



Issue Date: 09 December 2013

BALCA Case Nos.: 2014-TLN-00002, 2014-TLN-00003, 2014-TLN-00004, 2014-TLN-00005, 2015-TLN-00006
ETA Case Nos.: H-400-13254-380188, H-400-13254-590094, H-400-13254-103091, H-400-13269-927609, H-400-13269-504074

In the matter of:
NORTH AMERICAN SHIPBUILDING, LLC,
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 September 12, 2013, North American Shipbuilding (“Employer”) submitted several applications for temporary labor certification to ETA. *See, e.g.,* AF 101-112.¹ Employer requested certification for 100 structural metal fabricators and fitters; 50 plumbers, pipefitters, and steamfitters; and 90 welders, cutters, solderers and brazers to be employed from 10/01/2013

¹ As the five applications at issue were denied on the same grounds and the facts of each are similar, citations will be made to only one appeal file: ETA Case No. H-400-13264-590094. Citations to this 112-page appeal file will be abbreviated “AF” followed by the page number.

to 08/01/2014. On September 26, 2013, Employer submitted two additional applications for temporary labor certification, for 34 carpenters and 75 electricians. The certification requests were based on the peak load standard of temporary need. In an addendum, Employer stated the following about its temporary need:

NAS will experience a peak-load from the 4th quarter of 2013 to the 3rd quarter of 2013. NAS is one of four U.S. yards with contracts to construct up to 40 new construction deepwater vessels. Our fitters help layout and fabricate structural parts such as plats, bulkheads, frames, and brace them in position for welding during the construction of a ship. During slower periods we typically do not need many temporary laborers, and can manage with our permanent crew and a few necessary contract workers. During the peak construction period, we would have to maximize work hours in shipyards to work around the clock, which may increase health and safety factor due to the difficult and physically demanding nature of the work, and of working longer hours. We need to bring in additional workers to assist with the fabrication process, and enable the construction process to be operated around the clock in multiple shifts. The efficiency and success of our upcoming construction projects depend on getting additional helping hands from the temporary workers we are requesting.

AF 85.²

The CO issued a Request for Further Information (“RFI”) related to the first three applications on September 18, 2013, notifying Employer that its application failed to satisfy all the requirements of the H-2B program. AF 91. On October 23, 2013 the CO issued an RFI related to the two additional applications. Specifically, the CO determined that Employer failed to establish that the nature of its need is temporary and to satisfy pre-filing recruitment requirements.³ 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, “Signed work contracts and/or monthly invoices from previous calendar years(s) clearly showing work will be performed for each month during the requested period of need,” “Annualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of service and clearly showing work will be performed for each month during the requested period of need,” and “Summarized monthly payroll reports for a minimum of three previous calendar year that identify, for each month and separately for full-time permanent and temporary 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 the job order and all newspaper advertisements or other proof of publication.

Employer responded to the RFI related to the first three applications on September 19, 2013 with responses to specific statements made by the CO in its RFI. AF 32-90. Employer also

² The statements of temporary need for the other job opportunities are similar to this one.

³ The RFIs also contained additional deficiencies, but they were not raised in the CO’s final decisions.

provided additional documentation, including a press release “relating to the 40 new builds of Edison Chouest Offshore” and monthly payroll records for 2010, 2011 and 2012. *Id.* On October 29, 2013 Employer responded to the RFI related to the two additional applications.

The CO issued a Final Determination denying certification for the first three applications on October 29, 2013 and a Final Determination denying the two additional applications on November 15, 2013. *See* AF 22-31. 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 October 29, 2013 Final Determination on November 7, 2013 and the CO’s November 15, 2013 Final Determination on November 22, 2013. *See* AF 1-21. The Office of the Solicitor (“Solicitor”) filed its statement of position related to the CO’s October 29, 2013 Final Determination on November 25, 2013 and its statement of position related to the CO’s November 15, 2013 Final Determination on December 6, 2013.

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, highlighted Employer's statement in its application that its need is "based on a one-time need to build 40 additional vessels at four shipyards in the U.S." AF 13. According to the CO, this statement appears to indicate that there may be multiple worksites, yet Employer did not provide further detail as to their locations. *Id.* Employer, in its response to the RFI, stated that the "reference to multiple yards is a statement of fact about where the majority of those vessels shall be built, among four affiliated U.S. shipyards of which North American Shipbuilding is one. The application is intended for the job site at North American Shipbuilding, and not for any of the other three yards." After reviewing Employer's response to the RFI, the CO acknowledged that Employer stated that there will be only one worksite. AF 15. Nevertheless, the CO found that Employer's supporting documentation is "inadequate to overcome this deficiency." *Id.*

I find that the supporting documentation is sufficient to overcome this deficiency. The job order and advertisements provided by Employer all specify that the address of the job location is at North American Shipbuilders in Larose, LA. *See id.* 72-76. That the company is building additional vessels at other sites does not make it any less clear that the job opportunities advertised will be located in Larose. Therefore, I find that the advertisements conform with the requirement that they describe 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.

The CO found additional deficiencies related to the advertising requirements. First, the CO noted that the submitted job order indicates drug testing/screening and background checks in its hiring requirements, but the requirement was not indicated in its ETA form or in its advertisements.⁴ *Id.* 26. As a result, the minimum qualifications "were not correctly identified in the advertisements and job order." *Id.* The CO also noted that the job order does not contain a beginning date of need for the job opportunity, both the job order and the advertisements do not indicate an end date for the job opportunity, and although the advertisements indicate the availability of overtime the job order does not, "which is a requirement if available as stated in the advertisements." *Id.*

Employer argues that it did not include the pre-employment testing information in the advertisement because pre-employment screening is not listed as a requirement in § 655.17. *Id.* 8. The Solicitor directs me to *Pro Landscape, Inc.*, where, according to the Solicitor, BALCA found an advertising deficiency where "nothing in the Employer's application, and thus its advertisements with the SWA and local newspapers, notified applicants that they would be required to perform such rigorous [physical ability] tests during the interview." The Solicitor

⁴ The CO noted that the job orders related to the applications for electricians and carpenters also indicated credit check and driver's license as requirements but these requirements were not indicated in the ETA form or advertisements.

alleges that Employer's failure to include pre-employment testing in this case is similar. Contrary to the Solicitor's allegation, however, BALCA did not find an advertising deficiency in that case. Rather, BALCA affirmed the CO's denial of certification because the employer failed to prove that the physical ability tests were consistent with normal qualifications required by non-H-2B workers, and therefore, the Employer did not have a lawful, job related reason for denying employment to otherwise qualified individuals. *See Pro Landscape, Inc.*, 2010-TLN-63, slip op. at 4 (June 18, 2010). § 655.17 does not require that the employer list whether pre-employment screening is a requirement for the job. Therefore, I find that the absence of pre-employment testing in the advertisement is not appropriate grounds for denying the certification.

In its appeal letter, Employer asserts, contrary to the CO's finding, that the advertisements did identify the end date of employment. *Id.* 8. Indeed, the advertisements say that the job will last "10 months to begin 10/01/13," indicating that the job will end on August 1, 2013. *See id.* 75-76.

Employer acknowledged that the final job order does not contain a beginning and end date, but explained that this is because the option to put in start and end dates did not exist in the job order form. *Id.* 6. According to Employer, the job order form provided only three options – over 150 days, 4 to 150 days, and 1 to 3 days – and Employer chose the closest option to its 10 months duration, over 150 days. *Id.* Employer did not address the overtime issue in its appeal letter.

Employer's job order failed to include the expected start and end dates of employment and did not indicate whether or not overtime would be available. Both are required pursuant to § 655.17(f). It is no excuse that the job form did not have a specific prompt requesting this information. In *Larry's Oysters LLC*, BALCA found the employer's argument that the online job order form did not permit the employer to include expected start and end dates of employment, whether or not overtime will be available, and a statement that the position is temporary in nature to be unpersuasive because "it is clear that the Employer could have included all of the required information within the job description of the online job order form, which is where it included other specifics about the job opportunity." 2012-TLN-00018, slip op. at 5 (March 2, 2012). Here, Employer could have included the required information within sections of the job order form that allowed comments by Employer. Instead, Employer chose to write only that the job is "Full Time (30 hours or More)" and "Hours Vary." *See id.* at 72-74.

For the foregoing reasons, I find that Employer did not comply with the advertising requirements provided at 20 C.F.R. § 655.17. 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.⁵

ORDER

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

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE

⁵ 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.