



Issue Date: 01 October 2009

**BALCA Case Nos.: 2009-TLN-00091
2009-TLN-00092**

ETA Case Nos.: C-09216-46049
C-09216-46052

In the Matter of:

PHIL-KOR GROUP OF COMPANIES, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Nick Cho, Vice-President of Phil-Kor Group
Pro Se for the Employer

Gary M. Buff, Associate Solicitor
Vincent C. Costantino, Senior Trial Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

DECISION AND ORDER

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("CO") denial of applications 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. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2009).

Because the same or substantially similar evidence is relevant and material to each of these appeals, I have consolidated these matters for decision. *See* 29 C.F.R. § 18.11. Unless otherwise noted, the following Statement of the Case is based on BALCA Case 2009-TLN-00091, which is representative of the issues in both cases. The cases are identical in regard to the dispositive issues raised and dealt with by the CO, and the evidence and argument presented by the Employer.

STATEMENT OF THE CASE

On July 31, 2009,¹ and August 4, 2008, the Employment and Training Administration (“ETA”) received applications from Phil-Kor Group of Companies, Inc., (“the Employer”) requesting temporary labor certification for 50 Waiters/Waitresses and 40 Landscapers from September 1, 2009, through August 1, 2010. (AF 71-81; AF2 87-97).² According to the Employer’s statement, it has a one-time occurrence need during the requested period. The Employer attached a statement of temporary need and a recruitment report. (AF 80-81).

On August 10, 2009, the CO issued a *Request for Further Information* (“RFI”), and identified several deficiencies requiring remedial action, only one of which is relevant to this appeal.³ (AF 66-70). Regarding this deficiency, the CO stated that “the employer must prepare, sign and date a written recruitment report no fewer than 2 calendar days after the last date on which the job order was posted and no fewer than 5 calendar days after the date on which the last newspaper or journal advertisement

¹ This is the date the CO referred to as the filing date in his appellate brief. The date stamp indicating when ETA received the application is not legible on the ETA Form 9142.

² Citations to the Appeal File for 2009-TLN-00091 will be abbreviated “AF” followed by the page number. Citations to the Appeal File for 2009-TLN-00092 will be abbreviated “AF2” followed by the page number.

³ While the CO identified other deficiencies in his RFI, the Final Determination discusses a single dispositive issue.

appeared.” (AF 69). The CO noted that the Employer’s SWA job order start and end dates were July 21, 2009, and August 20, 2009, and the dates for its print advertisements were July 26, 2009, and July 28, 2009. The CO asserted that “[since] the employer’s recruitment report was signed and dated on July 31, 2009, the employer had failed to follow the regulatory requirement of waiting at least 2 days after the last date of the job order and 5 days after the last date of the newspaper advertisement before preparing its recruitment report.” (AF 70).

The Employer filed a response to the CO’s RFI on August 17, 2009.⁴ (AF 15-65). This response includes: a Prevailing Wage Determination ETA Form 9141; an amended ETA Form 9142; a letter of Attestation signed by Vice President Nick Cho; a revised recruitment report with Annex A attached; a copy of a job contract/agreement between the Employer and Jose Brothers, Inc., with the job description for waiter/waitress attached; a posted flyer of the entertainment show; copies of newspaper advertisements; and an advertisement receipt from Las Vegas Review Journal.

On September 4, 2009, the CO issued a Final Determination denying certification for the job opportunities. (AF 9-12). The CO found that the Employer filed its application for temporary employment before it completed all of the pre-filing recruitment, in violation of 20 C.F.R. § 655.15(a) and 20 C.F.R. § 655.15(e). Specifically, the CO contended that the Employer indicated on ETA Form 9142 that the job order was still open when it submitted its application, in direct violation of the pre-filing requirements of the H-2B program that a job order must have ended before the employer creates its recruitment report and submits its application. Additionally, the CO indicated that the Employer failed to respond to the RFI.

The Employer requested review of the CO’s Final Determination by letter dated September 9, 2009. In its request for review, the Employer asserted:

⁴ It is not clear on what date the Employer’s response was filed as there is no cover letter or date stamp on the response. The Appeal File’s index indicates that it was filed on August 17, 2009; the Employer’s request for review asserted that it filed its response via Fedex on August 14, 2009; and the CO contended in both the Final Determination and his appellate brief that the Employer did not file a response to the RFI.

Our recruitment report that we submit [sic] to your office shows a date of July 24, 2009 to August 10, 2009 to show that we were [sic] first received applicants on July 24, 2009 and last on August 10, 2009.

The department requires a period of advertisement of 10 days from July 21 through August 4, 2009. We complied with the requirements as our ads were published on July 26 and 27, 2009.

(AF 1-2).

The Employer also contended that it sent a reply to the RFI on August 14, 2009, and attached a copy of a Fedex Airbill at Exhibit 1. (*See* AF 7-8).

The Board issued a Notice of Docketing on September 16, 2009. The CO filed a brief on September 24, 2009, arguing that the Employer did not comply with the H-2B regulations at 20 C.F.R. § 655.15(j). The CO asserted that under the regulations, an employer must not submit his recruitment and application “fewer than 2 calendar days after the last date on which the job order was posted.” The CO contended that, “The employer’s recruitment report is dated August 13, 2009, nine days earlier than the earliest date the report could be prepared under the regulation.” Thus, the CO asserted that the denial of certification should be affirmed.

The Employer did not file an appellate brief.

DISCUSSION

The regulation at 20 C.F.R. § 655.15(a) provides that an employer may not file an application before all of the pre-filing recruitment steps have been fully satisfied. Regarding recruitment, 20 C.F.R. § 655.15(j) states, “No fewer than 2 calendar days after the last date on which the job order was posted and no fewer than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare, sign and date a written recruitment report.” *See also* 20 C.F.R. § 655.20(a) (requiring that a recruitment report completed in compliance with § 655.15(j) accompany an employer’s application).

In the instant case, the Employer indicated on ETA Form 9142 that the SWA job order started on July 21, 2009, and ended on August 20, 2009. (AF 75). The Employer submitted two recruitment reports: the first recruitment report that the Employer submitted with its ETA Form 9141 was dated July 31, 2009, and the revised recruitment report that the Employer submitted with its response to the RFI was dated August 13, 2009. Both of these dates are before the job order's August 20, 2009, close date, and therefore not at least 2 days after the order's closure, as is required by the regulation. Accordingly, regardless of which report is controlling, the report was premature under 20 C.F.R. § 655.15(j).⁵

Additionally, the Employer filed its applications on July 31, 2009, and August 4, 2009, before all of the pre-filing recruitment steps had been fully satisfied (namely the completion of the job order) in violation of 20 C.F.R. § 655.15(a). Since the Employer is in clear violation of the regulations regarding the filing date of its job order, the date of its recruitment report, and the filing date of its applications, I do not reach the issue of the date of the print advertisements. Based on the foregoing, I find that the CO properly denied certification.

ORDER

Based on the foregoing, **IT IS ORDERED** that the CO's denial of certification is **AFFIRMED**.

For the Board:

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WILLIAM COLWELL

Associate Chief Administrative Law Judge

⁵ It appears that ETA requires a short waiting period following the close of the recruitment period to allow an employer time "to receive resumes, make contact with any applicant(s), conduct interviews, and make decisions regarding any U.S. applicants who may have applied for the job opportunity in response to the recruitment effort." *Golden Bridge Restaurant LLC*, 2007-PER-00099, slip op. at 4 (Dec. 18, 2007) (interpreting a similar regulation governing permanent labor certification applications); see *Labor Certification Process and Enforcement (H-2B Workers)*, 73 Fed. Reg. 29,942, 29,950 (proposed May 22, 2008) (explaining that § 655.15(j)'s two-day waiting period affords an employer time to finish reviewing all job order referrals before completing the recruitment report).