



Issue Date: 17 December 2015

BALCA CASE NO.: 2016-TLC-00007
ETA CASE NO.: H-300-14078-140772

In the Matter of:

GARLAND L. PITT,

Employer.

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the U.S. Department of Labor (“the Department”), Employment and Training Administration (“ETA”) at 20 C.F.R. Part 655. This Decision and Order is based on the written record, consisting of the Appeal File (“AF”) forwarded by the Employment and Training Administration, and the written submissions of the parties pursuant to my December 2, 2015 Order.

BACKGROUND

On April 10, 2014, Garland Pitt Farms (“the Employer”) obtained H-2A temporary labor certification for one (1) Farmworker for the period beginning May 5, 2014, and ending December 15, 2014. AF at 58-62. On August 21, 2015, after the dates of need passed, and the certification expired, the Certifying Officer (“CO”) selected the Employer’s 2014 H-2A application for an audit and issued a Notice of Audit Examination (“NOAE”). AF at 50-55. Among other things, the CO directed the Employer to submit proof of positive recruitment steps, including copies of all newspaper advertisements required by 20 C.F.R. Part 655. AF at 51. The Employer responded to the NOAE on September 4, 2015. AF at 24-49. On September 8, 2015, the CO issued a Request for Supplemental Information letter (“RSI”), AF at 17-23, specifically requesting the Employer to: (1) substantiate its advertisements in a newspaper of general circulation in the area of intended employment, noting the Employer’s dates of need; (2) provide documentation establishing that the Employer adequately conducted the required recruitment, and; (3) provide documentation establishing its temporary need. AF at 17-18. The Employer submitted its response to the RSI on October 5, 2015. AF at 9-16.

Upon review of the documentation, on October 23, 2015, the CO issued a “Notice of Special Procedures” (“Notice”) to the Employer, informing the Employer that it must comply

with the special procedure requirements set forth at 20 CFR § 655.183(a) for future H-2A applications filed by the Employer between October 23, 2015, and October 22, 2016. AF at 3-8. The Notice alleged violations of 20 C.F.R. §§ 655.151, 655.152, and 655.154, charging the Employer with failure to provide adequate advertisements in a newspaper of general circulation in an area of intended employment and failure to provide documentation establishing that the employer adequately conducted the required recruitment. Specifically, the Notice charged that the Employer's required advertisements did not include the dates of need as required, thus the Employer's recruitment efforts may have negatively affected the recruitment of U.S. workers. AF at 4. In particular, the special procedure required that the Employer "must supply copies of the advertisements required by 20 C.F.R. § 655.151 and § 655.154 to [the CO] once an application has been Accepted for processing and before a favorable final determination can be issued. The contents of the advertisements must comply with 20 C.F.R. § 655.152." AF at 5.

On November 16, 2015, the Employer filed its "Appeal to USDOL ALJ for Administrative Review" ("Appeal"), requesting a reversal of the CO's decision to impose special procedure requirements for its failure to comply with Departmental regulations. In its Appeal, the Employer does not dispute that his advertisements did not comply with Departmental regulations. Instead, it notes that at the time of its 2014 H-2A application, it was represented by International Labor Management Corp. (ILMC), an agent that, in August 2014, took a voluntary disbarment and went out of business. As a result, the Employer states that it has been unable to obtain copies of files related to its H-2A application. The Employer, however, recognized that "at the end of the day, the employer is ultimately responsible for their H2A paperwork," but notes in mitigation that it, the Employer, was the only individual who did not see the advertisement prior to the Certification of its H-2A application. The Employer argues that the CO did not catch the error prior to certification, nor did the CO comply with the notification requirements of 20 C.F.R. § 655.140 and forward to the Employer (not just his agent) a copy of the Acceptance. The Employer notes that it has since "hired someone to oversee all of the H2A paperwork [who] reviews all documents including ads to ensure everything is correct [and] shares with [the Employer] a copy of the [A]cceptance." AF at 2.

The Appeal File was received by me on November 24, 2015. On December 2, 2015, after numerous attempts during the preceding week to arrange a conference call with the parties, I issued to the parties a Briefing Order, affording them the opportunity to brief their respective positions. On December 8, 2015, both parties filed briefs as directed. In its brief, the Employer noted that his former agent provided the newspaper proofs to the CO on April 9, 2014, prior to the CO certifying the Employer's case on April 10, 2014. It argued that "[n]o domestic applicants were denied employment based on the content of the advertisements," because, according to the Employer, no one applied. It further argued that an advertisement without dates "should have encouraged applicants to call and expect to work immediately." Employer Brief at 1. The Employer further argued that it was obligated to interview applicants until its "50% date," but received no applicants. It noted that the job order was also available in other mediums such as the "State Workforce or SWA," and that those postings did contain the dates of need. Employer Brief at 1. The Employer reiterated that "ultimately at the end of the day it's the employer that is responsible for the actions of their agent, and/or employees working on their behalf," but urges me to reverse the requirement of special procedures because the "[CO] is not justified in their decision to do so because [the CO] should have caught the error and "should not

be allowed to pass the consequences of their actions on to us.” Employer Brief at 1-2. The Employer further argued that the errors on the newspaper advertisements were the only errors found by the CO in its “intense review” of the Employer’s 2014 application/certification. The Employer concedes, however, that “[w]hether we would have noticed the error in the advertisements back in 2014 we cannot say with 100% surety ... [but] I can tell you that if we were to view the same advertisement today, we would know immediately that those advertisements did not comply with H-2A regulations.” Employer Brief at 1-2.

The CO, in its brief, notes that the Employer does not dispute that its advertisements were defective and argues that it was justified in its implementation of special procedures based on those deficiencies. The CO argues that the special procedure imposed does not impose unduly restrictive obligations on the employer and that “the special procedures contested by the employer are really no more than a requirement that the employer submit to the CO its advertisements demonstrating that it has complied with the regulatory mandate.” CO Brief at 8. The CO argues that the Employer’s contention that the Employer was not properly served with required documentation pursuant to 20 C.F.R. § 655.140, thus should not be held accountable, is irrelevant because the Employer was represented by an agent and, under agency theory, serving the agent was sufficient.¹

DISCUSSION

Pursuant to 20 C.F.R. Part 655, the CO may require an employer to follow special requirements during its recruitment process if the employer is guilty of a less than substantial violation of the terms of its labor certification and the CO determines that past actions on the part of the employer may have had or may continue to have a “chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers.” 20 C.F.R. § 655.183; *see also* 75 Fed. Reg. 6938 (February 12, 2010). “Such requirements will be reasonable ... and will be no more than deemed necessary to assure employer compliance with the test of U.S. worker availability and adverse effect criteria of this subpart.” 20 C.F.R. § 655.183(a).

The record reveals that the Employer’s 2014 H-2A application did not comply with the newspaper advertising requirements at 20 CFR §§ 655.151, 655.152, and 655.154. Even if, as the Employer argues, it relied on its agent, ILMC, to publish the required advertisements pursuant to the requirements set forth in the regulations, the record reveals – and the Employer does not dispute – that these newspaper advertisements were not published with the mandated dates of need. *See In the Matter of Talbott’s Honey, LLC*, 2013-TLC-00002, at 3 (Nov. 19, 2012) (holding employer liable despite good faith effort to publish notification). I reject the Employer’s “no harm, no foul” argument (i.e., no one ever applied for the job when no dates should have encouraged them to apply immediately) as a basis for overturning the CO’s decision as speculative and contrary to the regulation’s intent of ensuring that U.S. workers are properly notified of available jobs. I further reject the Employer’s argument that the CO is “pass[ing] the consequences of [its] actions” to the Employer.” First, assuming *arguendo* the CO failed to provide relevant documents related to the 2014 application, the Employer cites to no authority to support a reversal on this basis. Second, the Employer concedes that it cannot proffer that it

¹ The CO asserts that the Employer was in fact provided with relevant documents related to the 2014 application. In light of my holding below, a determination on this issue is not necessary.

would have noticed the deficiency prior to certification if it had reviewed the advertisements. Lastly, and significantly, both parties agree that the Employer bears the ultimate burden in demonstrating the accuracy of its labor certification application.

Based on the above-discussed violations, the CO reasonably imposed a one year requirement that the Employer submit its newspaper advertisements to the CO prior to the issuance of a final determination on its application(s) through October 22, 2016. Such a requirement is within the CO's authority, does not appear overly burdensome, and is no more than deemed necessary to allow the CO to confirm whether the required advertising was published in accordance with the regulations (and thus whether U.S. workers were adequately informed of the available job opportunities) prior to certifying the Employer's application.

ORDER

In light of the foregoing discussion, it is hereby **ORDERED** that the Certifying Officer's decision requiring the Employer to conform to special procedures for a period of one year from October 23, 2015 to October 22, 2016, is **AFFIRMED**.

CARRIE BLAND
Administrative Law Judge

Washington, D.C.