



Issue Date: 10 September 2014

BALCA Case No.: 2014-TLN-00040
ETA Case Nos.: H-400-14189-077281

In the Matter of:

ANDY AND ED INC., d/b/a GREAT CHOW,

Employer.

Appearances: Douglas B. Payne, Esq.
Attorney at Law
New York, NY
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: DANA ROSEN
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 C.F.R. §214.2(h)(1)(ii)(D); see also 8 U.S.C. §1101(a)(15)(H)(ii)(b); 8 C.F.R. §214.2(h)(6)(ii)(B); 20 C.F.R. §655.6(b)¹. Employers who seek

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 following a U.S. District Court decision, Vol. 77 Fed. Reg., No. 95 at 28764 (May 16, 2012). See also *Bayou Lawn*

to hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”). 8 C.F.R. §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 C.F.R. §655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. §655.33(a).

STATEMENT OF THE CASE

On June 8, 2014, the employer filed an H-2B application with the Department seeking one full time worker to be employed as a Cook-Chinese Specialty Worker for the period from June 28, 2014 to February 28, 2015. On July 15, 2014, the Certifying Officer (CO) sent out a Request for Information (RFI) which requested that the employer provide certain information in accordance with 20 C.F.R. § 655.23(c).

In the RFI, the CO found that the employer failed to establish the nature of its temporary need in violation of 20 C.F.R. §§ 655.6 and 655.21(a); failed to show that the qualifications for the job were consistent with the normal and accepted qualifications required by non-H-2B employers in violation of 20 C.F.R. § 655.22(h); failed to satisfy the advertising requirements of the regulations in violation of 20 C.F.R. §§ 655.17(a)-(g), 655.15(e)(2), and 655.15(f)(3); and failed to submit a complete and accurate recruitment report in violation of 20 C.F.R. §§ 655.15(j) and 655.20(a). The employer was requested in the RFI to document its compliance with the regulations.

The employer responded to the RFI on July 22, 2014. After he reviewed the RFI responses, the CO found that the employer had failed to demonstrate that it satisfied all of the deficiencies identified in the RFI. On August 6, 2014, the CO denied the employer’s H-2B application. This appeal followed when BALCA received a letter from the Employer on August 18, 2014, requesting administrative review of the Certifying Officer’s Final Determination. The notice of docketing was issued on August 20, 2014.

BALCA received the CO’s brief on August 29, 2014 and the employer’s brief on September 3, 2014. The Appeals File was received on September 4, 2014.

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 C.F.R. §655.22(a). The qualifications for the job must be “consistent with the normal and

& 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.

accepted qualifications required by non-H-2B employers in the same or comparable occupations.” 20 C.F.R. §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 C.F.R. §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 C.F.R. §655.23(c).

Upon appeal to BALCA, only that documentation upon which the CO’s final determination was made (the Appeal File), 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 C.F.R. §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 C.F.R. §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.² The SWA “may only refer for employment individuals for whom they have verified identity and employment authorization.” 20 C.F.R. §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)

While the CO’s finding regarding the failure to file an accurate recruitment report is affirmed, the other counts will be addressed nevertheless.

1: The employer failed to complete and submit an accurate recruitment report.

The CO found that the employer failed to file an accurate recruitment report in violation of 20 C.F.R. §§ 655.20(a), 655.15(j)(2)(i), and this court agrees with that finding.

When an employer files its application for temporary nonagricultural employment, it **must** submit a signed and dated recruitment report that identifies **each** recruitment source by name,

² See comments to the Final Regulations at Vol. 73 Fed. Reg. No 245 at 78031-78032 (Dec. 19, 2008)

states the name and contact information of each U.S. worker who applied or was referred to the job opportunity, and explain the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position.

Development Resource Management, Inc., 2011-TLN-00029 (June 14, 2011) (*emphasis added*). By not listing SWA as a recruitment source, the employer did not comply with the letter of the law. Each recruitment source was not listed in the recruitment report due to the fact that the SWA report at AF 83 was absent from the recruitment report listed at AF 88.³ While the employer may consider the omission of the SWA from the employer's recruitment report to be a *de minimis* violation, this court does not view it that way. The governing regulations must be strictly followed. Failure to follow the regulations requires denial of the application.

2: There is insufficient evidence to determine whether the employer failed to demonstrate that it had complied with the advertising requirements of 20 C.F.R. § 655.17.

The CO found in its decision that the employer's job order did not comply with the required pre-filing recruitment obligations contained in 20 C.F.R. § 655.17. (AF 95). Specifically, the CO was correct in stating that the job order in evidence does not contain the experience nor language requirements; however, this is likely due to the fact that a large portion of the job order is "cut off" on the computer print off submitted with the Appeals File and therefore does not appear in evidence. (AF 83). The regulations require that any job offer posted through SWA contain experience requirements. 20 C.F.R. § 655.17(e). "By omitting one of the advertising components, the Employer did not conduct a proper test of the labor market to determine if labor certification was required." *Freemont Forest Systems, Inc.*, 2010-TLN-00038 (Mar. 11, 2012). In the case of Great Chow, however, it is not clear whether the experience requirement was actually omitted from the job offer posted through SWA.

Because the SWA job order in evidence does not contain the experience requirements, and because this court is not prepared to assume what language was contained in the "cut off" portions, this issue must be decided against the employer. It is essential that the employer adhere to the regulatory requirement that all advertising contain the required information listed in 20 C.F.R. § 655.17(f).

It is important to note that the employer has adhered to all other aspects of the advertising requirements contained in the regulations. For example, the **newspaper** advertisement contained the following: the employer's name and appropriate contact information for applicants to send resume's directly to the employer; 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; 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; the job opportunity's minimum

³ "AF" refers to the Appeal File and is followed by the pertinent page number of the relevant page in the Appeal File. Please note that this court is using the September 4, 2014 updated copy of the appeals file, so pagination may slightly differ from the Solicitor's and the employer's briefs.

education and experience requirements and whether or not on-the-job training will be available the work hours and days and expected start and end dates of employment; the wage offer; and the fact that the position is temporary and the total number of job openings the employer intends to fill. (AF 65). *See* 20 C.F.R. § 655.12(a), (b), (d), (e), (f), (g), (h). It is likely that the SWA job order contained this information as well; however, this court cannot be certain due to the deficiency in the current evidence and therefore must affirm the CO's Denial of Temporary Labor Certification.

It should also be noted that the employer is requiring two years of experience in Chinese cooking and fluency in Mandarin, rather than two years of experience in the Mandarin language, in its newspaper advertisements. This court is uncertain as to how the CO was confused about this. Also, the employer argues that the SWA did contain experience requirements at the left side of the job order under the title job specs, where it states "Apprenticeship: No." (AF 83, Emp. Brief 7). It is this court's opinion that this does not refer to experience requirements, but rather states that the job position is not an apprenticeship.

3: The employer established that the nature of the employer's need is temporary.

Based on the record, the employer's need is seasonal. Under the applicable regulations, an "employer must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 C.F.R. § 214.2(h)(6)(ii); 20 C.F.R. §655.5(a). According to the CO's decision, a seasonal need requires that the petitioner (employer) establish "that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees." (AF 9).

The employer meets this test. In its ETA form 9142B, the employer states that "[t]he employer's need is seasonal covering the busy summer vacation and fall and winter seasons." (AF 100). It also states the required dates of employment in the newspaper advertisements as well as ETA form 9142B. (AF 65 & 100). In response to the RFI, the employer sent a letter dated July 22, 2014 with additional information. In this letter, Employer stated that its "need is seasonal, tied to Christmas, New Year's, and Chinese New Year's holidays and banquets and parties during the summer holidays, beginning around July 1. The employer does not need the services from shortly after Chinese New Year, which continues for about fifteen days, until about July 1." (AF 34). The employer needs this additional cook for a limited, seasonal period of time that coincides with major holidays. This period of time also recurs each year. Therefore, the employer has established that the nature of the employer's need is temporary.

The CO also erred by stating that the employer was required to submit additional documentation to support a finding of temporary need. The employer submitted monthly invoices covering September 2013 through the first two months of 2014 (AF 38-58). The employer also included its 2012 Corporation Income Tax Return. (AF 135). As the list of required documents in the RFI is disjunctive (see AF 94), the employer was not required to submit monthly payroll reports. The CO was in error to require these documents. The materials that were submitted by the employer,

as well as the employer's attestations of temporary need, were sufficient to adequately respond to the RFI and to support the employer's argument of temporary need.

Therefore, the employer established that the need of an additional employee is temporary in nature due to increased business during the busy secular and Chinese New Year holiday season.

4: The employer sufficiently demonstrated that the job opportunity was consistent with the normal and accepted qualifications of non-H-2B Employers.

The CO found that the employer failed to satisfy the obligations of H-2B employers and violated 20 C.F.R. § 655.22(h) because it did not include qualifications for its job opportunity that are normal and accepted by non-H-2B employers in the same or comparable occupations. The CO was in error. The employer provided one, firm example of a comparable job advertisement of a non-H-2B employer with even greater experience requirements than the job postings at issue in this case. (AF 110-112). For example, in the non-H-2B employer job posting, applicants for the Sichuan/Guangdong cuisine cook positions were required to have three or more years of experience. *Id.* The administrative chef position required five or more years of Chinese cooking experience. *Id.* In this case, requiring two years of experience for a Chinese restaurant that does approximately 1.6 million dollars in business each year (see AF 135) is not unreasonable. Instead, it seems that the experience qualifications for this job opportunity are normal and accepted by non-H-2B employers in the same or comparable occupations.

The Mandarin language requirement is also normal and accepted by non-H-2B employers in the same or comparable occupations. A chef must be able to communicate with other members of the business as well as the customers. Therefore, the applicant must be able to fluently speak Mandarin Chinese in order to converse with his or her coworkers and English to converse with the average customers. The restaurant manager position listed in the non-H-2B employer example provided at AF 111 also lists Chinese and English language fluency as a job requirement.

Finally, in its response to the RFI, the employer explains the reasons why the 24 month experience and Mandarin language requirements are necessary for the job of Chinese Specialty Cook.

The employer's requirement of 24 months' experience for a cook who will purchase appropriate ingredients, who will prepare dishes of Chinese cuisine to satisfy customers' demands, and who must see that the foods are kept in a manner compliant with local regulations, are less than comparable positions in the Chinese cuisine industry. . . . The employer herein is a high level restaurant with many employees and high overhead, which must maintain a very high level of food product for its customers. As with virtually any Chinese restaurant in the world, its kitchen staff primarily speaks a Chinese dialect and Mandarin Chinese.

(AF 35). The employer's description of the reasoning behind the experience and language requirements is sufficient to satisfy the CO's RFI demand for a letter detailing the necessity of these requirements for the specific occupation listed on the employer's ETA Form 9142. (AF 95).

CONCLUSION

In conclusion, it is this court's opinion that the employer did provide enough additional documentation to demonstrate that the employer's requirements for the job opportunity are consistent with the normal and accepted qualifications required by non-H-2B employers. However, based on the employer's failure to complete and submit an accurate recruitment report in violation of 20 C.F.R. §§ 655.20(a) and 655.15(j)(2)(i), and insufficient evidence to determine whether the employer complied with the advertising requirements of 20 C.F.R. § 655.17, the Certifying Officer's denial must be affirmed.

ORDER

It is hereby ORDERED that the Certifying Officer's DENIAL of the Employer's June 8, 2014, Application for Temporary Employment Certification is AFFIRMED.

DANA ROSEN
Administrative Law Judge

DR/ERH/jcb
Newport News, Virginia