



**Issue Date: 20 May 2011**

**BALCA Case No.: 2011-TLN-00023**

ETA Case No.: C-11059-54255

*In the Matter of:*

**JOCELYN AND DAVID ROSS,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Jocelyn and David Ross  
Plano, Texas  
*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 February 28, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Jocelyn and David Ross ("the Employer") for one nanny from April 18, 2011 to April 18, 2012. AF 38-45.<sup>1</sup> On its application, the Employer indicated that it did not place a job order with the State Workforce Agency ("SWA") serving the area of intended employment and did not place any advertisements for the position in the newspaper. AF 42. In explaining its decision not to advertise the position, the Employer stated:

Due to the sensitive nature of this kind of employment (live-in nanny situation), we cannot do what would be an imprudent way of filling such a position, that is, by advertising. As mentioned, we already found the perfect woman for us, someone who has earned our confidence and trust that has been tested over a number of years.

*Id.*

On March 4, 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 30-37. Among the six deficiencies identified, the CO notified the Employer that it appeared that the Employer failed to comply with the regulatory requirements of placing a job order with the SWA and placing advertisements in a newspaper of general circulation prior to filing its H-2B application. AF 32-33.

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<sup>1</sup> Citations to the 47-page appeal file will be abbreviated "AF" followed by the page number.

Therefore, the CO required the Employer to submit copies of the newspaper advertisements and job order to ensure that the Employer had complied with the pre-filing recruitment requirements. *Id.*

The Employer responded to the RFI on March 10, 2011. AF 14-29. The Employer did not submit the requested copies of the newspaper advertisement and job order, and instead stated, “[w]e did not think that this applied to our need of a live-in-nanny because it can be imprudent and even a safety issue for our children. We cannot hire a stranger to live with us, as I am sure you can appreciate.” AF 15.

On April 8, 2011, the CO denied the Employer’s application on six grounds. AF 3-13. Among the grounds for denial, the CO determined that the Employer failed to comply with the H-2B regulations at 20 C.F.R. § 655.15(d)(2) and (3) because it did not place a job order with the SWA serving the area of intended employment and did not publish two newspaper advertisements. The Employer appealed the CO’s denial, arguing that it was not necessary for it to place advertisements to try to hire a U.S. worker for the position, because if it cannot hire its chosen foreign worker as a nanny, it will not hire anyone as a nanny.

## **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 the employer files its petition. 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 20 C.F.R. § 655.5(a)(1). Therefore, the CO must determine whether an employer conducted the recruitment steps required by the H-2B regulations that are designed to apprise U.S. workers of the job opportunity that is the subject of the labor application. The H-2B regulations require an employer to conduct several recruitment steps prior to filing an application for temporary labor certification, including placing a job order with the SWA serving the area of intended employment and placing a newspaper advertisement on two separate days in a newspaper of general circulation serving the area of intended employment. 20 C.F.R. §§ 655.15(d)(2) and (3), (e),(f).

The H-2B regulations require that the job order and newspaper advertisements satisfy the advertisement content requirements contained at Section 655.17. 20 C.F.R. § 655.15(f)(3). Under 20 C.F.R. § 655.17, advertisements must contain terms and conditions of employment which are not less favorable than those offered to H-2B workers, and must contain the following information:

- (a) The employer's name and appropriate contact information for applicants to send resumes directly to the employer;
- (b) The geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;
- (c) If transportation to the worksite(s) will be provided by the employer, the advertising must say so;
- (d) A description of the job opportunity (including the job duties) for which labor certification is sought with sufficient detail to apprise applicants of services or labor to be performed and the duration of the job opportunity;
- (e) The job opportunity's minimum education and experience requirements and whether or not on-the-job training will be available;
- (f) The work hours and days, expected start and end dates of employment, and whether or not overtime will be available;
- (g) The wage offer, or in the event that there are multiple wage offers, the range of applicable wage offers, each of which must not be less than the highest of the prevailing wage, the Federal minimum wage, State minimum wage, or local minimum wage applicable throughout the duration of the certified H-2B employment; and
- (h) That the position is temporary and the total number of job openings the employer intends to fill.

The Employer argues that it should not have to conduct any recruitment of U.S. workers given the nature of position, *i.e.*, a live-in nanny, and because it is not planning to hire anyone as a nanny if it cannot hire its chosen foreign worker. This argument is unpersuasive, and the Employer's failure to place advertisements in a newspaper of general circulation and a job order with the SWA is fatal to its H-2B application. The regulatory recruitment requirements are not optional, and if an employer seeks to utilize the H-2B program, it must adhere to all of the program's regulatory requirements.

The Employer's position that it should not be required to recruit any U.S. workers for the job opportunity because it will not hire a nanny if it cannot hire its chosen foreign worker reflects a misunderstanding of the purpose of the H-2B program. The purpose of

the H-2B program is to allow employers to hire temporary foreign workers if there is a shortage of domestic workers available to perform the work. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). In other words, an employer is *only* permitted to hire a foreign worker under the H-2B program if has tried without success to hire a U.S. worker prior to filing its H-2B application. Moreover, that the Employer is not going to hire anyone to work as a nanny if it cannot hire the particular foreign worker that it has selected reveals that the Employer does not have an actual need for the temporary labor or services to be performed. Without an actual need for the labor or services to be performed, an employer cannot establish eligibility for temporary labor certification.

In this case, because the Employer failed to place a job order with the SWA and advertisements with a newspaper of general circulation, the Employer has failed to comply with the H-2B requirements at 20 C.F.R. §§ 655.15(d)(2) and (3), (e),(f), and I find that the CO properly denied certification.<sup>2</sup>

## **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

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<sup>2</sup> As I find that the CO properly denied certification based on the Employer's failure to comply with the job order and newspaper advertisement requirements, I need not reach the other four grounds for denial.