

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 20 April 2011

BALCA Case No.: 2011-TLN-00016

ETA Case No.: C-11039-53921

In the Matter of:

**STAPP CONSTRUCTION
D/B/A
GREG STAPP,**

Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Greg Stapp
Stapp Construction
Farmington, Utah
For the Employer

Gary M. Buff, Associate Solicitor
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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 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 February 8, 2011, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Stapp Construction (“the Employer”). AF 50-79.¹ The Employer requested certification for 8 construction laborers from May 1, 2011 to December 15, 2011. AF 50. On its application, ETA Form 9142, the Employer indicated that no employment experience is required for the position. AF 53. The Employer listed the start date of its job order with the State Workforce Agency (“SWA”) as December 1, 2010, and rather than providing an end date, indicated that the job order was still active. AF 54. The Employer submitted two copies of its SWA job order with its application. AF 58, 60. These two job orders have the same order number and both are date stamped February 1, 2011 at 11:04 a.m. AF 58, 60. One job order was taken on January 11, 2011 and lists the experience requirements as “none.” AF 58. The other job order was taken on February 1, 2011 and lists the experience requirements as “months.” AF 60.

The Employer also indicated in its application that it placed an advertisement in the Salt Lake Tribune from January 30, 2011 to February 1, 2011 and an advertisement in the Deseret News from January 30, 2011 to February 1, 2011. AF 54. Additionally, the Employer submitted a copy of its recruitment report with its application, which was signed and dated December 21, 2010. (AF 63-65).

On February 15, 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 44-49. Among the four deficiencies listed in the RFI, the CO found that the Employer incorrectly completed Section H., Item 2b of the application regarding the end date of the job order. AF 47. Specifically, the CO found that the Employer indicated that the job order is still open but signed and dated the recruitment report December 21, 2010. *Id.* Therefore, the CO required the Employer to submit a job order with an end date in order to verify that the Employer complied with the pre-filing recruitment requirements.

The Employer responded to the RFI on March 8, 2011 and submitted the requested documentation. AF 22-42. The CO denied certification on March 24, 2011. AF 17-21. The CO

¹ Citations to the 79-page appeal file will be abbreviated “AF” followed by the page number.

determined that the Employer corrected three of the four deficiencies identified in the RFI, but that the Employer failed to comply with the pre-filing recruitment requirements provided at 20 C.F.R. § 655.15(e)(2) and 20 C.F.R. § 655.15(f)(3). AF 19. The CO found that the Employer’s newspaper advertisements were published before the start date of the SWA job order and that the SWA job order included an experience requirement of “months, while the Employer’s application indicated that no experience was required. AF 21. Additionally, the CO determined that the Employer’s newspaper advertisement did not contain the end date of the period of employment. *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 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 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. The regulations require that the newspaper advertisements cannot be placed until after the job order is placed for active recruitment by the SWA. 20 C.F.R. § 655.15(f)(1).

Additionally, 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.

The record contains two job orders, one that evidently was taken by the Utah SWA on January 11, 2011, and one that was taken by the Utah SWA on February 1, 2011. AF 58, 60. The Employer's newspaper advertisements were placed on January 30, 2011. AF 59. Because the Employer published its newspaper advertisements before placing a job order with the SWA, the Employer failed to comply with the pre-filing recruitment requirement at 20 C.F.R. § 655.15(f)(1). I note that the record contains a job order placed with the SWA on January 11, 2011, which is before the Employer published its newspaper advertisements. However, even accepting the Employer's argument that the February 1, 2011 job order was just an update to its initial job order, placed on January 11, 2011, the Employer's application remains deficient.

First, the Employer's February 1, 2011 job order added the experience requirements of "months," while the Employer's application indicates that no experience is required for the position. This violates the regulatory requirement that newspaper advertisements and job orders must contain the job opportunity's minimum experience requirements. 20 C.F.R. § 655.17(e). Secondly, the Employer's newspaper advertisements do not include the expected end date of employment in violation of 20 C.F.R. § 655.17(f).

Accordingly, the CO properly denied certification.

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