

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 04 February 2013

BALCA Case No.: 2013-TLN-00025
ETA Case No.: H-400-12333-423221

In the Matter of:

HERDER PLUMBING, INC.,

Employer

Certifying Officer: Chicago National Processing Center

Appearance: Jeff Herder
Owner, Herder Plumbing, Inc.
Mesa, Arizona
For the Employer

Before: **PAUL R. ALMANZA**
Administrative Law Judge

ORDER OF REMAND
FOR CONSIDERATION OF EVIDENCE SUBMITTED
WITH REQUEST FOR REVIEW

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, as defined by the Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.33(a).

STATEMENT OF THE CASE

On December 3, 2012, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Herder

Plumbing, Inc. (“the Employer”). AF 28-44.¹ The Employer requested certification for fifteen Helpers – Pipelayers, Plumbers, Pipefitters, and Steamfitters, from February 15, 2013, to December 15, 2013. AF 28. The Employer also submitted its recruitment report with its application, as required by the H-2B pre-filing requirements. This report noted that the Employer received one applicant as a result of its advertisements placed in the *East Valley Tribune* and its placement of job order 569667 with the Arizona Department of Economic Security. AF 40. The Employer did not hire this applicant because even though it called him three times, the applicant never called back. *Id.*

On December 10, 2012, the CO issued a *Request for Further Information* (“RFI”), notifying the Employer that it was unable to render a final determination for the Employer’s application because the Employer did not comply with all requirements of the H-2B program. AF 24-27. The CO identified one deficiency resulting in denial of certification: “failure to comply with required pre-filing recruitment obligations” under 20 C.F.R. § 655.15(e). Specifically, the CO determined that “the employer did not establish that the job order was kept open for a period of not less than 10 calendar days.” AF 26. The CO then stated that if the Employer had evidence establishing that it complied with the pre-filing advertising requirements, it must provide the job order and all newspaper advertisements. AF 27. The CO also required the Employer to submit appropriate corrections to the ETA Form 9142. *Id.*

On December 14, 2012, the Employer submitted a response to the RFI stating that the job order was open from October 24, 2012 through November 6, 2012, more than ten days, and that advertisements were published in the *East Vallley Tribune* on Sunday, October 28, 2012, and Wednesday, October 31, 2012. In compliance with the RFI, the Employer submitted copies of the job order and the newspaper advertisement with its response. AF 18-23. The Employer also authorized the CO to correct the ETA Form 9142 to reflect the correct start and end dates of the job order. AF 19.

On January 2, 2013, the CO issued a final determination denying certification. AF 13-17. The CO stated that the Employer did not correct the deficiency identified in the RFI. AF 9-11. While the CO acknowledged that the Employer submitted a job order that was open for 10 days and also submitted a copy of the newspaper advertisements, AF 10-11, the CO determined that the Employer’s submission of this documentation did not correct the identified deficiency on the grounds that “the contents of the job order did not meet the regulatory requirements at 20 CFR 655.15(e)(2) which states the job order submitted by the employer to the SWA must satisfy all requirements for newspaper advertisements contained in 655.17” and “[t]he employer’s job order failed to provide the dates of need as well as the job duties.” AF 11. (The CO did not acknowledge that the Employer addressed the identified need to correct the ETA Form 9142 in its response to the RFI.)

On January 9, 2013, the Employer submitted a request for BALCA review, arguing that it had provided the appropriate information to the Arizona State Workforce Agency (AZ SWA)² in submitting its job order request and that the state agency had erred in not including the dates of need and job duties information on the job order. AF 1-6. In support of its position, the

¹ Citations to the 44-page appeal file will be abbreviated “AF” followed by the page number.

² The formal name of the agency is the Arizona Department of Economic Security. AF 3-6.

Employer submitted a copy of the job order request it submitted to the AZ SWA. This document stated the dates of need for the position were “February 15th, 2013 to December 15th, 2013” and stated the job duties for the position were “[t]o help pool laborers using, supplying or holding pipes for pools, and cleaning work area and equipment.” AF 5-6. The Employer also submitted a January 9, 2013, letter from Cammy Cecil of the AZ SWA stating that the agency erred in not correctly entering the job order request into their system and apologizing for the agency’s error. AF 3-4.

The Board received the request for review on January 11, 2013, and the appeal file on January 16, 2013. On January 17, 2013, the Employer filed a letter enclosing the appeal file and expressing the hope that these documents will help resolve this matter. As of February 1, 2013, no brief has been filed on behalf of the CO.

DISCUSSION

The scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e).

In this case, the CO denied the Employer’s application based not on the original deficiency identified in the RFI (failure to establish the job order was kept open for not less than 10 calendar days), but rather on additional deficiencies found in the Employer’s response to the RFI (failure to include the dates of need and job duties in the job order). The Board has previously found it “problematic” when “the CO appears to have denied the application due to additional deficiencies found in the Employer’s response to the RFI” because failing to list in the RFI the specific ground on which the denial is based “denie[s] the Employer notice and an opportunity to address th[e] issue.” *Fabulous Flavors, Inc., d/b/a Baskin Robbins*, 2009-TLN-35, slip op. at 3 (Apr. 14, 2009). Here, the RFI failed to note the specific deficiencies in the job order upon which the denial was ultimately based and thus the Employer had no notice of these deficiencies until the Final Determination was issued.

Moreover, the regulation at issue merely imposes a duty on the employer to submit the requisite information to the state workforce agency; it does not require the employer to ensure that agency accurately enters that information into its system. Specifically, 20 C.F.R. § 655.15(e)(2) states: “The job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.17.”

The CO could have asked the Employer for more information about what was contained in the job order request it submitted to the AZ SWA to determine whether the Employer met its obligations under 20 C.F.R. § 655(e)(2). Instead, the CO appears to have assumed that the AZ SWA included in the job order entered into its system all of the information that the Employer submitted in its job order request to the AZ SWA in accordance with 20 C.F.R. § 655.15(e)(2). The evidence the Employer has submitted with its request for review at AF 3-6 addresses this issue.

Accordingly, a strict application of the scope of review regulation precluding any consideration of the Employer's evidence at AF 3-6 would deny the Employer its only opportunity to argue and present evidence demonstrating that it had, in fact, met its obligation to provide all the requisite information in its job order request to the AZ SWA in accordance with 20 C.F.R. § 655(e)(2).

Procedural due process requires that an employer be permitted to respond to the basis for denial where the employer did not previously have the opportunity to establish the relevant facts. Accordingly, as the CO's denial appears to have been based on the Employer's failure to submit a job order to the AZ SWA in compliance with 20 C.F.R. § 655(e)(2), fundamental fairness requires this case to be remanded to allow the CO to consider the evidence at AF 3-6 that the Employer submitted with its request for review.

ORDER

In light of the foregoing, it is hereby **ORDERED** that this matter is **REMANDED** to the Certifying Officer for consideration of the evidence submitted on appeal.

For the Board:

PAUL R. ALMANZA
Administrative Law Judge