

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 13 July 2012**

**BALCA Case No.: 2012-TLN-00040**

ETA Case No.: C-12107-59017

*In the Matter of:*

**THANITRA PICHEDVANICHOK DBA TSPOONS,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Mark H. Shafer, Esquire  
Law Offices of Mark H. Shafer and Associates  
Laguna Hills, California  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Harry Sheinfeld, Counsel for Litigation  
Office of the Solicitor of Labor  
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 H-2B temporary non-agricultural labor or services 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 allow 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 at the place where the alien is to perform such services or labor. 8 C.F.R. §

214(2)(h)(1)(ii)(D). Before filing a petition for H-2B visa classification, an employer must apply for and receive a temporary labor certification from the U.S. Department of Labor (“the Department”), Employment and Training Administration (“ETA”). 20 C.F.R. § 655.20. After ETA accepts an employer’s *Application for Temporary Employment Certification* for processing, a Certifying Officer (“CO”) reviews the application and makes a determination to either grant or deny the requested labor certification. 20 C.F.R. § 655.23. If the CO denies labor certification, in whole or in part, then the employer may request review before 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 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).

### **STATEMENT OF THE CASE**

On April 16, 2012, ETA received an application from Thanitra Pichedvanichok, DBA Teaspoons (“the Employer”), requesting H-2B temporary labor certification for one chef’s assistant. AF 71-82.<sup>1</sup> In this application, the Employer failed to identify the State Workforce Agency (“SWA”) serving the area of intended employment or provide any information concerning a SWA job order. *Id.*

The CO issued a *Request for Further Information* (“RFI”) on April 20, 2012. AF 61-70. In an attachment to the RFI, the CO identified seven deficiencies requiring corrective action, including the Employer’s failure to provide the required recruitment information. To remedy this deficiency, the CO instructed the Employer to submit evidence that it complied with the mandatory pre-filing recruitment requirements, including a copy of its SWA job order. The Employer responded to the RFI on April 30, 2012, submitting: (1) an E-mail addressing the deficiencies; (2) its original application; (3) evidence of a job posting on Craigslist.org; (4) a receipt for newspaper advertisements placed in *Mission Viejo News*; and (5) three newspaper tear sheets from the *Mission Viejo* news. AF 43-60.

On May 25, 2012, the CO issued a *Final Determination* denying the Employer’s application. AF 31-42. In an attachment to the denial, the CO identified five unresolved

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<sup>1</sup> References to the 82 page administrative file will be abbreviated “AF” followed by the page number.

deficiencies, including the Employer's failure to comply with the pre-filing recruitment requirements at 20 C.F.R. § 655.15(e). AF 33-42. Among other things, the CO noted that the Employer failed to complete the relevant recruitment information on its application or provide any evidence that it filed a SWA job order. AF36. The Employer requested BALCA review of the CO's denial on June 18, 2012. AF 1-30. The Board received the appeal file on June 26, 2012.

### **DISCUSSION**

The H-2B regulations require an employer to conduct several recruitment steps prior to filing an application for temporary labor certification, including the placement of a job order with the SWA in the area of intended employment. 20 C.F.R. § 655.15(e). In the instant case, the Employer did not provide *any* evidence that it filed a SWA job order. Accordingly, I find that the Employer failed to comply with the pre-filing recruitment requirements at 20 C.F.R. § 655.15(e), and that the CO properly denied certification on this basis.

### **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