

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 February 2014

BALCA Case No.: 2014-TLN-00009
ETA Case Nos.: H-400-13344-610510

In the Matter of:

STEVEN HEGER

Employer.

Appearances: Lesli Downs
Southern Impact
Fairview, OK
For the Employer

Gary M. Buff, Associate Solicitor
Jonathan R. Hammer, Attorney
Office of the Solicitor of Labor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Certifying Officer: Chicago National Processing Center

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

DECISION AND ORDER

This case arises from the Employer's request for review of the Certifying Officer ("CO")'s denial of an application for temporary alien labor certification under the H-2B nonimmigrant program. The H-2B nonimmigrant 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). For the reasons explained below, this matter is REMANDED to the CO for evaluation of the Employer's response to the RFI.

STATEMENT OF THE CASE

On December 10, 2013, Steven Heger ("Employer") submitted an application to the Department of Labor's Chicago National Processing Center ("CNPC"), requesting H-2B labor certification for one Farm Equipment Mechanic from December 1, 2013 through April 1, 2014. Administrative File ("AF") at 38. On December 16, 2013, the CO issued a *Request for Further Information* ("RFI") informing the Employer that its application did not include adequate attestations to establish a temporary need for the Farm Equipment Mechanic, as required by 20 C.F.R. §§ 655.6, 655.21(a), given that the Employer already had an active H-2A certification for similar job duties at the same address. AF 35-36. Accordingly, the CO directed the Employer to "submit additional information which clarifies that the duties of the worker are not agricultural in nature." AF 37.

On December 30, 2013, the CNPC informed the Employer's agent via email that it had not yet received a response to the RFI. AF 27-28. In this email, the CNPC informed the Employer's agent that the Employer needed to respond by email to TLC.Chicago@dol.gov or by fax to 312-353-8830 by 2:00 pm on December 31, 2013 if it wanted the CNPC "to continue to process the H-2B application without further delay." AF 27-28. The Employer's agent sent a response a half hour later, informing the CNPC that she had not received a copy of the RFI. AF 27. Later that afternoon, the CNPC sent the Employer's agent an email with a copy of the RFI that the CO originally issued on December 16, 2013. *Id.* That same day, the Employer's agent emailed a response to the RFI to TLC.Chicago@dol.gov. AF 27, 29-30.¹ On January 9, 2014, however, the CO issued a letter denying the Employer's application based on the Employer's failure to provide a response to the RFI, as required by 20 C.F.R. § 655.23(d). AF 16-23.

By letter dated January 14, 2014, the Employer's agent requested BALCA review, arguing that she had responded to the RFI the same day that she was informed an RFI had been issued. The undersigned Administrative Law Judge issued a Notice Docketing on January 23, 2014, informing the parties that BALCA had docketed the appeal and providing the parties the opportunity to file a brief on an expedited basis.

The Board received a copy of the Administrative File on January 31, 2014. Counsel for the CO filed a brief on February 7, 2014, acknowledging that the Employer's response to the RFI had not been evaluated but nevertheless arguing that this response does not alter the CO's finding in the RFI that the employer failed to demonstrate a temporary need.

DISCUSSION

In denying the Employer's application, the CO relied on his understanding that the Employer had failed to respond to the RFI. The Administrative File makes clear that the CO was

¹ The index to the Administrative File indicates that the analyst who reviewed the Employer's application never received a copy of this response.

misinformed and that the Employer did in fact respond to the RFI. I am unpersuaded by Counsel for the CO's argument that nothing in the Employer's response alters the CO's finding that the Employer failed to demonstrate a temporary need, because such a finding must be made by the CO in the first instance. Accordingly, this matter is hereby REMANDED to the CO to evaluate the Employer's response to the RFI.

SO ORDERED.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge