No.: H-100-12363-264554

In the Matter of:

GRIGORIY & FAMILY ENTERPRISES, INC.

Employer

Certifying Officer: Chicago National Processing Center

Appearances:

Gary M. Buff, Associate Solicitor
Vincent C. Constantino, Senior Trial Attorney
Office of the Solicitor of Labor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

DECISION AND ORDER

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Employer Grigoriy & Family Enterprises, Inc.’s request for administrative review of the Certifying Officer’s denial of temporary labor certification under the H-2B non-immigrant program. For the reasons set forth below, the Certifying Officer’s denial in this matter is **AFFIRMED**.

BACKGROUND

The H-2B Program

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”),

Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* (ETA Form 9142) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20 (2008).¹ After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer, who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

Procedural History

On December 28, 2012, Grigoriy & Family Enterprises, Inc. (“the Employer”) filed an *Application for Temporary Employment Certification* with ETA’s CNPC, seeking temporary labor certification for eight “First Line Supervisors of Housekeeping and Janitors,” from April 22, 2013 to March 26, 2014. AF 119-151.² The rate of pay for this position was \$10.78 per hour. AF 123.

On January 4, 2013, the CO issued a *Request for Further Information* (“RFI”) informing the Employer that its application failed to meet all of the requirements of the H-2B program. AF 108-118. In particular, the CO questioned whether the Employer was offering a wage which does not equal or exceed the highest of the prevailing wage, the federal minimum wage, state minimum wage, or local minimum wage applicable through the duration of the H-2B employment, as required by 20 C.F.R. §§ 655.10, and 655.22(e). AF 114. Accordingly, the CO instructed the Employer to submit evidence that it satisfied the regulatory pre-filing requirements, including but not limited to, “the ETA Form 9141, *Prevailing Wage Determination*.” *Id.*

On January 14, 2012, the CO received the Employer’s response to the RFI. AF 39-107. The Employer submitted the Adverse Effect Wage Rates for the year 2012, which reflects a wage of \$10.78 for the state of Michigan, and a copy of the ETA 9141 it completed in connection with its application. AF 69-74. However, the Employer did not provide any evidence that it actually submitted this form to the National Prevailing Wage Center (“NPWC”), or that the NPWC ever issued a prevailing wage determination in response to this request.

On January 25, 2013, the CO issued a *Final Determination* denying certification. AF 23-37. The CO explained that the H-2B regulations require an employer to obtain a prevailing wage determination that is valid either on the date recruitment begins or the date that the employer files its application for temporary labor certification. AF 31, 114. Because the ETA Form 9141

¹ All citations to 20 C.F.R. Part 655 refer to the Final Rule promulgated in 2008. Although the Department promulgated a new Final Rule in February 2012, the U.S. District Court for the Northern District of Florida has issued an order enjoining the Department from implementing or enforcing this rule. *See Bayou Law & Landscape Services et al. v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (April 26, 2012). Accordingly, on May 16, 2012, the Department announced the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the district court’s order. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Guidance*, 77 Fed. Reg. 28764, 28765 (May 16, 2012).

² Citations to the Appeal File will be abbreviated “AF” followed by the page number.

the Employer submitted in response to the RFI did not include a prevailing wage determination issued by the NPWC, the CO determined that the Employer failed to provide sufficient documentation to overcome the deficiency listed in the RFI. AF 32.

The Employer requested administrative review of the CO's denial on February 4, 2013. AF 1-22. The Employer asserted that it submitted an ETA 9141 Form to the National Prevailing Wage Center, and attached e-mail correspondence from the Office of Foreign Labor Certification confirming that the Employer submitted an ETA Form 9141 "for the position of First line supervisors of housekeeping and Janitorial Works" to the NPWC on January 25, 2013. AF 13. BALCA received the Appeal File from the CNPC on February 8, 2013; a statement of position from the Employer on February 12, 2013; and a statement of position from the CO on February 19, 2013.

DISCUSSION

The regulations require an employer seeking H-2B temporary labor certification to request a prevailing wage determination from the NPWC. 20 C.F.R. § 655.10(a)(1). Section 655.10(a)(2) specifies that an 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."

Here, the Employer began its recruitment on December 14, 2012, and filed its application on December 28, 2012. AF 119-151. But the Employer did not even submit its request for a prevailing wage determination to the NPWC until January 25, 2013—almost a month after it filed its application. AF 13. The Employer thus failed to "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," as required by section 655.10(a)(2). Accordingly, I find that the CO properly denied certification.

ORDER

In light of the foregoing, the Certifying Officer's *Final Determination* denying certification is hereby AFFIRMED.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge