U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 21 February 2013

BALCA Case No.: 2013-TLN-00031
ETA Case No.: H-400-12363-307670

In the Matter of:

LOUISIANA STRUCTURAL MOVERS,
D/B/A DEVILLIER HOUSE MOVERS,

Employer

Certifying Officer: Chicago National Processing Center

Appearances: Ashley Foret Dees, Esquire
Lake Charles, Louisiana
For the Employer

Gary M. Buff, Associate Solicitor
Stephen R. Jones, Attorney
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

This proceeding is before the Board of Alien Labor Certification Appeals ("BALCA" or "the Board") pursuant to the above-captioned Employer's request for administrative review of the Certifying Officer's *Final Determination* denying temporary labor certification under the H–2B non-immigrant program. For the reasons discussed below, the Certifying Officer's *Final Determination* in this matter is REVERSED and REMANDED for processing consistent with this Decision.

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 such 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 the employer's application has been accepted for processing, it is reviewed by a Certifying Officer ("CO"), 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 December 28, 2012, Louisiana Structural Movers, d/b/a Devillier House Movers ("the Employer") filed an *Application for Temporary Employment Certification* (ETA Form 9142) with the CNPC for eight H-2B workers to be employed as "Construction Laborers" from March 1, 2013 until January 1, 2014. AF 45-61.[2] The workers were to be paid an hourly wage of $9.50. AF 49. Although the Employer is located in Eunice, Louisiana, the application stated that worksites would also be located in the following areas of Louisiana: the Natchitoches Nonmetropolitan Area, Lake Charles, Lafayette, and the New Iberia Nonmetropolitan Area. AF 51.

In an attempt to comply with the regulatory required pre-filing recruitment, the Employer placed two advertisements in the *Jennings Daily News*— one on Friday, December 14, 2012 and another on Sunday, December 16, 2012. Both advertisements stated:

> Louisiana Structural Movers seeks 8 temporary, peakload workers for the position of laborer in and around Eunice, New Iberia, Lake Charles, Lafayette, Natchitoches areas; worker will help in lifting, moving houses, digging holes/tunnels under house for move; digging, setting crib jacks along with setting cribbing/foundations; must be able to repetitively lift 1001bs; work outdoors in

[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 61 page appeal file will be abbreviated "AF" followed by the page number.

> inclement weather; 40 hours per week; 7am to 5pm; Mon to Fri; no overtime; needed from 03/01/2013 to 01/01/2014, no education required, no experience required, no on-job training; travel to houses required - transportation provided, $9.50 per hour; random drug screening upon hire; contact employer at 337 -546-0255; 5328 Hwy 190 Eunice, LA 70535

AF 57-58. The Employer also posted a job order with Louisiana's State Workforce Agency ("SWA"), which provided a job description identical to the one listed in the above advertisements. AF 59-60.

On January 4, 2013, the CO issued a Request for Further Information ("RFI"), notifying the Employer that its application did not satisfy the requirements of the H-2B program. AF 39-44. In particular, the CO noted:

> [I]n Section G., Item 1. of the ETA Form 9142, the employer indicates that the basic rate of pay offered will be $9.50 per hour. However, the wage range determined in the employer's prevailing wage determination is $8.09 to $9.69 per hour, with the lowest wage being $8.09 for Natchitoches Nonmetropolitan Area, LA, and $9.69 for Lake Charles County, LA which are both listed in the employer's itinerary. The employer appears to be offering an hourly wage for Lake Charles County, LA that falls below its prevailing wage determination. Therefore, the ETA Form 9141 Prevailing Wage Determination must be submitted in order to verify that the employer has satisfied the pre-filing requirements.

AF 41. Because the wage offered in the Employer's application and pre-filing recruitment—$9.50—fell below the prevailing wage of $9.69 per hour in Lake Charles County, Louisiana, the CO instructed the Employer to "provide evidence that it satisfied the regulatory pre-filing recruitment requirements," including but not limited to, the State Workforce Agency ("SWA") job order and newspaper advertisements the Employer placed in connection with its application. AF 42-43.

The Employer responded to the RFI via email on January 10, 2013. AF 31-38. The Employer resubmitted copies of the SWA job order and newspaper advertisements included in its initial application, and asked the CO to amend its application to "clearly reflect that the additional worksites include the New Iberia Nonmetropolitan Area ($9.50), the Lafayette area ($8.58) and the Natchitoches Nonmetropolitan Area ($8.09)." AF 31. The Employer clarified that its application should no longer include Lake Charles as an additional worksite. *Id*. Due to this amendment, the Employer asserted that its advertisements and job order should now reflect the highest prevailing wage for the areas of employment reflected in its modified application. *Id*.

On January 25, 2013, the CO issued a *Final Determination* denying certification. In support of the denial, the CO cited the Employer's failure to comply with 20 C.F.R. § 655.15(e)(2), (f)(3). AF 26-30. Specifically, the CO explained:

> The employer's request to amend its application and remove Lake Charles County does not cure the deficiency. The employer's submitted newspaper advertisements

> and job order still list Lake Charles County as one of the employer's worksite locations. The employer is not in compliance with Departmental regulations at 20 CFR sec. 655.17. The employer failed to submit evidence of newspaper advertisements and a SWA Job order which list, with specificity, its updated worksites. Therefore the deficiency remains with the application.
>
> The employer did not adequately respond to the RFI and did not provide sufficient documentation to overcome the deficiency listed above, therefore, the application is denied.

AF 30. Based on the above findings, the CO determined that the Employer did not provide sufficient documentation to overcome the deficiency listed in the RFI—failure to comply with the pre-filing recruitment requirements at 20 C.F.R. § 655.15(e)(2), (f)(3)—and, accordingly, denied the Employer's application.

On February 4, 2013, BALCA received a letter on behalf of the Employer requesting administrative review of the CO's *Final Determination*. In this letter, Counsel for the Employer asserted:

> Employer feels that potential candidates for the job were adequately notified as to where the worksite locations may be in terms of geographic location within the state of Louisiana. Per the advertisements already placed, any potential candidate would have been apprised of the locations of remaining worksite locations. Specifically, 20 CFR 655.17 reads that employer's advertisement 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." Therefore, applicants were apprised that they may have to travel to Eunice, New Iberia, Lafayette and Natchitoches areas because those areas were specifically listed within the newspaper advertisement.
>
> Employer feels that the language in the advertisement, stating where the workers may expect to work, has apprised the workers of where they may expect to work in the job position, as the advertisement does INCLUDE the worksite locations remaining after the amendment to the ETA 9142.

AF 3. Counsel for the Employer maintained that the Employer had remedied the identified deficiency and that, to the extent any defect remained, the Employer had been denied the opportunity to make the corresponding corrections.

The undersigned issued a Notice of Docketing on February 5, 2013, notifying the parties that BALCA docketed the above-captioned appeal, and providing the parties an opportunity to submit briefs on an expedited basis.

On February 14, 2013, Counsel for the CO filed a brief stating, in pertinent part:

> Where, as in the present case, the wage rate advertised in the pre-filing recruitment does not coincide with the appropriate wage rates for the area covered by the application, the application is properly denied. The RFI provided clear notice of the deficiency and of the requisite corrective action, but the employer's response was inadequate.
>
> It is the employer's burden to establish that the interests of U.S. workers have been protected. Based on the information in the record, the CO could not determine that the employer had complied with the pre-filing recruitment requirements. The inadequate RFI response constituted a valid reason for denial of temporary labor certification and the BALCA should affirm the CO's final determination.

(CO's Statement of Position at 2).[3] Counsel for the Employer filed a brief on February 15, 2013, reiterating the arguments made in the Employer's request for administrative review.

DISCUSSION

Scope of Review

The H-2B regulations limit the scope of the Board's review to the appeal file prepared by the CO, legal briefs submitted by the parties, and the 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 C.F.R. § 655.33(a), (e).

Pre-Filing Recruitment Requirements

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."

As discussed above, the Employer placed a SWA job order and two advertisements with the *Jennings Daily News* seeking "8 temporary, peakload workers for the position of laborer in and around Eunice, New Iberia, Lake Charles, Lafayette, Natchitoches areas . . . ." AF 57-60. The Employer's original application mirrored the worksite locations listed in these

[3] Counsel for the CO appears to overlook the CO's stated basis of denial, as the deficiency he cites was remedied by the Employer's amendment to its application in the response to the RFI.

advertisements, but in an attempt to remedy a deficiency identified in the RFI, the Employer later amended its application to remove Lake Charles as an additional worksite. Accordingly, the Employer's advertisements list a worksite location that is not included in the additional worksite locations listed on the Employer's amended application.

The CO found that the Employer failed to comply with section 655.17, since "[t]he Employer failed to submit evidence of newspaper advertisements and a SWA Job order which list, with specificity, its updated worksites." AF 30. But the regulations do not require an employer's pre-filing recruitment advertising to list all worksite locations with specificity. Rather, they require the advertising to 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." 20 C.F.R. § 655.17(b). The CO never explained why the inclusion of Lake Charles as a potential worksite in the Employer's advertising necessarily violates 20 C.F.R. § 655.17. Indeed, when reviewing the Employer's original application (which lists Lake Charles as a potential worksite), the CO did not find that the application was deficient because it listed worksites located in multiple areas of intended employment. I therefore assume the CO determined that Lake Charles was in the same area of intended employment as the other worksites listed on the Employer's application. And assuming Lake Charles is in the same area of intended employment as the other worksites listed in the advertisements, it is not clear why the inclusion of Lake Charles necessarily means that the advertisements failed to provide "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." More specifically, if Lake Charles and the other worksites listed in the advertisements are in the same area of intended employment—defined as "the geographic area within normal commuting distance of the place (worksite address) of intended employment of the job opportunity for which the certification is sought)"—I cannot see why applicants would not have been adequately apprised of where they would likely have to reside to perform the advertised services or labor.

Counsel for the Employer maintains that "potential candidates for the job were adequately notified as to where the worksite locations may be in terms of geographic location within the state of Louisiana." While the record does not contain any additional evidence or documentation to support this assertion (such as a map or more detailed argument), the CO failed to identify the worksite locations listed in the advertising as a potential issue until the *Final Determination*. The Employer was thus denied the opportunity to present evidence or argument to rebut the CO's finding that its advertising did not adequately apprise applicants of "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."

Procedural due process requires that an employer be permitted to respond to the basis for denial when the employer did not previously have the opportunity to establish relevant facts. As discussed above, the employers' pre-filing recruitment advertising did not need to list its updated worksites "with specificity." It is clear that the Employer did not list Lake Charles as a worksite location in its advertisements to dissuade American workers from applying for the advertised positions. Accordingly, this matter will be remanded to the CO in order to provide the Employer an opportunity to present evidence and argument in response to the CO's finding that the

Employer's pre-filing recruitment advertisements did not adequately apprise applicants of the geographic location of the job opportunity.

ORDER

In light of the foregoing, I hereby **ORDER** that the Certifying Officer's denial in this matter is **REVERSED** and **REMAND** the matter to the Certifying Officer for processing consistent with the foregoing Decision.

For the Board:

Digitally signed by WILLIAM COLWELL
DN: CN=WILLIAM COLWELL,
OU=ADMINISTRATIVE LAW JUDGE,
O=Office of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge