

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 December 2014

BALCA Case No.: 2015-TLN-00008
ETA Case No.: H-400-14322-764720

In the Matter of:
EL MESQUITE GRILL,
Employer.

Certifying Officer: Chicago National Processing Center

Appearance: Malvern C. Burnett
New Orleans, Louisiana
For Employer

BEFORE: John P. Sellers, III
Administrative Law Judge

ORDER OF REMAND

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 visa program. The H-2B visa program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time, 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). If the CO denies an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals ("the Board"). 20 C.F.R. § 655.33(a).

On November 18, 2014, El Mesquite Grill ("the Employer") filed an Application for Temporary Employment Certification ("Application") requesting H-2B temporary labor certification for eight Food Preparation Workers. On November 24, 2014, in accordance with 20 C.F.R. § 655.23(c), the CO issued a Request for Further Information ("RFI"), allegedly notifying the Employer that it was unable to render a final determination in the Employer's Application. The CO gave the Employer seven calendar days from the date of the RFI to submit additional information addressing deficiencies in the Application. On December 10, 2014, the CO denied the Employer's Application based on the Employer's failure to respond to the RFI.

Following the CO's determination, the Employer's counsel telephoned the U.S. Department of Labor and e-mailed the CO advising both that he never received the RFI. In response, in an e-mail dated December 17, 2014, the CO stated the Employer's inquiry was

under review and it would provide a response as soon as possible. In a letter dated December 17, 2014, in accordance with 20 C.F.R. § 655.33(a), the Employer's counsel requested administrative review of the CO's December 10, 2014 decision denying the Employer's Application. The Employer alleged that neither it nor its counsel of record received the RFI.

The record does not contain evidence establishing whether the CO delivered the RFI to the Employer or the Employer's counsel in accordance with 20 C.F.R. § 655.23(c). The CO appears to have based its denial on the Employer's failure to respond to an RFI that the Employer claims it never received. Procedural due process requires that the employer have an opportunity to respond to the denial where it did not previously have the opportunity to establish facts relevant to its case. Thus, in the interest of fundamental fairness, this case is remanded to the CO to give the Employer an opportunity to respond to the RFI and to give the CO the opportunity to consider the Employer's response.

ORDER

Accordingly, this matter is **REMANDED** to the Certifying Officer to give the Employer an opportunity to respond to the Request for Further Information.

For the Board:

John P. Sellers, III
Administrative Law Judge