

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 19 May 2014

BALCA Case No.: 2014-TLN-00028
ETA Case Nos.: H-400-14069-651613

In the Matter of:

**CLIPPERS LAWN MAINTENANCE INC.,
D/B/A CLIPPER LANDSCAPE & SUPPLY,**

Employer.

Appearances: Ryan S. Bewersdorf
Bewersdorf PLC
Birmingham, MI
For the Employer

Gary M. Buff, Associate Solicitor
Harry Sheinfeld, Counsel for Litigation
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 matter arises under the H-2B temporary nonagricultural guest worker provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184, and the implementing regulations set forth at 8 C.F.R. § 214.2(h)(6) and 20 C.F.R. Part 655, Subpart A (collectively H-2B program).¹ The H-2B program permits employers to bring foreign workers

¹ All citations to 20 C.F.R. Part 655, Subpart A refer to the Final Rule promulgated in 2008 (“2008 Rule”), 73 Fed. Reg. 78020 (Dec. 19, 2008), as amended by the Interim Final Rule (“2013 IFR”) promulgated in 2013, 78 Fed. Reg. 24047 (Apr. 24, 2013), since the Department has postponed its implementation of the Final Rules promulgated in January 2011, 76 Fed. Reg. 3452 (Jan. 19, 2011) (“2011 Wage Rule”) and February 2012, 77 Fed. Reg. 10038 (Feb. 21, 2012) (“2012 Rule”). See 79 Fed. Reg. 11450,11453 (Mar. 5, 2014) (announcing that until such time as the Department finalizes a new wage methodology, the current wage methodology contained in 20 C.F.R. § 655.10(b), as set by the 2013 IFR, will remain unchanged and continue in effect); 78 Fed. Reg. 53643 (Aug. 30, 2013) (indefinitely delaying effective date of 2011 amendment); *Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (ND FL Apr. 26, 2012) (enjoining DOL from implementing or enforcing the 2012

into the United States 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 under this program must apply for a “labor certification” from the U.S. Department of Labor (Department). 8 C.F.R. §214.2(h)(6)(iii). Applications are reviewed by a Certifying Officer in the Employment and Training Administration (ETA) pursuant to the procedures set forth at 20 C.F.R. Part 655, Subpart A. If an employer’s application is denied by the Certifying Officer, in whole or in part, then the employer may request expedited administrative review by the Board of Alien Labor Certification Appeals (BALCA). 20 CFR §655.33(a).

The Employer in this case, Clippers Lawn Maintenance Inc. (Employer), filed an application seeking H-2B labor certification for five landscape laborer positions. A Certifying Officer denied the Employer’s application, and the Employer timely petitioned for expedited administrative review by BALCA. For the reasons set forth below, the Certifying Officer’s Final Determination in this matter is AFFIRMED.

BACKGROUND

The Employer filed an *Application for Temporary Employment Certification* (ETA Form 9142) seeking H-2B labor certification for five landscape laborer positions on March 11, 2014. Administrative File (AF) 20-28, 46-48. On March 18, 2014, a Certifying Officer (CO) in the Chicago National Processing Center (CNPC) issued a *Request for Further Information* (RFI) stating that the Department was unable to render a final determination on the Employer’s application because the Employer failed to satisfy all the requirements of the H-2B program. AF 39. The RFI identified four deficiencies, only one of which is relevant to the instant appeal. The first deficiency, entitled “Pre-filing recruitment requirements,” stated:

In accordance with Departmental regulations at 20 CFR sec. 655.15(e)(2) and 20 CFR sec. 655.15(1)(3), the job order and newspaper advertisements must satisfy the requirements contained in 20 CFR sec. 655.17. Specifically, Section F.b., Item 5. of the ETA Form 9142, indicates candidates must have softscape and hardscape experience. However, the employer did not indicate the number of months of experience required in Section F.b., Item 4a. of the ETA Form 9142. Additionally, the employer's recruitment report indicates that it rejected two U.S. applicants due to lack of experience. Therefore, the advertisements and job order must be submitted in order to verify that applicants were properly apprised of the experience requirement for the job opportunity and to verify that the employer has complied with the pre-filing recruitment requirements.

AF 42. The RFI identified the information that must be included in job orders and newspaper advertisements pursuant to 20 C.F.R. § 655.17, and directed the Employer to provide evidence that it complied with the regulatory requirements. The Employer’s attorney responded that same

Rule), affirmed by *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013); 77 Fed. Reg. 28764 (May 16, 2012) (announcing “the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the order in the Bayou II litigation”).

day, providing, *inter alia*, a copy of the job order that was posted by the SWA, and copies of the newspaper advertisements that the Employer placed pursuant to 20 C.F.R. § 655.15(f).

The CNPC sent an email to the Employer's attorney on April 10, 2014, to inform him that a final determination had been issued on the Employer's application. The letter attached to the email was only one page, and did not include an attachment stating the reasons for the denial. AF 2. The Employer's attorney replied twenty minutes later, stating the reasons for the denial had not been attached and requesting "the full letter with reason for denial." AF 8. The CNPC sent an email to the Employer's attorney later that day, stating "we inadvertently did not include the final determination letter for [the Employer's application]." Attached to this email was the same incomplete determination letter that the CNPC had sent earlier that day. AF 2, 10. The Employer's attorney responded less than an hour later, stating: "The second page that is supposed to be attached stating the reasons for the denial is not attached. Only the first page is attached. Please send me the full document so my client knows the basis for the denial." AF 13. In a conference call held with the parties on May 14, 2014, Counsel for the CO did not dispute that the CNPC never responded to this second email.

On April 21, 2014, the Employer requested expedited administrative review by BALCA. AF 1-14. The Employer argued that BALCA should vacate the CO's denial because the regulations require the CO to identify the regulation allegedly violated and the nature of the violation when denying an application, and in this case, the CO failed to identify any reason in support of the denial. AF 2.

The undersigned Administrative Law Judge issued a Notice of Docketing on April 28, 2014. BALCA received a copy of the Administrative File on May 1, 2014, which included, among other things, a complete copy of the Final Determination. The Final Determination in the Administrative File consists of five pages, including a three page attachment stating the basis for the denial. AF 15-19. The three page attachment provides one basis in support of the denial: failure to comply with the pre-filing recruitment requirements at 20 C.F.R. § 655.17(e). In particular, it states that the Employer's job order and newspaper advertisements did not specify the 12 month experience requirement as required by 20 C.F.R. § 655.17(e), and that the Employer's newspaper advertisements did not contain the employer's name "as required by the regulations."

Counsel for the CO sent a letter to the Board on May 12, 2014, requesting BALCA affirm the denial of certification for the reason set forth in the denial letter, specifically, that the Employer violated the provision of 20 C.F.R. § 655.17(2e) by not identifying the nature of the required experience. Counsel for the CO acknowledged the Employer's attorney had not received a complete copy of the Final Determination, but argued that this regrettable "oversight" did not prejudice the Employer because the Employer's attorney obtained a complete copy of the Final Determination in the Administrative File that was sent in response to the Employer's appeal and was therefore able to address the ground for denial in the Employer's brief before the Board. In addition, Counsel for the CO argued that because the deficiency identified in the Final Determination was incurable, the fact that the Employer was not fully apprised of it at the time it filed the appeal was "of no import."

By letter dated May 13, 2014, the Employer's attorney filed a Supplemental Brief on Appeal, arguing the CO's failure to provide a complete denial letter was prejudicial because it forced the Employer to assert an appeal without knowing the basis for which the CO denied the claim and caused the Employer considerable expense, first in having to appeal just to find out the basis of the denial, and then again having to file a supplemental brief to address the sole basis for the denial. Although the Employer's attorney argued that BALCA should vacate the denial on this basis alone, he alternatively argued that the CO's sole reason for denial, the failure to list 12 months experience in its advertisement and job order, was in error.

The undersigned held a conference call with the parties on May 14, 2014, at which time he expressed his concern that the Employer's attorney had not been afforded adequate opportunity to review the reasons for the denial set forth in the Final Determination in the Administrative File, and offered the Employer's attorney additional time to file a supplemental brief. The Employer's attorney declined to do so, and informed the undersigned that he had filed a supplemental brief on May 13, 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 the prevailing wage. 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 (2009). 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 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 throughout 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.

20 C.F.R. § 655.17. Applications that do not comply with the required criteria "shall not be accept for processing." 20 C.F.R. § 655.15(a).

The undersigned does not doubt that the CNPC's failure to send a complete copy of the denial letter was prejudicial to the Employer's interests. Unfortunately for the Employer, however, the appropriate remedy is not to vacate the denial with instructions to certify the denial. Although I would have considered vacating the denial and remanding it to the CO to adequately explain his basis for denial, the need for this action was mooted when the CO provided a complete copy of the Final Determination, with the stated reasons for denial, in the Administrative File. In this Final Determination, the CO found that the Employer failed to comply with Section 656.17 because (1) the job order and newspaper advertisements did not indicate the job opportunity's minimum education and experience requirements and whether or not on-the-job training will be available; and (2) the employer's newspaper advertisements did not contain the employer's name. Neither the Employer's attorney nor the Counsel for the CO addressed this second omission in their briefs before BALCA; the undersigned, however, finds it to be determinative, and therefore does not address the CO's other reason for denial.

The record in this case is clear. The tear sheets that the Employer provided in response to the RFI confirm that the advertisements the Employer placed pursuant to 20 C.F.R. § 655.15(f) did not identify the name of the employer, as required by 20 C.F.R. § 655.17(a). The advertisements therefore do not comply with the unambiguous requirement at 20 C.F.R. § 655.17(a) to include the name of the employer. And, because the Employer failed to comply with an unambiguous regulatory requirement governing the recruitment of domestic workers, the CO properly denied certification.

ORDER

In light of the foregoing discussion, it is hereby **ORDERED** that the Certifying Officer's denial of certification is **AFFIRMED**.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge