



Issue Date: 17 August 2012

BALCA Case No.: 2012-TLN-00044

ETA Case No.: C-12172-59309

In the Matter of:

A & W BUILDERS OF JACKSONVILLE, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: David Donaldson
USAMEX Ltd Co.
Bald Knob, Arizona
For the Employer

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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 matter arises under the Temporary Labor Certification provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations at 8 C.F.R. Part 214 and 20 C.F.R. Part 655, Subpart A. These provisions, referred to as the “H-2B program,” permit U.S. employers to bring foreign nationals to the United States to fill temporary nonagricultural jobs when there are not

sufficient workers who are able, willing, qualified, and available to perform such services or labor. *See* 8 C.F.R. § 214(2)(h)(1)(ii)(D).

STATEMENT OF THE CASE

On June 20, 2012, the U.S. Department of Labor (“the Department”), Employment and Training Administration (“ETA”) received an *Application for Temporary Employment Certification* from A & W Builders of Jacksonville, Inc. (“the Employer”) for twenty-five carpenters from June 15, 2012 to March 15, 2013. AF 39-119.¹ The Employer’s application included various supporting documentation, including a copy of the job order it placed with the North Carolina Division of Workforce Solutions (“North Carolina SWA”). AF 55-56.

On June 25, 2012, ETA’s National Certifying Officer (“CO”) issued a *Request for Further Information* (“RFI”), informing the Employer that the Department identified two deficiencies in its application. AF 34-38. Only one of these deficiencies—the Employer’s failure to comply with the Department’s pre-filing recruitment requirements—is relevant to the instant appeal. Specifically, after identifying this deficiency, the RFI states:

In accordance with Departmental regulations at 20 CFR sec. 655.15(e)(2), the job order submitted by the employer to the State Workforce Agency (SWA) must satisfy all of the requirements for newspaper advertisements contained in the Department’s regulations at 20 CFR 655.17.

AND

In accordance with Departmental regulations at 20 CFR sec. 655.17(f), the employer’s advertisements must contain the work hours and days, expected start and end dates of employment, and whether or not overtime will be available.

The Employer submitted a job order which failed to indicate the start and end dates of employment. The job order indicates the job will last or [*sic*] 273 days but does not include a start date of employment.

AF 36-38. To cure this deficiency, the CO instructed the Employer to submit a job order including the start and end dates of employment. However, the CO also reminded the Employer that, in accordance with 20 C.F.R. § 655.15(a), all of its recruitment, including

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

the placement of a job order, must have occurred *prior to* its application submission date on June 20, 2012. AF 38.

The Employer filed a response to the RFI on June 28, 2012. AF 22-33. The Employer's cover letter to this response states, in pertinent part:

The form that we used to request our Job Order is mandated by the North Carolina Division of Workforce Solutions and we believe that the form we submitted was correct. We are including the filled in form. That form specifically asks for duration of the job in days. Although the employer is regularly punished for our self-inflicted errors and mistakes, we are not prepared to review and challenge every piece of paper issued by the State agencies. We accepted the North Carolina Division of Workforce Solutions Job Order in good faith and prepared a correct advertisement using their Job Order.

AF. 24. The Employer also included a letter from the North Carolina SWA stating that the dates of temporary need were "inadvertently omitted" from the Employer's job order, and the Employer made "every effort . . . to have this H-2B job order listed in good faith with this agency." AF 30.

On July 27, 2012, the CO issued a *Final Determination* denying certification. AF 18-21. The CO acknowledged that the North Carolina SWA's job order request form asked for the job duration in days—and not start and end date—but explained that, pursuant to the Department's regulations, "all advertising must contain the information listed in [§ 655.17]," including the anticipated start and end date of the job opportunity. AF 21 (emphasis included). The CO went on to state that "[a]lthough the [North Carolina SWA's] form may be mandated, the [anticipated start and end dates] may be included in the Job Description or other section that allows the employer to enter additional information about the job opportunity." *Id.* As a result, the CO found that the Employer failed to comply with 20 C.F.R. §§ 655.15 (e)(2) and 655.17(f), and accordingly, denied the Employer's application on that basis. *Id.*

On July 30, 2012, the Employer filed a request for review with the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). AF 1-17. In its request for review, the Employer protested that the North Carolina SWA "had a duty to have knowledge of the H2B [*sic*] regulations to the extent necessary to gather the needed items for the Job Listing in any manner they chose and to ask for the items needed." AF 1.

Thus, because the North Carolina SWA provided a job order request form that did not contain a line item to communicate the start and end dates of a job opportunity, the Employer maintained that its omission of this information should not prevent certification of its application. *Id.* The Board issued a *Notice of Docketing* on August 3, 2012, providing the parties an opportunity to file briefs in this matter. Both the Employer and the CO filed timely briefs.

DISCUSSION

The Department may only certify an employer's application for temporary labor certification under the H-2B program if, at the time the employer files an application, there are not sufficient U.S. workers who are capable of performing the services or labor at the place where the foreign worker is to perform the work. 8 C.F.R. 214.2(h)(6)(iv). Accordingly, the Department's H-2B regulations require employers to complete specific domestic recruitment steps before filing an *Application for Temporary Employment Certification*. 20 C.F.R. § 655.15(a) (2008).² These steps include, *inter alia*, the placement of a job order with the State Workforce Agency (SWA) serving the area of intended employment. 20 C.F.R. § 655.15(e)(1). This job order must contain all of the detailed information listed in the regulations, including the "expected start and end dates of employment." *See* 20 C.F.R. § 655.15 (e)(2) ("The job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.17."); 20 C.F.R. § 655.17(f) (stating that an employer's advertising must include, *inter alia*, "the work hours and days, expected start and end dates of employment, and whether or not overtime will be available"). Applications that do not comply with the required criteria "shall not be accepted for processing." 20 C.F.R. § 655.15(a).

Here, the Employer does not dispute that its job order omits the expected start and end dates of employment. Rather, the Employer argues:

² Although the Department revised its H-2B regulations in February 2012, *see* 77 Fed. Reg. 10038 (February 21, 2012), the U.S. District Court for the Northern District of Florida enjoined the Department's enforcement of these provisions shortly thereafter. *See Bayou Law & Landscape Services et al. v. Solis*, Case 3:12-cv-00183-MCR-CJK (April 26, 2012). As a result, on May 16, 2012, the Department announced the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the district court's order. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Guidance*, 77 Fed. Reg. 28764, 28765 (May 16, 2012).

We believe the “Start Date/End Date” data item and the “Number of Day” data item published in the Job Order was so close as not be [*sic*] a factor in the recruitment of US workers for this job and that the “number of Days” item was commonly used for all temporary jobs by NC DOL and did not confuse anyone that may have tried to match prospective applications with this particular job.

But the Employer’s belief concerning the effect of this omission on the recruitment of U.S. workers is irrelevant, since the regulations unambiguously require the inclusion of “the expected start and end dates of employment.” 20 C.F.R. § 655.17(f). The Employer’s job order, which merely lists the job duration by number of days, does not fulfill this requirement, since it fails to apprise U.S. applicants of the Employer’s anticipated start and end dates of need.

The Employer cites no regulatory or statutory authority to support its assertion that SWAs have a duty to provide employers with an “adequate method” to place job orders in compliance with the Department’s H-2B regulations.³ Moreover, I am not persuaded the Employer’s argument that its omission should be excused because the North Carolina SWA’s job order request form did not contain a line item to communicate the start and end dates of employment. While this form did not specifically prompt the Employer to provide a start and end date, the Employer could have listed this information in its response to the “Job Summary” section, which instructs employers to “provide a detailed job description” and provides ample space for a response. Indeed, the Employer’s response to the “Job Summary” section includes many specifics about the Employer’s job opportunity, including a statement that the Employer will provide transportation to all worksites from a central pickup location free of charge. AF 56.

Since the Employer’s job order omitted regulatory-required information, I have no choice but to affirm the CO’s denial. While this may seem a harsh result, the standard of

³ The Employer does cite language in the preamble to the Department’s 2008 H-2B regulations stating:

SWAs will be responsible for clearing and posting job orders, both intrastate and interstate, thus reducing the risk for employers to make mistakes with respect to job descriptions, minimum requirements, and other application particulars. SWAs will, as part of these duties, review the job offer, its terms and conditions, any special requirements, and the justifications as part of the SWAs’ duties to clear and post such orders.

73 Fed. Reg. 78020, 78034-35 (December 19, 2008). However, these statements do not support the conclusion that an employer may rely on a SWA to confirm that its job order fully complies with the Department’s regulations.

review leaves me no other option when, as here, the Department's regulations require that the Employer's job order satisfy *all* of the regulatory-required criteria. 20 C.F.R. § 655.15 (e)(2).

ORDER

In light of the foregoing, the Certifying Officer's *Final Determination* denying certification is AFFIRMED.

For the Board:

A

WILLIAM S. COLWELL

Associate Chief Administrative Law Judge