



Issue Date: 08 June 2011

BALCA Case No.: 2011-TLN-00028

ETA Case No.: C-11094-54647

In the Matter of:

HUNT CONSTRUCTION OF CENTRAL FLORIDA,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Chuck Hunt, Jr.
President, Hunt Construction of Central Florida
Lakeland, Florida
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
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, 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 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).

STATEMENT OF THE CASE

On April 4, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Hunt Construction of Central Florida, Inc. ("the Employer") for one construction carpenter from April 21, 2011 to April 21, 2012. AF 90-96.¹ On its application, ETA Form 9142, the Employer listed the minimum requirements for the job opportunity as 36 months of training and 48 months employment experience, and noted that the job opportunity does not involve the supervision of other employees. AF 92-93. The Employer stated that the offered rate of pay was \$17.60 per hour. AF 94.

With its application, the Employer submitted a copy of its Prevailing Wage Determination ("PWD"), ETA Form 9141. In the ETA Form 9141, the Employer stated that the minimum job requirements for the position were 24 months of experience and that no training was required. AF 100. The Employer indicated that the position does not involve the supervision of other employees. AF 99. Based on the information provided in the ETA Form 9141, the U.S. Department of Labor determined that the prevailing wage for the job opportunity was \$17.60 per hour. AF 101.

The Employer also submitted a copy of its job order with the Florida State Workforce Agency ("SWA") and a recruitment report with its application. AF 103-105. The job order placed the with SWA listed the minimum requirements for the job opportunity as eight years of experience, one year of supervisory experience, and

¹ Citations to the 145-page appeal file will be abbreviated "AF" followed by the page number.

possession an occupational license. AF 103. The recruitment report shows that the Employer had 55 applicants for the job opportunity, and that 52 of these applicants were rejected because they did not meet the experience requirements. AF 104-105. Besides stating that eight of these applicants did not possess the supervisory experience required, the Employer did not specify what type of experience the applicant did not possess. *Id.*

On April 8, 2011, the CO issued a *Request for Further Information* (“RFI”), notifying the Employer that it was unable to render a final determination for the Employer’s application because the Employer did not comply with all requirements of the H-2B program. AF 68-80. Among the ten deficiencies identified, the CO explained that the job order placed with the Florida SWA lists additional job requirements that were not provided on the Employer’s PWD, ETA Form 9141, or on the Employer’s application, ETA Form 9142. AF 74-75. Specifically, the CO noted that the SWA job order required a high school education, one year of supervisory experience, occupational license, and eight years of experience, but that the ETA Form 9142 and ETA Form 9141 did not include these requirements. AF 75. Therefore, the CO required the Employer to submit a copy of its job order and all newspaper advertisements to ensure that it complied with the pre-filing advertisement requirements and. AF 76.

The Employer responded to the RFI on April 18, 2011. AF 30-66. In its response, the Employer stated, “[t]his job is not requiring 8 years of experience. It is a minimum of 2 years if all of the requirements are being met. To be proficient at all trades more experience is recommended [but] not mandatory.” AF 44. Regarding the supervisory experience requirement, the Employer stated that “[t]he supervisory experience is so the employee will understand the scope of the project in relation to others. This is what I feel is important in hiring whenever possible.” AF 45. Additionally, with respect to the education requirement, the Employer stated that a high school education is preferred, but not mandatory. *Id.* The Employer also submitted a copy of its SWA job order, which stated, “[a]pplicants must have all tools, occupational license, and a high school diploma or its equivalent. 8 years of experience and 1 year of supervisory experience are required.” AF 47. The Employer did not submit any copies of its newspaper advertisements with its RFI response materials.

On May 3, 2011, the CO denied the Employer's application, finding that the Employer corrected two of the deficiencies identified in the RFI, but that eight remained. AF 6-19. Among the remaining eight deficiencies, the CO found that the Employer did not provide the complete set of job duties or job requirements, such as the level of education, training, experience, and occupational license required for the job opportunity when it applied for its PWD, in violation of 20 C.F.R. § 655.10. AF 10-11. The CO also found that the Employer's SWA job order did not comply with the requirements at 20 C.F.R. § 655.15(e)(2) because the Employer listed job requirements that were not included on the PWD and the ETA Form 9142. AF 12-13. Specifically, the Employer required a minimum of eight years experience, an occupational license, and one year of supervisory experience on the job order, but not on ETA Forms 9141 or 9142. *Id.* The Employer's appeal followed.

DISCUSSION

The CO may only grant an employer's petition to admit nonimmigrant workers on H-2B visas for temporary nonagricultural employment in the U.S. if there are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of filing the petition and in the place where the foreign worker is to perform the work. 20 C.F.R. § 655.5(b)(1). Accordingly, an employer is required to recruit U.S. workers for employment prior to filing an application for temporary employment certification. 20 C.F.R. § 655.15(d). Among the required pre-filing recruitment steps, and employer must submit a job order to the SWA serving the area of intended employment and publish two print advertisements. 20 C.F.R. § 655.15(d)(2),(3). The newspaper advertisements and the job order must satisfy the advertisement content requirements contained at Section 655.17. 20 C.F.R. § 655.15(e)(2), (f)(3). Under 20 C.F.R. § 655.17, the job order and newspaper advertisements may not contain terms and conditions of employment which are less favorable than those offer to the H-2B workers and must contain the job opportunity's minimum education and experience requirements. 20 C.F.R. § 655.17(e).

In this case, the Employer indicated on its ETA Form 9142 that the job opportunity did not involve supervision of other employees, there was no minimum

education requirement, that 48 months of experience was required for the position, and that 36 months of training was required for the job opportunity. AF 93. However, in its SWA job order, the Employer indicated that the minimum requirements for the position were eight years of experience, one year of supervisory experience, and an occupational license. AF 103. As these requirements clearly exceed the minimum education and experience requirements that the Employer attested to on the ETA Form 9142, the Employer has failed to comply with the H-2B pre-filing requirements at 20 C.F.R. § 655.15(e)(2) and 655.17(e).

The Employer's argument that it does not actually require eight years of experience, but rather requires a minimum of two years if all other requirements are met, is irrelevant to the determination of whether the Employer's job order complied with the regulations.² The H-2B regulations clearly require an employer to state its minimum education and experience requirements in its job order and newspaper advertisements. Therefore, an employer is not permitted to include education and experience requirements in its job order and advertisements that may be preferred, but are not in fact the minimum requirements. If an employer does not advertise the job opportunity with the minimum education and experience requirements, the employer has failed to conduct an accurate test of the labor market, and the CO will be unable to certify that there are no qualified U.S. workers who are capable of performing the temporary labor or services. By advertising the job opportunity with the Employer's preferred experience requirements, rather than the actual minimum requirements, the Employer failed to comply with Section 655.17(e) and prevented the CO from determining whether any qualified U.S. workers were available for the job opportunity.

Accordingly, I find that the CO properly denied certification because the Employer's SWA job order included education and experience requirements that exceeded the minimum requirements provided on the Employer's ETA Form 9142 in violation of Section 655.17(e).

² I note that the Employer's rejection of 52 U.S. workers for the job opportunity because they did not meet the experience requirements, without explaining whether they failed to meet a two year experience requirement, or the four year experience requirement provided on the ETA Form 9142, or the eight year experience requirement listed on the SWA job order, only undermines the Employer's argument that the eight year experience requirement was "recommended [but] not mandatory." AF 45.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge