

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 June 2013

BALCA Case No.: 2013-TLN-00050
ETA Case No.: H-400-13066-461901

In the Matter of:

BLUE WATER INDUSTRIAL TECHNOLOGIES, INC.,
Employer

Certifying Officer: Chicago National Processing Center

Appearances: Rhonda Butler Harkey, Esquire
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Beaumont, Texas
For the Employer

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Washington, DC
For the Certifying Officer

Before: WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

The above captioned matter arises under the temporary nonagricultural labor or services provisions of the Immigration and Nationality Act, 8 USC §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations at 8 CFR Part 214 and 20 CFR Part 655, Subpart A. The 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 CFR § 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* with the U.S. Department of Labor's Employment and Training Administration (ETA). 20 CFR § 655.20. The applications are reviewed by a Certifying Officer (CO) within ETA, who makes a determination to either grant or deny the requested certification. 20 CFR § 655.23. If the CO denies certification, in whole or in part, an employer may request review before an Administrative Law Judge on the Board of Alien Labor Certification Appeals (BALCA or the Board). 20 CFR § 655.33(a).

BACKGROUND

Blue Water Industrial Technologies, L.P. (Employer) is an oil field service and fabrication company based in Beaumont, Texas. The Employer filed an *Application for Temporary Employment Certification* (Application) on March 7, 2013, requesting H-2B certification for 75 Shipfitters. AF 237-284.¹ On the Application's "Place of Employment Information" section, the Employer reported that work would be performed in "Jefferson-Beaumont-Port Arthur, TX MSA, and Nueces-Corpus Christi, TX MSA." AF 243.

The CO issued a *Request for Further Information* (RFI) on March 14, 2013, notifying the Employer that its Application failed to satisfy all the requirements of the H-2B program. AF 231-237. In the RFI, the CO informed the Employer that "certification of more than one position may be requested on an *Application for Temporary Employment Certification* so long as all H-2B workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment and during the same period of employment." AF 233, citing 20 CFR § 655.20(d). According to the CO, the Employer's Application seeks certification for H-2B workers to perform labor or services in multiple areas of intended employment. AF 233. Specifically, the CO stated:

The employer listed worksites in Section F.c. of the ETA Form 9142 which are significantly distant from one another. Specifically, the employer indicated the following worksites in ETA Form 9142, Section F.c.:

1. Beaumont, TX
2. Corpus Christi- TX

These worksites are located a significant distance from one another. For example, the furthest worksite, Corpus Christi is approximately 291 miles from Beaumont, TX and requires 4 hours and 30 minutes to travel between them. Based on the geographic distance between the worksites, the Department does not find the worksites to be within the same area of intended employment. The employer may not submit one application for multiple worksites which are not within the same area of intended employment.

AF 233. After identifying this deficiency, the CO stated:

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

The employer must provide evidence that the locations are within normal commuting distance and are in the same area of intended employment as defined by 20 CFR sec. 655.4.

AND

The employer must submit an amended ETA Form 9142, Section F.c., Item 7. that complies with the requirement that all H-2B workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment. Note: The amendment to this Section must match what is in the employer's advertisements.

AND

The employer must submit evidence of newspaper advertisements and a copy of the SWA Job order which lists, with adequate specificity, all worksite locations, which must be located within the same area of intended employment as defined by Departmental regulations at 20 CFR sec. 655.4. (A listing of city or town names, or if the location is outside of inhabited areas, rural highway/road crossings will meet this requirement.)

Note: The employer is reminded that in accordance with Departmental regulations at 20 CFR sec. 655.15(a), all recruitment including the placement of the job order and newspaper advertisements must have occurred prior to the application submission date of March 7, 2013. Subsequent advertisements that occurred after the employer filed its H-2B application with the Chicago NPC will not cure pre-filing advertisement errors.

We require your written permission to make the corrections to the application on your behalf.

AF 233-234 (emphasis in original).

The Employer responded to the RFI on March 20, 2013, submitting, *inter alia*, an amended application that excluded Jefferson County, Texas as a worksite location. AF 162. In a cover letter, the Employer explained:

In response to your Request for Information dated March 14, 2013, we submit the following amended ETA Form 9142 at Exhibit 1.

The amended ETA Form 9142 reflects the single worksite in the Nueces-Corpus Christi, TX MSA. Therefore, the amended form complies with the Departmental regulations at 20 CFR sec. 655.20(d) and 20 CFR sec, 655.4 requiring all H-2B workers will perform the same services or labor on the same terms and conditions,

in the same occupation, in the same area of intended employment and during the same period of employment, and also requiring the “geographic area within normal commuting distance of the place (worksites address) of intended employment...” Because the worksite is within one county (Nueces), this letter provides evidence that the single location requires no commute.

The attached is an amended ETA Form 9142, Section F.c., Item 7 that complies with the 20 CFR sec. 655.20(d) requirement as listed above. Additionally, the employer has submitted evidence of recruitment which lists the worksite location.

AF 156. The Employer provided the CO permission to make “the corrections needed for application completion and approval.” *Id.*

On May 13, 2013, the CO issued a Final Determination denying certification. AF 147-151. In an attachment explaining the denial, the CO identified one deficiency preventing certification of the Employer’s application: Multiple Areas of Intended Employment. AF 149, *citing* 20 CFR §§ 655.20(d) and 655.4. After repeating his instructions to the Employer in the RFI, the CO stated:

The employer was instructed to provide evidence that its worksites were in one area of intended employment. The employer could amend its ETA Form 9142 to reflect one area if it has advertisements that were consistent with its amendments.

In their response to the RFI the employer did not challenge the Department's findings that the worksite locations of Jefferson County and Nueces County are in different areas of intended employment. Rather, the employer requested the Department amend ETA Form 9142 removing Jefferson County, the location of Beaumont, TX and include only the worksite of Nueces County, the county where Corpus Christi, TX is located.

However, amending ETA Form 9142 without providing a job order and a newspaper advertisement consistent with the amended worksites does not cure the deficiency. The areas listed on the job order and on the newspaper advertisements are no longer the true and accurate areas of intended employment as Jefferson County (Beaumont, TX) has been excluded in the response to the RFI.

The deficiency remains with this application. Therefore the application is denied.

AF 151. The Employer requested review of the CO’s Final Determination in a letter dated May 21, 2013 and received by BALCA on May 22, 2013. AF 1-146. The Board issued a Notice of Docketing on May 23, 2013.

DISCUSSION

Scope of Review

The Board'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 application. 20 CFR sec. 655.33(a), (e). Accordingly, I am unable to consider additional evidence included in the Employer's request for review. 20 CFR § 655.33(a)(5).

Multiple Areas of Employment

The CO based his denial of the Employer's Application on one deficiency: Multiple Areas of Intended Employment. AF 21, *citing* 20 C.F.R. §§ 655.20(d) and 655.4. As discussed above, the Employer's initial application listed worksites in "Jefferson-Beaumont-Port Arthur, TX MSA, and Nueces-Corpus Christi, TX MSA." AF 243. The Employer does not contend that these worksites are located within a single area of intended employment. Rather, the Employer argues that it amended its application to include worksites only in "the Nueces-Corpus Christi, Texas Metropolitan Statistical Area (MSA)," and the CO's basis for denial is, therefore, not relevant.

In an attachment explaining the denial, the CO acknowledged the Employer's request to amend its application, but stated that "amending ETA Form 9142 without providing a job order and a newspaper advertisement consistent with the amended worksites does not cure the deficiency." AF 151, *citing* 20 C.F.R. §§ 655.20(d) and 655.4. However, neither of the regulations cited as authority for the denial—20 C.F.R. §§ 655.20(d) and 655.4—condition an employer's ability to amend the worksites on its application to an employer's ability to provide a job order and newspaper advertisement "consistent with the amended worksites."² In fact, another regulatory provision—section 655.34(c)(3)—explicitly authorizes an employer request amendments to its application, "including elements of the job offer and the place of work." A request for such an amendment "will be granted if the CO determines the proposed amendments are justified and will have no significant effect upon the CO's ability to make the labor certification determination required under 655.32." 20 C.F.R. § 655.34(c)(3). Accordingly, I must determine whether the CO abused his discretion in denying the Employer's request to amend the worksites listed on its application.

The Board has never had cause to determine whether an employer's amendment request is "justified" or whether it would have "a significant effect upon the CO's ability to make the

² Rather, section 655.20 provides that certification of more than one position may be requested on the application as long as all H-2B workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment. And section 655.4 defines an area of intended employment as "[t]he geographic area within normal commuting distance of the place (worksite address) of intended employment of the job opportunity for which the certification is sought."

labor certification determination required under section 655.32.” In the instant case, the CO did not allow the Employer to remove Jefferson County as a worksite on its application because the Employer did not provide a job order and newspaper advertisements—placed prior to the Employer filing its application—that would be consistent with the worksites on its amended application. The CO explained that such an amended was precluded because “the areas listed on the job order and on the newspaper advertisements are no longer the true and accurate areas of intended employment as Jefferson County (Beaumont, TX) has been excluded in the response to the RFI.” AF 151.

Notably, the Department’s H-2B regulations require an employer to satisfy certain pre-filing recruitment steps before filing an *Application for Temporary Employment Certification*. 20 C.F.R. § 655.15. Those steps include placing a job order with the relevant state workforce agency and running two advertisements in a newspaper of general circulation serving the area of intended employment. 20 C.F.R. § 655.15(e), (f). Both the job order and advertisements must meet the requirements set forth in 20 C.F.R. § 655.17, and may not “contain terms and conditions of employment” that are less favorable than those offered to the H-2B workers. 20 C.F.R. § 655.17. Pursuant to section 655.17(b), all advertising must include “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.”

In its brief before the Board, Counsel for the CO explained that allowing the Employer to amend its application to remove Jefferson County after the Employer included Jefferson County as a worksite in its job order and newspaper advertisements “would render the [Employer’s] application in violation of the general requirement that the advertisements . . . not contain terms and conditions less favorable than those offered to the H-2B workers and the specific requirement in 20 C.F.R. § 655.17(b) that the employer to [*sic*] describe the geographic area of employment with enough specificity to inform applicants of travel requirements.” Counsel for the CO further elaborated:

The CO is required to conduct a labor market test as part of the certification process. The pool of applicants willing to drive 4 hours and thirty minutes between job sites is very likely to be smaller than the pool of applicants willing to work at one job location in which their commute would only be from their home to the job location. Thus, this is clearly a less favorable term and condition than only reporting to one worksite. The presence of the requirement in the advertisements means that they contain less favorable terms and conditions than those offered to the H-2B workers, a violation of 20 C.F.R. § 655.17 and the CO correctly found that he could not make a determination that there are not sufficient domestic workers available to fill the positions.

In light of this explanation, I find that the CO reasonably did not allow the Employer to amend its application to remove Jefferson County, and affirm the CO’s denial of certification on this basis.

ORDER

The Certifying Officer's Final Determination denying certification is AFFIRMED.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge