

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 07 April 2011

BALCA Case No.: 2011-TLN-00012

ETA Case No.: C-11024-53555

In the Matter of:

R-P NURSERIES,

Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

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 occurrence, 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).

STATEMENT OF THE CASE

On January 24, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from R-P Nurseries ("the Employer").

AF 85-119.¹ The Employer requested certification for 5 landscape laborers from March 15, 2011 to December 24, 2011. AF 85.

On January 27, 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 failed to satisfy all the requirements of the H-2B program. AF 79-84. Among the three deficiencies listed in the RFI, the CO found that the job description in Section F.a item 5 of the Employer’s application did not specify any supervision of other employees, but Section F.a items 4 and 4.a of the Employer’s application stated that the job opportunity entails supervision of 5 workers. AF 82. Therefore, the CO required the Employer to provide evidence that it complied with the pre-filing advertising requirements, and requested the Employer to provide a copy of its job order, newspaper advertisements, and a copy of its prevailing wage determination (“PWD”) with its RFI response. AF 82-83.

The Employer responded to the RFI on February 4, 2011 and submitted, among other documentation, a copy of its job order and newspaper advertisements. AF 23-78. The job description in the job order listed the start and end dates for the position as April 1, 2011 to December 24, 2011. AF 66-68. The Employer’s newspaper advertisements listed the start and end dates for the position as April 15, 2011 to December 24, 2011. AF 77-78.

On March 11, 2011, the CO denied certification. AF 17-21. The CO found that the start dates in the job order and advertisements were different than the start date provided in the Employer’s application, and therefore, determined that the Employer’s job order and advertisements did not comply with the content requirements under 20 C.F.R. § 655.15(e)(2). AF 21. The Employer’s appeal followed the CO’s denial.

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. 20 C.F.R. § 655.5(a)(1). Therefore, the CO must determine whether the Employer conducted the recruitment steps required by the H-2B regulations that are designed to apprise U.S. workers of the job

¹ Citations to the 119-page appeal file will be abbreviated “AF” followed by the page number.

opportunity in the labor application. The H-2B regulations require an employer to conduct several recruitment steps prior to filing an application for temporary labor certification. 20 C.F.R. § 655.15. The regulation at 20 C.F.R. § 655.15(e) requires an employer to place a job order with the State Workforce Agency (“SWA”) serving the area of intended employment, and Section 655.15(f) requires an employer to place a newspaper advertisement on two separate days. Both the job order and the newspaper advertisements 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, 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.

There is no dispute that the Employer’s job order and newspaper advertisements included a different start date of employment than that contained in the Employer’s application. The start date listed in the job order is April 1, 2011, and the start date listed in the newspaper advertisements is April 15, 2011, while the start date in the Employer’s application is March 15, 2011. The Employer concedes these discrepancies, but argues that they did not adversely affect any potential U.S. applicants. However, there is simply no way for the CO to ensure that there are not sufficient U.S. workers

available for the position unless the job order and newspaper advertisements comply with 20 C.F.R. § 655.17. By providing different start dates of employment in its job order and newspaper advertisements than its H-2B application, the Employer has failed to comply with the requirement at Section 655.17(f). Moreover, because the Employer's job order and newspaper advertisements offer a shorter period of employment to U.S. workers, the Employer has offered terms of employment to U.S. workers that are less favorable than those offered to H-2B workers. Accordingly, the CO's denial of certification was proper.

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