

U.S. Department of Labor

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

BALCA Case No.: 2013-TLN-00039
ETA Case No.: H-400-13022-197237

In the Matter of:

T. LANDSCAPING CORPORATION,

Employer

Certifying Officer: Chicago National Processing Center

Appearances: Charles H. Cui, Esq.
Chicago, IL
For the Employer

Gary M. Buff, Associate Solicitor
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

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Employer T. Landscaping Corporation’s 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 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, who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the Certifying Officer denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

Procedural History

T. Landscaping Corporation (“the Employer”) filed an *Application for Temporary Employment Certification* with ETA’s CNPC on January 22, 2013, seeking temporary labor certification for one “Landscaper” from February 15, 2013 to December 15, 2013. AF 76-86.²

On January 30, 2013, the CO issued a *Request for Information* (“RFI”) informing the Employer that its application failed to meet all of the requirements of the H-2B program. AF 86-75. The CO identified four deficiencies, three of which the Employer corrected and are not at issue in this appeal. The remaining deficiency, resulting in the CO’s denial of certification, related to the Employer’s compliance with the pre-filing recruitment requirements at 20 C.F.R. §§ 655.15(e)(2) and 655.15(f)(3). Specifically, the CO instructed the Employer to provide evidence that it complied with regulatory requirements, including, but not limited to the following:

1. The job order; and
2. All newspaper advertisements (e.g. tear sheets) or other proof of publication (e.g. affidavit or publication, invoices or other electronic verification) furnished by the newspaper for each day the advertisement was published, one of which must be a Sunday advertisement unless the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition; which shows the text of the advertisements.

AF 72. The CO reminded the Employer that 20 C.F.R. § 655.15(a) requires that all recruitment must occur prior to the application submission date of January 23, 2013, and any subsequent

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.

advertisements that occur after the Employer files its H-2B application will not cure any pre-filing advertisement deficiencies. *Id.*

On February 6, 2013, the CO received the Employer's response to the RFI. AF 31-67. The Employer's response materials included copies of newspaper advertisements that were published in the *Chicago Times* on January 13, 2013 and January 14, 2013 and a print-out of a job order that was placed with Illinois Job Link (Job Order #705959). AF 45-47. The print-out of Job Order #705959 indicated that it had been posted on February 5, 2013 and expired on February 16, 2013. AF 46.

After reviewing the Employer's response, the CO issued a second RFI on February 15, 2013. AF 27-30. In this second RFI, the CO acknowledged the Department's receipt of Job Order #705959, but identified the following deficiency:

The submitted copy of SWA Job Order #705959 did not correspond with the Job Order information in Section H. of the ETA Form 9142. Specifically, Section H., Item 2 through 2b., indicated that Job Order #667253 was open from January 11, 2013 through January 22, 2013. Therefore, the submitted job order in response to the RFI was circulated after the newspaper advertisements were published and after ETA 9142 was submitted for processing. Therefore, the correct job must be submitted in order to verify that the employer has complied with the pre-filing requirements.

AF 29. To remedy this deficiency, the CO instructed the Employer to submit "the job order which corresponds to the submitted application." AF 30.

On February 15, 2013, Counsel for the Employer sent an e-mail in response to the second RFI, in which he attached a copy of Job Order #705959. AF 17-26. This copy of Job Order #705959 is identical to the Employer's submission in response to the initial RFI. *Id.*

The CO issued a *Final Determination* denying certification on February 21, 2013. AF 12-16. The CO confirmed receipt of the second RFI response materials, but observed that the SWA job order submitted in connection with this response was the same as the one the Employer had provided in response to the first RFI: Job Order #705959. AF 15-16. Because this job order opened on February 5, 2013, and closed on February 16, 2013, the CO found that the Employer "failed to provide any evidence of a Job Order that was circulating with the SWA at the time its newspaper advertisements ran." AF 16. The CO additionally noted that the Employer "did not provide a copy of Job Order # 667253 which was listed in Section H. of the ETA Form 9142." In light of these findings, the CO determined that the deficiencies identified in the RFIs remained with the Employer's application, and therefore, denied certification. *Id.*

Thereafter, the Employer requested review of the determination, via email, stating:

The Job Order No. 667253 posted with Illinois Department of Employment Security from 1/11-1/22/2013 was attached for your review. The job order previously submitted for RFI was not the correct one.

AF 1-11. Job Order #667253 was attached to this email. AF 3-6. BALCA received the Employer's request for review on February 28, 2013.

The undersigned issued a Notice of Docketing on March 1, 2013, notifying the parties that the appeal has been docketed and providing the parties an opportunity to submit briefs on an expedited basis. Counsel for the Employer filed a brief on March 1, 2013, arguing:

The employer submitted valid Job Order No. 667253 during first RFI, and the counsel maintained a clear record of it. In Memo to Chief Administrative Judge dated 2/27/13, USDOL enclosed Job Order No. 705959 (P46-49) as part of responses submitted by counsel to USDOL on 2/5/2013 and received by USDOL on 2/6/13, and the job order status was listed as "inactive", even though the expiration date was listed as 2/16/13. The job order was exactly the same as the one submitted in the second RFI. The fact is it is simply impossible to print and submit a Job Order as "inactive" status on 2/5, if the expiration date was listed as 2/16. This makes one wonder where the truth lies. Secondly, in the initial application Form 9142 and supporting documents, counsel clearly stated the Job Order No. is 667253. The Job Order (No. 667253) was re-submitted during Request for Review.

Counsel for the CO submitted a brief on March 7, 2013, maintaining that the Employer had submitted the incorrect job order in its submissions before the CO, and arguing that the CO properly found that the Employer's evidence failed to establish compliance with the regulation's pre-filing recruitment requirements.

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). Here, the Employer's request for review includes a job order (Job Order #667253) that the Employer failed to include in any of its previous filings before the CO. The Employer's argument for the inclusion of this evidence is not clear; however, I note that the printout of Job Order #667253 included in the request for review is dated January 11, 2013. There is thus no indication that this document was not available to the Employer at the time of the CO's requests for further information. Accordingly, the print-out of Job Order #667253 will not be considered upon appeal.

Documentation of Recruitment Steps

Pursuant to 20 C.F.R. § 655.15(a), an employer must satisfy all of the recruitment steps outlined in the regulations before filing an *Application for Temporary Employment Certification* with ETA. These pre-filing recruitment steps include, *inter alia*, the placement of an active job order with the State Workforce Agency ("SWA") serving the area of intended employment. 20

C.F.R. § 655.15(e). In the instant case, the Employer failed to establish that it complied with this step. Specifically, the Employer filed an *Application for Temporary Employment Certification* with the CNPC on January 22, 2013, but provided the CO with a Job Order—Job Order No. 705959—that had not been placed until February 5, 2013. Although the job order included in the Employer’s request for review—Job Order #667253—was circulated prior to January 22, 2013, as discussed above, I may not consider this evidence upon appeal.

The arguments in the Employer’s brief are not entirely clear, though the Employer appears to assert that it submitted the “correct” job order—Job Order #667253—in response to the first RFI. However, there is no credible support for this argument in the record. The Administrative File clearly establishes that the Employer submitted Job Order #705959 in response to both the first and second RFI, and that this job order differs from the job order that the Employer identified in its *Application for Temporary Employment Certification* (Job Order #667253). In fact, in the second RFI, the CO clearly stated that the job order included in the Employer’s response to the first RFI was Job Order #705959, and confirmed that this job order did not correspond with the job order listed on in the Employer’s application. *See* AF 29 (specifically stating that “[t]he Job Order submitted did not correspond with the Job Order information in Section H. of the ETA Form 9142”). Notably, the Employer did not dispute these remarks when it submitted its response to the second RFI. *See* AF 17-26 (failing to refute the CO’s finding that the Job Order submitted in response to the first RFI did not correspond with the Job Order listed on the Employer’s ETA Form 9142).

In light of the foregoing, I find that the Employer failed to establish compliance with the pre-filing recruitment requirements at 20 C.F.R. § 655.15. Since the burden to establish eligibility for the H-2B program falls squarely on the petitioning employer, I affirm the CO’s denial of certification on this basis.

ORDER

Accordingly, the Certifying Officer’s *Final Determination* denying certification is **AFFIRMED**.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge