



Issue Date: 28 July 2014

BALCA Case Nos.: 2014-TLN-00033
ETA Case Nos.: H-400-14147-195947

In the matter of:
CRESTVIEW RESIDENTIAL CARE FACILITY,
Employer

Certifying Officer: Chicago National Processing Center

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary nonagricultural labor or services provisions of the Immigration and Nationality Act, 8 USC § 1101(a)(15)(H)(ii)(b), 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

On May 27, 2014, Crestview Residential Care Facility (“Employer”) submitted an application for temporary labor certification to ETA. *See* AF 71-92.¹ Employer requested certification for 1 caregiver from 07/01/2014 to 03/30/2015. The certification request was based on the peak load standard of temporary need. In an addendum, Employer stated the following about its temporary need:

¹ Citations to this 92-page appeal file will be abbreviated “AF” followed by the page number.

Our company is a licensed residential care facility for the elderly established in 2005 to provide elderly care, board and lodging an a place for the elderly to call their home. We provide this service on a 24-hour basis/? days a week/365 days a year. Our facility is licensed for a maximum 6 elderly residents. Our facility is open everyday for visitors of the elderly from 10am to 8pm. We provide assistance to the elderly with their basic needs and activities of daily living such as personal hygiene, grooming, toileting and incontinence care, meals, laundry, daily exercise and medical appointments. We employ 2 permanent caregivers, 1 is a live-in caregiver and the other one is a day shift caregiver, From time to time, when a caregiver is sick or calls-off or is on an emergency leave, as the Owner/Administrator, would supplement the need and work the hours. However, I have become disabled and confined to a wheelchair. I would like to take a leave to rest and recuperate to gain my strength back before I resume my responsibilities. We now need a temporary caregiver to handle the extra work load that I am unable to handle and more importantly to cover for the off days of our live-in caregiver and day shift caregiver. This 1s a temporary and short term need only since we employ regular permanent caregivers to fill the position. I am unable to take off from work until such time as I am able to employ a temporary worker to fill in the temporary need.

Id. at 77.

The CO issued a Request for Further Information (“RFI”) on June 10, 2014, notifying Employer that its application failed to satisfy all the requirements of the H-2B program. *Id.* at 63. Specifically, the CO determined that Employer failed to establish that the nature of its need is temporary, and to satisfy pre-filing recruitment requirements.² To remedy the first deficiency, the CO requested that the employer review the four standards of temporary need and choose the standard that best fits its need; submit an updated temporary need statement, if applicable; and submit supporting evidence and documentation that justifies the chosen standard of temporary need including, but not limited to, “Summarized monthly payroll reports for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and Owner/Administrator employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received.” To remedy the pre-filing recruitment deficiencies, the CO requested that Employer submit evidence that it complied with the required pre-filing advertising requirements and the job order.

Employer responded to the RFI with a newspaper ad attached and an updated statement of need. *Id.* at 43-62.

The CO issued a Final Determination denying certification on June 24, 2014. *Id.* 4. The CO based its denial of certification on the Employer’s failure to satisfy pre-filing recruitment requirements and failure to establish that the nature of the employer’s need is temporary. *Id.*

Employer requested Administrative Review of the CO’s Final Determination on July 1, 2014. *Id.* at 1-2. I issued a Notice of Docketing on July 17, 2014. The Office of the Solicitor

² The RFIs also contained additional deficiencies, but they were not raised in the CO’s final decisions.

("Solicitor") filed its statement of position related to the CO's Final Determination ("Solicitor's Brief") on July 21, 2014.

DISCUSSION

Advertisement Requirements

The CO listed, as one deficiency in Employer's application, Employer's failure to satisfy pre-filing recruitment requirements related to job order and newspaper advertisements.

Under 20 C.F.R. § 655.17, advertisements 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 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 through 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.

The job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.17. 20 C.F.R. § 655.15(e)(2).

The CO, in the RFI, found:

Specifically, Job Order #1117 does not list the dates of need as required by 20 CFR sec. 655. 17(f). If the job order form does not contain fields for dates of need, the employer should have inserted this information in a free text field, such as with the job duties to comply with this requirement Therefore, a job order that is in compliance with the pre-filing recruitment requirements must be submitted to the Department.

AF 65. Employer, in its response to the RFI, attached copies of its newspaper ad and job order and stated:

The attached copies of the newspaper ad tear sheets dated April 23, 2014 (Wednesday) and April 27, 2014 (Sunday) will show that we have complied with the pre-filing requirements. The JOI 117 likewise attached will not show the dates of need but has complied with all the other requirements. The only applicant who applied for the position was informed verbally of the dates of need during her interview however, it did not have a negative impact on the applicant and the lack of that information only generated one applicant. With all the pre-filing requirements complete in the Newspaper ad - it still did not generate a single applicant. Our client herein argues that it did not make any difference whether that information was included in the job order or not.

Id. at 44. After reviewing Employer's response to the RFI, the CO found that Employer failed to overcome the deficiency. *Id.* The CO explained:

In the employer's response to the RFI, the employer provided the same copy of the Job Order #1117 that was originally submitted with the application. Upon review of this job order, the dates of need are not included. This job order is not compliant with Departmental regulations. The employer acknowledged in its e-mail letter of explanation, dated June 09, 2014, that the job order does not contain the required dates of need. In addition, the employer stated, "[w]ith all the pre-filing requirements complete in the Newspaper ad - it still did not generate a single applicant. Our client herein argues that it did not make any difference whether that information was included in the job order or not". Departmental regulations 20 CFR sec. 655.17 requires the employer to advertise dates of need in the newspaper advertisements and job order. The employer was reminded of this requirement in a previous denial letter for case number H-400-14020-378454, dated February 21, 2014, denied for this same reason.

Id. at 39.

In its appeal letter, Employer argues:

there are NO sufficient numbers of qualified U.S. workers available for the job opportunity for which the temporary labor certification is sought because the employer had placed two (2) job order (#902 and #1117) with the SWA and advertised the job opening twice - on December 5 and 8, 2013 and another 2 days in April 23 and 27, 2014 with reference to the Job Orders posted with the SWA. In spite of the deficiency pointed out by the Certifying Officer, only one (1) U.S. workers responded to the Job Order # 1117 posted in April 2014. The said applicant was interviewed by the Employer and was requested to submit her references to enable the Employer to do a background check. The applicant was also informed by the Employer during the interview that the job opening was for a temporary period of time from July 1, 2014 to March 30, 2015. The applicant said

she would email her updated resume with a detailed description of her experience. The applicant asked for the Employer's Telephone number and email address where she would send her updated resume but the Employer never received any further communication from the applicant. The Employer assumed she was no longer interested in the position. Attached is a copy of the emailed resume of the only applicant. The Employer also used word- of-mouth regarding the job opening to other RCFE owners and other caregivers, way beyond what is required of the Dept. Of Labor, but still did not generate any applicant/referral.

Id. at 1-2.

On appeal, the Solicitor argues that Employer does not dispute that it omitted the dates of need in its job order; rather, it tries to justify its error by suggesting that its omissions of the dates of need did not have a negative effect on the labor market test. However, “the regulations are clear and the employer did not follow the regulatory mandate.” Solicitor’s Brief at 4.

Employer, in its response to the NOD and its appeal letter, acknowledged that the job order did not contain a beginning and end date. According to Employer, however, “it did not make any difference whether that information was included in the job order or not” as the job order produced only one applicant and that applicant was informed during the interview of the expected beginning and end date. AF 1-2, 44.

I find Employer’s argument unpersuasive. As indicated above, the expected start and end dates of employment is required pursuant to § 655.17(f). It is no excuse that the job order produced only one applicant, and that the one applicant was advised later of the expected beginning and end date. The Department of Labor requires the information listed in § 655.17 in advertisements because such information is necessary for an adequate test of the domestic labor market. *Freemont Forest Systems, Inc.*, 2010-TLN-38, slip. op. at 3 (Mar. 11, 2010) (“the Department has determined that these steps are necessary in order to protect domestic workers”). By neglecting to include required information, Employer failed to conduct an adequate test of the labor market. See *BPS Industries, Inc.*, 2010-TLN-14 and 15, slip op. at 3 (Nov. 24, 2009).

Accordingly, I affirm the CO’s denial of certification on this basis.³

³ Because the denial of certification can be upheld on this basis alone, there is no need to address the additional grounds for denial cited by the CO in the Final Determination.

ORDER

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

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE