



Issue Date: 07 April 2014

BALCA Case No.: 2014-TLN-00021
ETA Case Nos.: H-400-14034-740881

In the Matter of:

AMERICAN POOL ENTERPRISES, INC.

Employer.

Appearances: Kimberly S. Maglin, Esq.
Attorney/Director of Compliance
United Work and Travel, a Division of American Pool Enterprises, Inc.
Owings Mills, MD
For the Employer

Vincent C. Constantino, Esq.
Assistant Counsel for Litigation, Senior Attorney
Office of the Solicitor of Labor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER - AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s denial in the above-captioned H-2B temporary labor certification matter. The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security, “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 8 CFR §214.2(h)(1)(ii)(D); see also 8 U.S.C. §1101(a)(15)(H)(ii)(b); 8 CFR §214.2(h)(6)(ii)(B); 20 CFR §655.6(b)¹. Employers who seek to

¹ The proposed revisions to federal regulations related to the H-2B program, 20 CFR Part 655, Subpart A, published in Vol. 77 Fed. Reg., No. 34 at 10038-10109 and 10147-10169 (Feb. 21, 2012) were stayed on May 16, 2012

hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”). 8 CFR §214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 CFR §655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 CFR §655.33(a).

STATEMENT OF THE CASE

On February 14, 2014 the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from American Pool Enterprises (“Employer”) for 6 Office Clerks as seasonal workers to be employed from May 1, 2014 through September 30, 2014. The position is classified as O*Net Code 43-9061, Office Clerks, General and is to be performed at a central office location in Savage, Maryland. A high school graduate or GED equivalent is indicated as a requirement in Section F.b of the application. The Employer indicated that no training for the job opportunity or employment experience is required in Section F.b Items 3 and 4; but, indicated a special requirement in Section F.b Item 5 of “One year staffing experience at a Pool Management Company” is required. The Employer indicated that the Maryland Workforce Exchange was the State Workforce Agency (“SWA”) utilized for the relevant SWA Job Order 3136-46 which had start and stop dates of 1/19/2014 and 1/29/2014, respectively. AF² 28-37 In support of Employer’s need for Office Clerks is seasonal, Employer attached summary of the summer employment of Office Clerks in 2011 (17 in April decreasing to 11 in September), 2012 (18 in May decreasing to 13 in September), and 2013 (20 in May decreasing to 14 in September). AF 91-95

The copy of Job Order 313646 submitted with the Application indicates the Employer’s worksite location for “Office Clerks, General (43906100) as being in Owings Mill, Maryland and that the job order would be displayed no earlier than 1/19/2014 and last displayed on 1/29/2014. Within the Job Order description was the requirement “Must have one year staffing experience at a swimming pool management company.” No testing or computer skills were required. A high school diploma or equivalent and a minimum “12” months experience in selected occupation was required. AF 86-90

The Employer indicated in its *Application for Prevailing Wage Determination* (ETA Form 9141) for the position of “Office Clerks, General” O*Net 43-9061 that the position does not supervise others but included duties of answering telephones, receiving and providing information, and required a high school education or equivalent as well as “12 months staffing experience” and the special requirement of “1 year staffing experience at a swimming pool management company.” The Employer also indicated the positions were in Savage, Maryland and that “In addition, an information clerk for American Pool Enterprises, Inc. will also be required to send

following a U.S. District Court decision, Vol. 77 Fed. Reg., No. 95 at 28764 (May 16, 2012). See also *Bayou Lawn & Landscape Services, et. Al. v. Sec. of Labor*, 713 F3d 1080 (11th Cir. 2013) affirming the U.S. District Court for Northern Florida. Accordingly, the regulations promulgated at Vol. 73 Fed. Reg., No.245 at 78020-78069 (Dec. 19, 2008) apply in this matter.

² “AF” refers to the Appeal File and is followed by the pertinent page number of the relevant page in the Appeal File.

and receive messages to and from all field employees handle light administrative duties.” The SWA indicated the ETA Form 9141 was received 12/20/2013; the position classification was O*Net 43-9061, Office Clerks, General; the prevailing wage was \$14.78 per hour based on OES (all Industries); and the determination was valid from 1/14/2014 through 4/17/2014. AF 99-102

In its recruitment report, the Employer indicated that responses from 5 applicants came directly to the Employer and 6 responses were received through the SWA. The Employer stated 9 of the 11 applicants were contacted and each contacted applicant “did not have 1 year of staffing experience at a swimming pool management company. Therefore [the respectively named applicant] was placed in the ‘Not Eligible for Hire’ status.” The Employer stated it was unable to contact the remaining 2 individuals and that they were “placed in the ‘Not Hired’ status as we have no additional contact from this applicant.” AF 38-40

On February 11, 2014 the CO issued a Request for Further Information (“RFI”) to obtain information to address the indicated deficiency:

“The employer has not established that the terms of employment offered to the H-2B workers are not more favorable than those offered to the U.S. applicants or are consistent with the normal and accepted qualifications required by non-H-2B employers in same or comparable occupations.

In ETA Form 9142, Section F.b, Item 5 the employer listed terms and conditions of employment that are not normal to U.S. workers similarly employed as Office Clerks, General.

Specifically, the employer has indicated that applicants must have one (1) year staffing experience at a Pool Management Company. This requirement does not appear to be consistent with normal and accepted qualifications for an Office Clerk. Therefore, the employer must provide documentation to validate its requirement.”

The CO indicated that the Employer’s response must include “a letter detailing the reasons why one (1) year staffing experience at a Pool Management Company is necessary for the specific occupation listed on the employer’s ETA Form 9142” and “documentation which supports the employer’s belief that its requirements for the job opportunity are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or compatible occupations.” AF 25-27

On February 14, 2014 the Employer filed its response to the RFI (AF 14-24) that –

“The Office Clerk position APEI is hiring for need to be filled with those applicants who have experience taking calls from lifeguard and our field staff. They must have knowledge to properly answer and direct these questions. The Prevailing Wage rate is reflective of what someone with experience should be paid; the Prevailing Wage provided by the DOL is not an entry level administrative pay-rate.

For as long as APEI has been hiring Office Clerks, we have asked for this particular position to have one year of staffing experience at a pool management company, so that on the day that the pools open and the Office Clerks begin working, we can assure that all our operations are running smoothly with an employee who has worked in this particular field before. Swimming Pool Management Companies, unlike other types of businesses, rely on employees who have previous experience not only to assist new employees, but to assure that all lifeguards and patrons are safe. Safety in the Pool Industry is something that APEI cannot take for granted and APEI must assure that ALL Office Clerk employees are trained properly on the first day that the pools open. This

particular position is not one that allows for employees to learn solely on the job, the experience is a key component to a successful and, more importantly, safe season for all of APEI staff and patrons.

Finally, please see attached the 9142 for Office Clerks at APEI in 2013, which was signed by Mr. Carlson and approved based on the same requirement of One Year Staffing Experience for this position. For several years, APEI has been hiring H-2B workers for this position and the one year experience requirement has always been a staple to this application for the reasons stated above.”

No further information was submitted in response to the RFI.

By Final Determination dated March 6, 2014, the CO denied the application for 6 H-2B Office Clerks requested by Employer because the Employer failed to show that “(1) there are not sufficient U.S. workers available who are capable of performing the temporary service or labor at the time of filing the petition for H-2B classification at the place where the foreign worker is to perform the work; and, (2) the employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.” The CO classified the Employer’s February 14, 2014 response to the RFI as “a brief business necessity argument” and noted that the described duties of the position “indicate basic office responsibilities of answering the telephoning and providing general information regarding pool operations ... [and] provided no information or documentation to establish that the one year experience with a Pool Management Company is a normal and accepted qualification required by non-H-2B employers in the same or similar occupations.” The CO acknowledged that the Employer had been certified for the position with the one year experience requirement in the past; but properly noted that each application is reviewed independently and a prior certification is not binding on a similar case in the future. AF 11-13

On March 17, 2014 the Employer filed its response to the Final Determination and captioned the document as “Appeal of Denial of ETA Case Number H-400-14034-740881.” The Employer argues that “APEI’s requirement of 1 year staffing experience at a pool management company meets the qualifications of 20 CFR 655.2(h) and the Denial of the H2B Labor Certification should be overturned for the aforementioned reasons.” AF 1-2 It is specifically noted that the Employer included additional information in its response to the Final Determination; however, only that information actually submitted in support of the application and before the CO at the time of the final determination may be considered by the Board of Alien Labor Certification Appeals (“BALCA”). 20 CFR §655.33(a)(5) Accordingly, the additional information set forth in Employer’s response to the Final Determination in this case is not considered.

The Appeal File was received in Washington, DC on March 25, 2014 and by this presiding Judge on March 27, 2014. Written briefs were received from the Solicitor and the Employer’s counsel on April 2, 2014. The AF and submitted briefs have all been considered.

DISCUSSION

An employer seeking certification to employ H-2B nonimmigrant workers bears the burden to establish eligibility for issuance of a requested temporary labor certification. The Employer must offer “terms and working conditions normal to U.S. workers similarly employed in the area of intended employment, meaning that [the terms and conditions of employment] may not be

unusual for workers performing the same activity in the area of intended employment ...” 20 CFR §655.22(a). The qualifications for the job must be “consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.” 20 CFR §655.22(h)

Where an employer has submitted an application for temporary labor certification of H-2B workers and that application fails to meet all the obligations required by 20 CFR §655.22 or other requirements of the H-2B program, “the CO must issue a RFI [Request for Further Information] to the employer” setting forth the deficiency in the application and permitting the employer to submit supplemental information and documentation for consideration before issuance of a final determination on the application. Failure to comply with an RFI, including not providing all documentation within the specified time period, may result in a denial of the application and also result in the CO requiring supervised recruitment in the future. 20 CFR §655.23(c).

Upon appeal to BALCA, only that documentation upon which the CO’s final determination was made (the AF), the request for BALCA review (which may not contain evidence that was not submitted to the CO for consideration in the underlying determination) and submitted legal briefs may be considered. 20 CFR §655.33

An employer seeking certification to employ H-2B nonimmigrant workers must conduct specific recruitment requirements to ensure that there are not qualified U.S. workers who will be available for the positions listed in the Application for Temporary Employment Certification. 20 CFR §655.15 This includes required advertising in newspapers and the mandatory SWA job order placement. A core function of the SWA is to refer individuals to posted job orders. The SWA also serves as the arbiter of the acceptability of job duties and terms and conditions of the job offer, including the minimum qualifications required for the position, if any, rate of pay, and any special requirements.³ The SWA “may only refer for employment individuals for whom they have verified identity and employment authorization.” 20 CFR §655.15(i) Additionally, the employer must identify each U.S. worker who applies for the advertised position and those referred to it by the SWA in response to a job order as well as the contact the employer had with each identified U.S. worker. Where a U.S. worker is rejected for the position, the employer must explain the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position. 20 CFR §655.15(j)

In this case the Employer identified 11 U.S. workers who applied or were referred to the Office Clerks, General position and placed 9 of the applicants for the position of Office Clerk, General in a “Not Eligible for Hire” status solely because each of the 9 applicants did not have 1 year of staffing experience at a swimming pool management company.⁴

The Department of Labor has recognized the long standing practices that (1) “the determination of whether job requirements and qualifications are consistent with the normal and accepted job requirements and qualifications of non-H-2B employers is fact specific [and that the] SWAs have decades of experience reviewing job orders according to these standards” and (2) in

³ See comments to the Final Regulations at Vol. 73 Fed. Reg. No 245 at 78031-78032 (Dec. 19, 2008)

⁴ The Employer indicated the inability to establish contact with the remaining 2 U.S. workers by telephone or mail.

determining whether a qualification is normal for a particular job, “employers will continue to be held to an objective standard beyond their mere assertion that a requirement is necessary ... Ultimately, however, it is incumbent upon the employer to provide sufficient justification for any requirement outside the standards for the particular job opportunity.” NPRM preamble Vol. 77 Fed. Reg. No. 34, 10038, 10065, 10071 (Feb. 21, 2012)

In this case the SWA referred to the Employer 6 U.S. workers who were considered qualified and available for the Office Clerks, General position. Additionally, 5 other U.S. workers with similar qualifications applied directly to the Employer. The Employer rejected the U.S. workers because they did not have 1 year of staffing experience at a swimming pool management company. (AF 38-79) The CO provided the Employer with the opportunity to objectively demonstrate that “1 year of staffing experience at a swimming pool management company” was a bone fide qualification for the Office Clerks, General position in the area of intended employment such that the stated reason for rejecting the U.S. worker applicants would be for a lawful job-related reason.

In response to the RFI the Employer failed to submit any objective evidence that the “1 year of staffing experience at a swimming pool management company” was a normal and accepted job requirement by non-H-2B employers in the relevant pool management industry. This could have been accomplished by the Employer submitting comprehensive questionnaires from those pool management companies that do not employ H-2B workers; or reports from recognized pool management associations who have conducted appropriate surveys of work requirements of pool management companies that do not employ H-2B workers. Since the Employer has a history of employing H-2B workers in the position advertised, it is not a non-H-2B employer and its hiring preferences/practices do not necessarily establish those preferences/practices of non-H-2B employers.

In its reply to the RFI, the Employer did set forth their reasons for asserting that the “1 year of staffing experience at a swimming pool management company” was necessary and included a copy of the 2013 approved temporary labor certification for the same position that included the same “1 year of staffing experience at a swimming pool management company.” (AF 14-25) However, the reasons for requiring prior staffing experience with a swimming pool management company stated by the Employer are not substantiated by objective evidence as a normal and accepted job requirement of swimming pool management employers who do not employ H-2B workers. Additionally, the fact that a similar position with the same 1 year staffing requirement had been approved previously is not binding on subsequent applications and is not persuasive in this case in light of the specific RFI inquiry and opportunity to provide specific objective documentation of such a “normal and accepted” job requirement in the swimming pool management industry, if such a requirement existed at the time of application.

In view of all the foregoing, the Employer has failed to establish that the “1 year of staffing experience at a swimming pool management company” is a normal and necessary qualification/requirement for the Office Clerks, General position as placed with the SWA and advertised in local newspapers and has thus denied employment to nine identified U.S. workers for an unlawful reason. Accordingly, the CO’s denial of the Employer’s February 14, 2014, *H-2B Application for Temporary Employment Certification* is proper.

ORDER

It is hereby ORDERED that the Certifying Officer's DENIAL of the Employer's February 14, 2014, Application for Temporary Employment Certification is AFFIRMED.

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia