



Issue Date: 30 December 2009

BALCA Case No.: 2010-TLN-00025

ETA Case No.: C-09323-47297

In the Matter of:

ARCHITECTURAL PAVING SYSTEMS, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

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

DECISION AND ORDER
REVERSING DENIAL OF PARTIAL 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. *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).

Statement of the Case

On November 19, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Architectural Paving Systems, LLC, ("the Employer") requesting certification for five

“Construction Laborers” from February 1, 2010, until November 30, 2010. AF 32-57.¹ The application included a copy of the Employer’s recruitment report, which detailed the Employer’s contact with 28 domestic workers. AF 41-57 The recruitment report indicated that the Employer interviewed four of the applicants. AF 41. However, none of them were hired because the applicants did not respond to the Employer’s request for a second interview. *Id.*

On November 23, 2009, the CO issued a Request for Further Information (“RFI”). AF 29-31. Citing to 20 C.F.R. § 655.22(c), the CO stated:

Any U.S. worker applicants [must be] rejected only for lawful, job-related reasons, and the employer must retain records of all rejections.

In this case, the job opportunity is for a temporary, unskilled laborer. The employer had four viable U.S. applicants . . . in its office for interviews, yet did not extend offers of employment. Instead the employer requested second interviews for temporary laborer positions, resulting in four viable U.S. applicants rejected for employment.

AF 31. The CO requested that the Employer provide a “business necessity letter detailing the reason(s) why a second interview is necessary for the specific occupation listed on the employer’s [application].” *Id.*

On November 30, 2009, the Employer responded to the RFI. AF 27-28. The Employer wrote:

At the conclusion of [the candidates] first interviews, these candidates were not rejected. They were told that a decision would be made in the next week or so, and they would be contacted if they were selected for the position. When we attempted contact with the applicants to schedule a follow-up interview, the purpose of the call was to determine whether the candidate was still available for work and to extend an offer of employment. Although we placed multiple calls to each applicant, leaving voice messages when we were able, and sending letters when we had the person’s address, no one called us back. As a showing of good faith, we attempted contact again with each candidate on Tuesday, November 24th.

¹ Citations to the 57-page Administrative File will be abbreviated “AF” followed by the page number.

AF 27. The letter further reflected that the Employer had hired one of the four job applicants on November 24, 2009. *Id.* However, the other three candidates failed to contact the Employer. *Id.*

On December 2, 2009, the CO issued a *Final Determination* granting partial certification.

AF 13. The CO wrote:

Certification has been reduced because the employer's recruitment report indicates that it successfully recruited and hired one U.S. worker for the position. Certification was further reduced for failing to hire the three viable U.S. workers who the employer deemed qualified for the position, however, neglected to offer them the position. The U.S. workers concluded the interview process (for an unskilled position); without job offers or follow-up correspondence sent to them.

Id. The Employer's appeal followed.

In its Request for Review, the Employer concedes that the initial certification should have been reduced by one worker. AF 1. However, the Employer asserts that the CO incorrectly reduced certification based on the Employer's failure to "immediately offer jobs to the three individuals." *Id.* The Employer argues that the "purpose of the follow-up interview was to determine whether the applicants were still available for, and still serious candidates to work." AF 2. The Employer also asserts that "there are practical reasons for not extending offers at the conclusion of the initial [interview]. . . . If we got twenty applicants for the position and hired the first five, we might have missed out on a really outstanding candidate." *Id.*

Discussion

The Labor Department's H-2B regulations allow an employer to reject U.S. applicants for a job opportunity "only for lawful job-related reasons." 20 C.F.R. § 655.22(c). Further, the employer is responsible for "retain[ing] records of all rejections." *Id.* The regulations, however, offer no provisions requiring an employer to offer an applicant the job opportunity immediately following the interview.

In his brief, the CO writes:²

The employer contends that it did not reject these qualified domestic workers and merely told them a decision would be made in the next week or two. . . . [Although the Employers contacted the job applicants later], this rationale is insufficient to rebut the CO's decision that qualified domestic workers were unlawfully rejected for these job opportunities. . . . These domestic workers, by the employer's own admission, met the employer's minimum qualifications for the positions. As such, they should have been offered the job when they were first interviewed and first met with the employer. Delay of the job offer was unwarranted and inappropriate here. . . . Moreover, the employer argues that it did not want to offer these four individuals the positions because [the Employer might find more qualified domestic workers later in the hiring process]. Such a rationale is improper under the labor certification program.

AF 3.

In support of its argument, the Employer cites to *Bobco Metals CO.*, 92-INA-372 (May 18, 1994). In *Bobco*, the board noted that a one month delay in contacting job applicants may have a "chilling" effect on the hiring process, although the board found it necessary to look to the intent of the employer in delaying contact in addition to the time delay. *Id.* at 6. Moreover, *Bobco* deals with delays in contact that occur prior to an interview, not the amount of time an Employer has to offer a job to the applicant.

The CO has not cited to any regulation or case law which suggest that the Employer must hire a job applicant immediately after concluding the interview. Although case law certainly exists that suggests employers may not unduly delay the recruitment process in order to discourage applicants, nothing in the present case demonstrates that the Employer's one week delay in contacting the job applicants had a chilling effect on the recruitment of domestic workers, particularly since the Employer forewarned the applicants that a one week delay would occur. It is worth noting that the Employer's follow-up contact with the job applicants resulted in one worker being hired.

² The CO initially issued an RFI based on the Employer's recruitment report, which stated the applicants had been contacted for a second interview. The CO properly required the Employer to give a business necessity for requiring multiple interviews. However, the Employer clarified in its response to the RFI that the purpose for the follow-up contact was not an interview, but a job offer to interested candidates.

Requiring employers to hire job applicants immediately following an interview is a draconian concept that has no basis in the regulations. Although the regulations under the H-2B program impose additional requirements on employers when hiring domestic workers that would not normally be imposed had the employer not chosen to utilize the H-2B program, the regulations do not intrude so far into the employer's hiring procedures that it is required to immediately hire the first domestic worker that presents for an interview.

Further, the CO incorrectly determined that the Employer rejected the three job candidates. The record before me indicates that not only did the Employer not reject the job candidates, but it made numerous attempts to offer them the job. An employer does not reject an applicant merely because it reserves the right to hire until after all interviews have been completed. Because the Employer did not reject qualified U.S. workers and the CO has failed to cite to any authority requiring the Employer to hire job applicants immediately after concluding the interview, I reverse the CO's partial certification. On remand, the CO should grant certification for four workers.

Order

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer's decision is **REVERSED**.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge