

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: 11 March 2013

BALCA Case No.: 2013-TLN-00038
ETA Case No.: H-400-13003-154161

In the Matter of:

**ADIMAR ENTERPRISES, d/b/a
WOW EGYPTIAN FAST FOOD RESTAURANT,**

Employer

Certifying Officer: Chicago National Processing Center

Appearances:

Gary M. Buff, Associate Solicitor
Micole Allekotte, Attorney
Office of the Solicitor of Labor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Adimar Enterprises’ request for administrative review of the Certifying Officer’s denial of temporary labor certification under the H-2B non-immigrant program. For the reasons set forth below, the Certifying Officer’s denial in this matter is AFFIRMED.

BACKGROUND

The H-2B Program

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor

certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* (ETA Form 9142) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20 (2008).¹ After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer, who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

Procedural History

On January 3, 2013, the CNPC received an application for temporary labor certification from Adimar Enterprises, d/b/a Wow Egyptian Fast Food Restaurant (“the Employer”) for one chef/head cook from December 21, 2012 to March 24, 2013. AF 103-116.²

The CO issued a *Request for Further Information* (“RFI”) on January 9, 2013, notifying the Employer that its application did not comply with all the requirements of the H-2B program. AF 94-102. In particular, the CO determined that the Employer had failed to comply with the Department’s pre-filing recruitment requirements. After identifying this deficiency, the CO stated in pertinent part:

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 sec. 655.17.

In accordance with Departmental regulations at 20 CFR sec. 655.17, all advertising 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

¹ All citations to 20 C.F.R. Part 655 refer to the Final Rule promulgated in 2008. Although the Department promulgated a new Final Rule in February 2012, the U.S. District Court for the Northern District of Florida has issued an order enjoining the Department from implementing or enforcing this rule. *See Bayou Law & Landscape Services et al. v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (April 26, 2012). Accordingly, 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).

² Citations to the appeal file will be abbreviated “AF” followed by the page number.

- 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.

AF 99-100. After identifying this deficiency, the CO instructed the Employer to submit evidence that it complied with pre-filing advertising, including, but not limited to, a copy of the SWA job order submitted by the Employer to the State Workforce Agency (SWA). AF 100.

The Employer responded to the RFI on January 13, 2013. AF 61-93. The Employer included a printout from the Illinois SWA website posted on December 4, 2012, and updated on December 21, 2012. AF 85. The job order on this printout indicated that the Employer's business was located in Carol Stream, Illinois, and contained following description: "Head chef/cook needed for an authentic Egyptian Restaurant. Must be able to use proper spices to prepare hummus, kabobs, falafel, shawarma, kufta, and other typical Egyptian Food from scratch." *Id.*

The CO issued a *Final Determination* denying certification on February 1, 2013. AF 51-60. In an addendum to the *Final Determination*, the CO acknowledged receipt of the Employer's SWA job order, but noted that this job order "failed to provide the job opportunity's minimum education and experience requirements and whether or not on-the-job training will be available." AF 58-59. As a result, the CO found that the Employer had failed to comply with 20 C.F.R. § 655.15(e)(2), and denied the Employer's application on that basis. *Id.*³

The Employer filed a request for review with BALCA on February 19, 2013. AF 1-50. BALCA issued a Notice of Docketing on February 25, 2013, notifying the parties that the appeal had been docketed and providing the parties an opportunity to submit briefs on an expedited basis. BALCA received the Appeal File (AF) from the CNPC on February 26, 2013. Counsel for the Employer filed a brief on March 1, 2013; Counsel for the CO filed a statement of position on March 4, 2013. Counsel for the CO argues that denial was proper in this case because the Employer failed to include all of the regulatory required information in its SWA job order. Specifically, Counsel for the CO notes that "the SWA job order did not include work hours and days, expected start and end dates, whether overtime would be available, the wage offer, or that the position is temporary as required by 20 CFR § 655.15(e)(2); § 655.17."

³ The CO provided three bases for denial in the *Final Determination*: failure to show comply with the pre-filing recruitment requirements; failure to establish that the nature of the Employer's need is temporary; and failure to submit a recruitment report. Because I affirm the denial on the first of these bases, the latter two are not discussed.

DISCUSSION

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). These steps include, *inter alia*, placing a job order with the State Workforce Agency (SWA) serving the area of intended employment. 20 C.F.R. § 655.15(e)(1). The SWA job order must contain all of the information required under Section 655.17. *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."). In particular, section 655.17 requires an employer's advertisements to contain the following:

- (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.

20 C.F.R. § 655.17 (2011). Applications that do not comply with the required criteria "shall not be accept for processing." 20 C.F.R. § 655.15(a).

In the instant case, the Employer's SWA job order omitted information that is required by regulation. Specifically, the job order did not contain information regarding the employer's name or contact information; the job opportunity's minimum education and experience requirements; the work hours and days, expected start and end dates of employment, and whether or not overtime would be available; or the wage offer. Nor did it state that the position is temporary. Based on these omissions, I agree with the CO and find that the Employer failed to comply with 20 C.F.R. § 655.15(e)(2). Accordingly, I affirm the CO's denial on that basis.

ORDER

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

For the Board:

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