

U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433



(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 28 April 2014

OALJ Case No.: 2014-TLN-00025

ETA Case No.: H-400-14050-999516

In the Matter of:

**G-VINE CORP.,
D/B/A FRESH COAT PAINTERS,**
Employer

Appearances: Gary Davine
Owner/President
G-Vine Corp.
Jupiter, FL
For the Employer

Jonathan Hammer, Esq.
Attorney
Office of the Solicitor of Labor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: **PATRICK M. ROSENOW**
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL
OF TEMPORARY LABOR CERTIFICATION**

This matter is before the Board of Alien Labor Certification Appeals (BALCA) pursuant to Employer's request for review of the Certifying Officer's denial in the above-captioned H-2B temporary labor certification matter. The H-2B program allows employers to hire foreign workers to perform temporary, non-agricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security, "if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor."¹ Employers who seek to hire foreign workers under

¹ 8 C.F.R. § 214.2(h)(1)(ii)(D); 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(ii)(B); 20 C.F.R. § 655.6(b). The proposed revisions to federal regulations related to the H-2B program, 20 C.F.R. Part 655, Subpart A,

this program must apply for and receive a labor certification from the U.S. Department of Labor.² Applications are reviewed by a Certifying Officer (CO) of the Office of Foreign Labor Certification of the Employment and Training Administration (ETA).³ If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA.⁴

On February 19, 2014, Employer submitted an H-2B Application for Temporary Employment Certification (ETA Form 9142B) for one electrostatic painter as an intermittent or other temporary need employee for the period from 1 Apr 14 to 31 Mar 15.⁵ Employer stated

We are in need of qualified individuals who are skilled at electrostatic spraying. This is a phase of painting that we have recently added to our portfolio to set us apart from all the other painting services in the North Palm Beach area. In electrostatic spray painting, the atomized paint particles are given a negative electrostatic charge, thereby repelling each other and spreading themselves evenly as they exit the spray nozzle. The object being painted is charged oppositely or grounded. To qualify as an electrostatic sprayer, the painter must know what spray nozzle to use, what consistency the paint must be prepared at and which solvents need to be used in order for the paint to accept a charge. I have one painter who is highly skilled at this process but will need at least one more individual in order to grow my business. The pool of candidates in my area is very slim. We do high-end quality painting and I have trouble finding a skilled, experienced regular painter, let alone someone who understands the electrostatic process. My main painter has worked with Vladko Pagovski and has recommended him as someone who is highly skilled at this process.

On February 26, 2014, the CO sent a Request for Further Information (RFI) to Employer via email.⁶ The RFI explained that Employer's application contained seven deficiencies that Employer had to address by providing further information and stated that the materials must be received by the CO within seven calendar days of the date of the RFI, or March 5, 2014. The RFI stated that failure to comply with it, including not providing all documentation within the specified time period, may result in denial of the application.⁷

The CO received no response from Employer, and on March 17, 2014, issued a denial of Employer's application.⁸ On March 31, 2014, Employer submitted its request for an appeal of the CO's denial.⁹ Employer explained that he had been expecting a mailed letter and instead received an email from the CO containing the RFI as an attachment, which went directly into his "spam" folder.

published in Vol. 77 Fed. Reg., No. 34 at 10038-10109 and 10147-10169 (Feb. 21, 2012) were stayed on May 16, 2012. These citations refer to the 2008 Rule.

² 8 C.F.R. § 214.2(h)(6)(iii).

³ 20 C.F.R. § 655.23.

⁴ 20 C.F.R. § 655.33(a).

⁵ Appeal File (AF) at 34.

⁶ AF 25-33.

⁷ AF 13; 20 C.F.R. § 655.23(d).

⁸ AF 9-22.

⁹ AF 1-8.

DISCUSSION

If a temporary labor certification is denied, the Final Determination letter states that an employer may request review in accordance with 20 C.F.R. Section 655.61. That regulation provides that an appeal to BALCA must be made within ten business days from the date of determination.¹⁰ The request may contain only legal argument and what evidence was before the CO on the date the determination was issued.¹¹

In this case, while Employer submitted additional materials with its request, including copies of proposed contracts, I can only consider the evidence in its application and argument in its appeal request.

The regulations state that:

Any notice or request sent by the CO to an employer requiring a response will be mailed to the address provided in the *Application for Temporary Employment Certification* using methods to assure next day delivery, **including electronic mail**. The employer's response to such a notice or request must be mailed using methods to assure next day delivery, including electronic mail, and be sent by the date or the next business day if the due date falls on a Saturday, Sunday, or Federal holiday.¹²

In its application, Employer listed an email address, gdavine@freshcoatpainters.com, in Section D., "Employer Point of Contact Information."¹³ Employer was thus on notice that correspondence from the CO, including an RFI, could be sent via electronic mail.

¹⁰ 20 C.F.R. § 655.61(a)(1).

¹¹ *Id.* at § 655.61(a)(5).

¹² 20 C.F.R. § 655.30(b) [emphasis added].

¹³ AF 35.

Employer concedes that it did not timely respond to the CO's RFI, which was sent on February 26, 2014 and required a response by March 5, 2014.¹⁴ The regulations provide that failure to timely respond is grounds for denial.¹⁵ The record supports the CO's reason for denial, therefore it is **AFFIRMED**.

ORDERED this 28th day of April, 2014, at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge

¹⁴ "I received an email on February 26 with an RFI attachment. The problem was that it went directly to my spam folder and I never saw it. On March 17, I received the denial letter explaining that I did not take any further action and that my request was denied." AF 1.

¹⁵ 20 C.F.R. § 655.23(d)