



Issue Date: 21 August 2014

BALCA Case No.: 2014-TLN-00039
ETA Case No.: H-400-14125-617304

In the Matter of:

JK MOVING SERVICES,
Employer.

Appearances: Andrea Bunch¹
 For the Employer

Jonathan R. Hammer, Esq.
Office of the Solicitor
For the Certifying Officer

Before: PAUL C. JOHNSON, JR.
 District Chief Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

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). 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 Employer’s request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the Employer’s application. 20 C.F.R. § 655.33(a), (e).

¹ Although Employer did not file a brief on appeal, and is not represented by counsel before BALCA, the Employer’s request for review was signed by Ms. Burch, its Vice President of Human Resources, and I have considered the arguments made in her letter of August 8, 2014 requesting BALCA review.

STATEMENT OF THE CASE

JK Moving Services (“Employer”) filed an ETA Form 9142 *Application for Temporary Labor Certification* (“Application”), requesting H-2B labor certification for a peakload need of 50 “Laborers and Freight, Stock, and Material Movers, Hand” positions from June 1, 2014 to October 1, 2014. AF 221-228.²

On July 7, 2014, the CO issued a *Request for Further Information* (“RFI”), notifying the Employer that the Department was unable to render a final determination for its application for failure to satisfy all requirements of the H-2B program. AF 209-220. The CO identified seven deficiencies in the RFI, and requested that the Employer take certain steps to correct them within 7 calendar days of the date of the RFI. Among the deficiencies was the CO’s determination that the Employer did not request a prevailing wage determination (PWD) and therefore did not satisfy pre-filing requirements. The CO instructed the Employer to request and obtain a PWD from the National Prevailing Wage Center (NWPC), and to offer and advertise its positions at a wage that was at least equal to the PWD obtained from the NWPC. The CO further instructed the Employer to submit documentation that it had done so, and that the documentation must include at least a *Prevailing Wage Determination*, ETA Form 9141. AF 216-217.³

The Employer responded to the RFI by email dated July 14, 2014. AF 186-208. The response included four documents: (1) an explanation of intended employment, (2) a recruitment report dated May 10, 2010, (3) an employee status chart, and (4) an employee chart for “moving helpers.” AF 189-208. The Employer also submitted an authorization for the CO to amend its application, but did not provide any information on which an amendment to the prevailing wage information on the application could be made. The response did not include any information concerning the PWD, and did not include a copy of the ETA Form 9141.

On July 30, 2014, the CO issued a Final Determination on Employer’s application. AF 176-185. With respect to the prevailing wage issue, the CO stated:

² Citations to the 228-page appeal file will be abbreviated “AF” followed by the page number.

³ The CO based her ultimate denial on this ground and four additional grounds. Because I will uphold the CO’s denial based on the Employer’s failure to obtain and document a prevailing wage determination, I need not discuss the other four grounds for denial. Additionally, in the RFI, the CO identified two additional deficiencies; however, the CO accepted the Employer’s response to the RFI with respect to those deficiencies and did not base the denial on them, so again I need not discuss them here.

In accordance with Departmental regulations at 20 C.F.R. § 655.23(c)(1), the Department issued an RFI to the employer on July 07, 2014. An RFI provides an employer the opportunity to remedy any deficiencies identified in the employer's application.

The RFI requested that the employer provide evidence that it satisfied the regulatory pre-filing requirements. The employer's response must include, but is not limited to, the ETA Form 9141, *Prevailing Wage Determination*.

The Chicago NPC issued an RFI to the employer via email on July 07, 2014. The employer was afforded seven calendar days from the date on the letter to provide the information requested. The response to the RFI was due at the Chicago NPC on July 14, 2014.

The Chicago NPC received a response to the RFI on July 14, 2014 via email. The response included the following:

- a) A cover sheet;
- b) Copies (2) of the Intended Employment letter dated July 11, 2014;
- c) A Recruitment Report dated May 10, 2010;
- d) A copy of the Employee Status Chart; and
- e) A copy of an Employee Chart for Moving Helpers.

The employer's response to the RFI did not include the ETA Form 9141 *Prevailing Wage Determination* as requested. Consequently, the employer's response was inadequate to overcome the deficiency listed above.

AF 180-181. Accordingly, the CO denied the Employer's application for H-2B labor certification.

By letter dated August 8, 2014, the Employer requested review of the CO's denial. AF 1-175. The Employer asserted:

[Our] originally submitted petition identif[ied] the need for [seasonal] workers beyond the August 2014 time frame to ensure our organization's ability to service military and government shipment of household goods in accordance with our contractual requirements. The exit of seasonal, temporary, and college students required to meet our needs is significantly depleted during the summer season due to a lack of qualified applicants (able to pass both a drug screen and pre-employment certification process), and those available to serve in manual labor capacities for the purposes described in our petition.

This package includes 1) a copy of our denial letter; 2) support documentation submitted with our original petition that was either omitted by the immigration law firm acting on our behalf, or inadvertently separated from our original submission; 3) a copy of our prevailing wage determination (ETA Form 9141).

The CO filed a brief on August 20, 2014, arguing that:

...in the RFI, the CO stated that she was unable to determine whether the employer is offering a wage which at least equals the highest of the prevailing wage or the federal, state, or local minimum wage. Therefore, the CO asked JK to submit a copy of its ETA Form 9141, the prevailing wage determination form. However, JK's response did not include that form. AF 186-208. Therefore, the employer has not demonstrated that it is offering the prevailing wage, so the CO correctly denied the application.

The Employer did not file an appeal brief.

DISCUSSION

Scope of Review

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 Employer has submitted evidence – the ETA Form 9141 – with its request for review. The regulation is clear that a request for review “[m]ay contain only legal argument and such evidence as was actually submitted to the CO in support of the application.” 20 C.F.R. § 655.33(a)(5). The ETA Form 9141 was not submitted to the CO in support of the application. Accordingly, I cannot consider it on appeal.⁴

Under 20 C.F.R. § 655.10, an employer seeking temporary alien labor certification must obtain a prevailing wage determination from the National Processing Center “that is valid either on the date recruitment begins or the date of filing a complete” application. 20 C.F.R. § 655.10(a)(2), (b). Thereafter, the employer must offer and advertise the position to potential workers at a wage at least equal to the PWD obtained from the NPC. Finally, an employer must certify on its application that it is offering a wage that “equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and local minimum wage...” 20 C.F.R. § 655.22(e). In this case, the Employer indicated on its application that the offered wage was \$9.00 to \$10.15 per hour (AF 225) but did not show that it had obtained a PWD. Accordingly, the CO could not determine whether the offered wage was equal to or exceeded the highest of the prevailing wage, the applicable Federal minimum wage, the

⁴ If I could consider it, I would find that the ETA Form 9141 does not help the Employer. The regulations require an employer to obtain a PWD *before* filing its application for alien labor certification. The PWD was not requested until July 9, 2014, after the application was filed and the RFI was issued. It was certified on August 1, 2014, well after the application was filed and about halfway through the period of need for the employees. AF 23-26.

State minimum wage, or the local minimum wage (AF 216). To verify that the Employer had done so, the CO requested the Employer to provide a copy of the PWD as reflected on the Form 9141 – in other words, the CO tried to confirm that the Employer had obtained the PWD and advertised and offered the required wage prior to filing its application for temporary labor certification. The Employer failed to provide the requested form or any other information showing that it had obtained a PWD or offered the required wage. Accordingly, the CO properly denied certification.

ORDER

Based on the foregoing, IT IS ORDERED that the Certifying Officer's denial of temporary labor certification is AFFIRMED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ,JR/jcb
Newport News, Virginia