

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: 05 August 2014

OALJ Case No.: 2014-TLN-00036

ETA Case No.: H-400-14139-038188

In the Matter of:

TT&T SALVAGE & TOWING SERVICES, INC.,
Employer

Before: Stephen R. Henley
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary labor certification provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations at 8 C.F.R. Part 214 and 20 C.F.R. Part 655, Subpart A. These 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 C.F.R. § 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* (ETA Form 9142) with the U.S. Department of Labor (“DOL” or “the Department”), Employment and Training Administration (“ETA”). 20 C.F.R. § 655.20. Employers’ applications are reviewed by a Certifying Officer (“CO”), who makes a determination to either grant or deny the requested labor certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, an employer may seek administrative review before the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a). BALCA’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 Employer’s application. 20 C.F.R. § 655.33(a), (e).

Background

On June 13, 2014, TT&T Salvage and Towing Services, Inc. (the “Employer”) filed an application with ETA requesting temporary labor certification under the H-2B program for one (1) Laborer & Freight, Stock and Material Mover for the period June 2, 2014 to November 14, 2014.¹ (AF 38-55).² The application listed a rate of pay for this position ranging from \$8.00 to \$13.00 per hour. (AF 42).

On June 20, 2014, the CO issued a *Request for Further Information* (RFI) notifying the Employer that its application failed to satisfy all of the requirements of the H-2B program. (AF 29-37). The CO found “reason to believe” that the wage range listed in the Employer’s application did not equal or exceed the highest of the prevailing wage, federal minimum wage, state minimum wage, or local minimum wage applicable during the requested period of certification. (AF 31). Accordingly, the CO directed the Employer to submit a copy of the Prevailing Wage Determination (“PWD”) that it had obtained from the National Prevailing Wage Center (“NPWC”). *Id.* The CO further directed the Employer to provide evidence that it complied with the pre-filing recruitment requirements specified in the regulations, and specifically instructed the Employer to provide a copy of the job order it had filed with the applicable State Workforce Agency (“SWA”), as well as newspaper tear sheets documenting the advertisements run in connection with this application. (AF 100-101).³ The CO reminded the Employer that, pursuant to 20 C.F.R. § 655.15(a), all recruitment must occur before the application submission date, which in this case, was on June 13, 2014. (AF 32-33).

Employer did not submit any additional documentation or information but did respond to the RFI on July 2, 2014, by submitting a letter declaring “the OFLC Certifying Officer has permission to correct or adjust the application for submission.”⁴ (AF 28).

The CO issued a *Final Determination* denying certification on July 11, 2014, specifically citing six deficiencies in the Employer’s application. (AF 16-27). The Employer’s BALCA appeal followed on July 21, 2014.⁵ (AF 1-15). The Board issued a Notice of Docketing on July

¹ The temporary worker was needed for “extra help with loading semi-trucks and unloading individual small trailers of scrap iron” whose duties would include “pick up scrap metal laying on ground and putting in proper pile until loaded in semi-trailer.”

² Citations to the Appeal File will be abbreviated “AF” followed by the page number.

³ The tear sheets documenting advertisements Employer ran in the *Ottawa Herald* on Saturday/Sunday May 3-4, 2014, Tuesday, May 6, 2014; Thursday May 8, 2014 and Saturday/Sunday, May 10-11, 2014, list an offered salary range of \$8.00 to \$10.00 per hour. AF 85.

⁴ Employer’s failure to provide the requested information is a basis for denial under 20 C.F.R. § 655.23(d). *See Development Resource Management, Inc.*, 2011-TLN-00029 (June 14, 2011).

⁵ In its appeal letter and subsequent statement of position, Employer acknowledges it did not offer a wage at least equal to the prevailing rate. However, Employer submits it is not a large corporation. Instead, it is a small family owned business with five employees operating in a largely rural area. When filing the PWD, Employer said it chose the closest thing it could to the job description at issue in this case and, when the PWD came back, it was more than its most experienced employee makes, and something Employer could not afford. Employer believes that one worker will not affect the community or the wages or the working conditions in the area and asks that the court reconsider the denial. While Employer’s implicit request that the court treat smaller employers differently than larger employers in applying the federal government’s temporary alien certification regulations has superficial appeal, and may make sense as a matter of equity, fairness and common sense, the regulations, unfortunately, do not

28, 2014, setting out an expedited briefing schedule. The CO filed a brief on July 30, 2014 and Employer filed an additional statement of position on July 31, 2014.

Discussion

The Department may only certify applications under the H-2B program if, at the time the application is filed, there are not sufficient able and qualified U.S. workers to fill the requested position(s), and employment of the requested foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 C.F.R. § 214.2(h)(6)(iv). To ensure that opportunities remain open to qualified U.S. workers, the Department requires employers to test the labor market for qualified U.S. workers at prevailing wages. *See* Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), 73 Fed. Reg. 78,020, 78,031 (Dec. 19, 2008). To that end, the regulations prescribe specific domestic recruitment steps that employers must complete before filing an application for H-2B labor certification. 20 C.F.R. § 655.15 (2008). These steps include the placement of a job order with the SWA in the area of intended employment, and the placement of two print advertisements in a newspaper of general circulation. § 655.15(e), (f). Both the SWA job order and the newspaper advertisements must contain, *inter alia*, “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.” § 655.17(g). Neither may contain terms and conditions of employment that are less favorable than those offered to H-2B workers. § 655.17. In the instant case, the Employer’s newspaper advertisement advertised a wage of \$8.00 to \$10.00 per hour. AF 52-55. The prevailing wage for the requested position, as determined by the NPWC, was \$12.77 per hour. AF 31.⁶ The Employer’s newspaper advertisement thus advertised a wage range that is far below the prevailing wage provided by the NPWC, and one which is clearly less favorable than the wage the Employer has promised to offer the H-2B worker in its application, \$8.00 to \$13.00.

Additionally, while I recognize that it may be more costly, an employer must offer the prospective foreign national a wage range that equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and local minimum wage. 22 C.F.R. § 655.22(e). In this case, Employer indicated in section G, item 1 of its ETA

distinguish between categories of employers. Instead, they treat all employers equally and mandate certain filing requirements be satisfied, regardless of size. If an Employer elects to utilize the H-2B visa program, then it must comply with the Department’s regulations. *Nico Art Link, Inc.*, 2010-TLN-00078 (Sept. 22, 2010), *citing Chris Orser Landscaping*, 2010-TLN-00031 (Feb. 5, 2010). The regulations clearly require that any employer seeking to fill a temporary nonagricultural job with a foreign national must offer a wage, or a range of wages, not less than the applicable prevailing wage. While its explanation for not doing may appear reasonable, Employer did not offer the prevailing wage rate, which is a violation of the applicable pre-filing recruitment regulations. Once this deficiency was identified, the application could not be accepted for processing. There is no discretion to act otherwise as neither BALCA nor the CO may disregard the plain text of the regulations for policy or other considerations. *See, e.g., Dearborn Public Schools*, 1991-INA-222, slip op. at 7 (Dec. 7, 1993) (en banc) (holding BALCA lacks the express authority to invalidate a regulation as written).

⁶ While the ETA Form 9141 (Prevailing Wage Determination) is not included in the appeal file, the CO references it in the RFI and Employer appears to concede it is correct, based on the information provided.

Form 9142 that the foreign national employee would be offered a basic rate of pay of between \$8.00 and \$13.00. However, as noted above, the PWD is \$12.77 and the employer did not amend the beginning rate range on the ETA Form 9142 to be at least equal to the prevailing wage.

In light of the foregoing discussion, I find that the ETA Form 9142 and newspaper advertisements are in clear violation of the pre-filing requirements listed in section 655.15(f) and 22(e). Because applications that do not comply with the pre-filing recruitment regulations “shall not be accepted for processing,” 20 C.F.R. § 655.15(a), I find that the CO properly denied certification on these bases.⁷

Order

Based on the foregoing, it is hereby **ORDERED** that the Certifying Officer’s denial of certification in this matter is **AFFIRMED**.

STEPHEN R. HENLEY
Administrative Law Judge

⁷ The CO denied Employer’s application on four (4) additional bases: failure to establish the temporary nature of the employment need (20 C.F.R. § 655.6); failure to contact the local union as a recruitment source for U.S. workers (§ 655.15(d)(4)); failure to submit a complete recruitment report regarding the manner in which drug and alcohol determinations were made (§ 655.15(j)); and no original signature on the application (§ 655.20(a)). Given this appeal can be resolved on the issue of prevailing wage rates, the Court need not address the other bases for denial.