

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 18 October 2012

BALCA Case No.: 2012-TLN-00051

ETA Case No.: C-12209-59511

In the Matter of:

PERLON CORPORATION,

Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **PAUL C. JOHNSON, JR.**
Associate Chief Administrative Law Judge

DECISION AND ORDER

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 employers to bring foreign nationals to the United States to fill temporary nonagricultural jobs when there are not sufficient domestic 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). Prior to applying for a visa under the H-2B program, employers must file an *Application for Temporary Employment Certification* (ETA Form 9142) with the U.S. Department of Labor (“DOL” or “the Department”), Employment and Training Administration (“ETA”). 20 C.F.R. § 655.20. Employers’ applications are reviewed by a Certifying Officer (“CO”), who makes a determination to either grant or deny the requested labor certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, an employer may seek administrative review before the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a). BALCA’s scope of review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the Employer’s request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the Employer’s application. 20 C.F.R. § 655.33(a), (e).

BACKGROUND

On July 27, 2012, Perlon Corporation (the “Employer”) filed an application with ETA requesting temporary labor certification under the H-2B program for a “Sales/Distributor

trainee” position. AF 103.¹ The application listed a rate of pay for this position ranging from \$13.00 to \$16.00 per hour. AF 107.

On August 1, 2012, the CO issued a *Request for Further Information* (RFI) notifying the Employer that its application failed to satisfy all of the requirements of the H-2B program. AF 94-102. The CO found “reason to believe” that the wage listed in the Employer’s application did not equal or exceed the highest of the prevailing wage, federal minimum wage, state minimum wage, or local minimum wage applicable during the requested period of certification. AF 97. Accordingly, the CO directed the Employer to submit a copy of the Prevailing Wage Determination (“PWD”) that it had obtained from the National Prevailing Wage Center (“NPWC”). *Id.* The CO further directed the Employer to provide evidence that it complied with the pre-filing recruitment requirements specified in the regulations, and specifically instructed the Employer to provide a copy of the job order it had filed with the applicable State Workforce Agency (“SWA”), as well as newspaper tear sheets documenting the advertisements run in connection with this application. AF 100-101. The CO reminded the Employer that, pursuant to 20 C.F.R. § 655.15(a), all recruitment must occur before the application submission date, which in this case, was on July 27, 2012. AF 62.

The Employer responded to the RFI on August 8, 2012, submitting, *inter alia*, a copy of the PWD it received from the NPWC, dated August 7, 2012. AF 80. Because the PWD listed a prevailing wage of \$17.23 an hour, the Employer amended its application to increase the rate of pay for the requested position to “\$17.23/hr.” AF 74. The Employer also submitted a copy of the job order it placed with the Illinois SWA, dated June 29, 2012, and tear sheets documenting advertisements it ran in the *Southtown Star* on Sunday July 1, 2012 and Monday, July 2, 2012. AF 81-91. The job order lists an offered salary range of \$11.00 to \$15.00 per hour. AF 85. Neither of the newspaper advertisements contain any wage information. AF 81-84.

The CO issued a *Final Determination* denying certification on September 7, 2012, specifically citing four deficiencies in the Employer’s application. AF 57-68. The Employer’s BALCA appeal followed. The Board issued a Notice of Docketing on September 27, 2012, setting out an expedited briefing schedule. The CO filed a brief on October 11, 2012; the Employer did not file an additional brief or statement of position.

DISCUSSION

The Department may only certify applications under the H-2B program if, at the time the application is filed, there are not sufficient able and qualified U.S. workers to fill the requested position(s), and employment of the requested foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 C.F.R. 214.2(h)(6)(iv). To ensure that opportunities remain open to qualified U.S. workers, the Department requires employers to test the labor market for qualified U.S. workers at prevailing wages. *See Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers)*, 73 Fed. Reg. 78,020, 78,031 (Dec. 19, 2008). To that end, the regulations prescribe specific domestic recruitment steps that employers must complete before filing an application for H-2B labor certification. 20

¹ Citations to the Appeal File will be abbreviated “AF” followed by the page number.

C.F.R. 655.15 (2008).² These steps include the placement of a job order with the SWA in the area of intended employment, and the placement of two print advertisements in a newspaper of general circulation. § 655.15(e), (f).

Both the SWA job order and the newspaper advertisements must contain, *inter alia*, “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.” § 655.17 (g). Neither may contain terms and conditions of employment that are less favorable than those offered to H-2B workers. § 655.17. In the instant case, the Employer’s SWA job order advertised a wage of \$11.00 to \$15.00 per hour. AF 85. The prevailing wage for the requested position, as determined by the NPWC, was \$17.23 per hour, AF 80, and the Employer listed a wage of “\$17.23/hr” in its amended application, AF 74. The Employer’s SWA job order thus advertised a wage that is far below the prevailing wage provided by the NPWC, and one which is clearly less favorable than the wage the Employer has promised to offer the H-2B worker in its amended application. Moreover, both of the Employer’s advertisements in the *Southtown Star* failed to list any wage offer at all.

In light of the foregoing discussion, I find that both the SWA job order and newspaper advertisements are in clear violation of the pre-filing requirements listed in section 655.17. Because applications that do not comply with the pre-filing recruitment regulations “shall not be accepted for processing,” 20 C.F.R. § 655.15(a), I find that the CO properly denied certification on this basis.³

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer’s denial of certification is **AFFIRMED**.

For the Board:

PAUL C. JOHNSON, JR.
Associate Chief Administrative Law Judge

² Although the Department revised its H-2B regulations in February 2012, *see* 77 Fed. Reg. 10038 (February 21, 2012), the Department’s enforcement of these provisions has been enjoined by the U.S. District Court for the Northern District of Florida. *See Bayou Law & Landscape Services et al. v. Solis*, Case 3:12-cv-00183-MCR-CJK (April 26, 2012). As a result, the Department has announced the continuing effectiveness of the 2008 H-2B Rule until further judicial or other action suspends or nullifies the district court’s order. *See* 77 Fed. Reg. 28764, 28765 (May 16, 2012). Accordingly, in adjudicating this matter, I will refer to the final rule published in 2008.

³ Because we affirm the CO’s denial of certification on this ground, we do not reach the three other grounds cited by the CO in the *Final Determination*.