

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 24 April 2014

BALCA Case No.: 2014-TLN-00026
ETA Case No.: H-400-14058-348741

In the Matter of:

CULINARY ADVISORS, INC.
d/b/a EVO ITALIAN,
Employer

Certifying Officer: Charlene Giles
Chicago National Processing Center

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For the Certifying Officer

Before: **CLEMENT J. KENNINGTON**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("CO") denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B guest worker program permits employers to hire foreign workers to perform temporary non-agricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of

Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request administrative review by the Board of Alien Labor Certification Appeals ("the Board" or "BALCA"). 20 C.F.R. § 655.33(a).

STATEMENT OF THE CASE

On February 27, 2014, Culinary Advisors Inc., d/b/a Evo Italian ("Employer"), submitted an application for temporary labor certification to the Department of Labor's Employment and Training Administration ("ETA"). (AF 46-78).¹ Employer requested certification for a "Cook" to be employed from February 28, 2014 to June 30, 2014 on a temporary peakload basis. (AF 46-78).

On March 6, 2014, the CO issued a Request for Further Information ("RFI"), notifying Employer that it was unable to render a final determination for Employer's application because Employer did not comply with all requirements of the H-2B program. (AF 40-45). The CO identified two deficiencies resulting in denial of certification: "Pre-filing recruitment requirements" under 20 C.F.R. §§ 655.15(e)(2) and (f)(3) and "Failure to establish that the nature of the employer's need is temporary" under 20 C.F.R. §§ 655.6 and 655.21(a). (AF 40-45).

On March 13, 2014, Employer submitted a response to the RFI. Employer submitted a copy of the job order from Employ Florida, Florida's State Workforce Agency ("SWA"), and proof of publication of newspaper advertisements in the Palm Beach Post to address the pre-filing requirements, and a study prepared by Nova Southeastern University discussing the population shifts in Florida to address the deficiency involving temporary need. (AF 14-39).

In the Final Determination of March 28, 2014, the CO informed Employer that its application was denied. While Employer had corrected one of the two deficiencies outlined above, the first deficiency – "pre-filing recruitment requirements" – remained and thus required denial of the application because Employer did not satisfy 20 C.F.R. § 655.1(b).² (AF 9, 11-13). Specifically, the CO found that Employer's job order failed to indicate the start and end dates of the job opportunity, as required by the pre-filing requirements in 20 C.F.R. § 655.17. (AF 12). The CO also noted that the SWA job order form may not have a specific prompt requesting the start and end dates of the job opportunity, but Employer "could have included all of the required information within the job description section of the online order form, which is where it included other specifics about the job opportunity." (AF 13).

On April 8, 2014, Employer requested administrative review of the denial of certification. Employer asserts that there is no authority for the CO's contention that the job description area

¹ In this decision, AF is an abbreviation for Appeal File.

² 20 C.F.R. § 655.1(b) (2008) states: "Regulations of the Department of Homeland Security (DHS) for the U.S. Citizenship and Immigration Services (USCIS) at 8 CFR 214.2(h)(6)(iv) require that, except for Guam, the petitioning H-2B employer attach to its petition a determination from the Secretary of Labor (Secretary) that: (1) There are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of filing of the petition for H-2B classification and 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."

of a job order is a “catch-all” for any information not specified elsewhere in a job order. (AF 1-2). Thus, Employer did not list the information regarding start and end dates in the job order “solely because the SWA does not require it in its online form (use of which is mandatory).” (AF 2). Employer also contends that the DOL has a “duty” to ensure that its “agents,” i.e. the SWA, provide resources which comply with the DOL’s requirements. (AF 2). Further, “[t]he State of Florida has used the same job order system for years,” and the DOL has “acquiesced to its usage” knowing that Florida’s system does not provide the opportunity to enter certain information the DOL requires in an H-2B job order. (AF 2). Thus, Employer has complied with all “applicable regulations” and its application should be certified. (AF 2).

The Board received the request for review on April 11, 2014, and then issued a Notice of Docketing on April 14, 2014. The Board received the appeal file on April 15, 2014.

On April 18, 2014, the Board received a position statement on behalf of the CO. In the statement, the CO reiterated his position that a SWA’s failure to indicate where information regarding the start and end dates would appear in the job order does not relieve an employer of the responsibility to provide the information, nor does it make the corresponding requirements “inapplicable.” (CO Br., p. 2). The CO also cited case law from the Program Electronic Review Management (“PERM”) decisions to affirm the principle of BALCA that non-compliant applications must be denied. (*Id.* at 2).

On April 23, 2014, Employer indicated that it would not be submitting an additional brief and that it relies on statements previously submitted in seeking certification.

DISCUSSION

A. H-2B Program

The H-2B program permits employers to hire foreign workers 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 through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii).

This appeal is governed by the 2008 regulations located at 73 Fed. Reg. 78020 (Dec. 19, 2008). *See Ridgebury Management LLC*, 2014-TLN-20 (Apr. 7, 2014). In February of 2012, the DOL published a final rule on the Temporary Non-Agricultural Employment of H-2B Aliens in the United States. *See* 77 Fed. Reg. 10038 (Feb. 21, 2012). Several days after the 2012 Rule went into effect, the U.S. District Court for the Northern District of Florida issued an order temporarily enjoining the DOL from implementing or enforcing the 2012 Rule. *See Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (Apr. 26, 2012); *Ridgebury Management LLC*, 2014-TLN-20. On May 16, 2012, the DOL published guidance on how to proceed in the wake of these developments. 77 Fed. Reg. 28765 (May 16, 2012). The guidance directed employers to file H-2B applications under the 2008 H-2B rule and “using

those procedures and forms associated with the 2008 H-2B rule . . .” *Id.* On April 1, 2013, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court’s issuance of an injunction. *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F. 3d 1080 (11th Cir. 2013); *Ridgebury Management LLC*, 2014-TLN-20 at p. 2. Based on these developments, this appeal is not governed by the 2012 Rule, but is instead governed by regulations promulgated in 2008 (“2008 Rule”), 73 Fed. Reg. 78020 (Dec. 19, 2008), as amended by the Interim Final Rule (“IFR”) promulgated in 2013, 78 Fed. Reg. 24047 (Apr. 24, 2013).³

To apply for this certification, an employer must file an Application for Temporary Employment Certification (ETA Form 9142B) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20 (2008).⁴ After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer, who will either request additional information, or issue a decision granting or denying the requested certification. 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).

B. Pre-Filing Recruitment Requirements

The CO may only grant an employer’s application for non-immigrant workers on H-2B visas if there are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time the employer files its petition. 20 C.F.R. 655.1(b)(1). In conjunction with this duty, the CO must determine whether the employer conducted the recruitment steps required by the H-2B regulations that are designed to apprise U.S. workers of the job opportunity in the labor application. The H-2B regulations require an employer to conduct several recruitment steps prior to filing an application for temporary labor certification, including placing a job order with the SWA in the area of intended employment. 20 C.F.R. § 655.15(e).

The regulation at 20 C.F.R. § 655.15(e)(2) provides that “[t]he job order submitted to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.17.” Under 20 C.F.R. § 655.17, advertisements must contain terms and conditions of employment which are not less favorable than those offered to H-2B workers, and 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;

³ The Interim Final Rule revises the methodology by which the Department determines the prevailing wages to be paid to H-2B workers. As this appeal does not involve wage methodology, it will be considered under the 2008 regulations. See *Ridgebury Management LLC*, 2014-TLN-20 (Apr. 7, 2014).

⁴ All citations to 20 C.F.R. Part 655 refer to the Final Rule promulgated in 2008.

(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.

Two cases, *A & W Builders of Jacksonville, Inc.*, 2012-TLN-44, (Aug. 17, 2012) and *Deer Ridge, Inc.*, 2014-TLN-13 (Mar. 5, 2014), are instructive in this matter. In *A & W Builders*, a CO denied the application because the employer submitted a job order that failed to list the start date of employment. The North Carolina SWA's job order request form asked for the job duration in days. *A & W Builders*, 2014-TLN-13 at 2-3. In response to the RFI, the employer argued that it used the form mandated by the North Carolina SWA and prepared a corrected advertisement using their job order, and even included a letter from the North Carolina SWA stating that the employer filed its H-2B job order in good faith. *Id.* at 3. BALCA upheld the denial because the employer did not prove its assertion that SWAs have a duty to provide employers with an adequate method to place job orders in compliance with the DOL's H-2B regulations. *Id.* at 5. Additionally, while the form did not specifically prompt the employer to provide a start and end date, "the [e]mployer could have listed this information in its response to the 'Job Summary' section," which is where it included other specifics about the job opportunity. *Id.* Like the employer in *A & W Builders*, Employer could have included the start and end dates in the "Job Description" section of the Florida SWA job order form. (AF 28).

In *Deer Ridge*, a CO denied the employer's application because it failed to specify expected work hours, expected start and end dates, and whether overtime was available. However, the employer did provide at least some information on work hours and overtime within the limited options of the drop-down menus on the Maryland SWA website, and the CO did not specify a different section where the employer could have provided the start and end dates. *Deer Ridge*, 2014-TLN-13 at 4-5. Thus, the Board vacated the denial. *Id.* at 5. Here, the CO did specify a section, "Job Description," where Employer could have provided the start and end

dates and, therefore, could have fulfilled all of the pre-filing requirements under 20 C.F.R. § 655.17. (AF 7, 28).

BALCA has strictly enforced the H-2B job order and newspaper advertisement content requirements in order to protect domestic workers. *See Larry's Oysters, LLC*, 2012-TLN-18 (Mar. 2, 2012); *Freemont Forest Systems, Inc.*, 2010-TLN-38, slip op. at 3 (Mar. 11, 2010); *BPS Industries, Inc.*, 2010-TLN-14 and 15, slip op. at 2-3 (Nov. 24, 2009); *Quality Construction & Production LLC*, 2009-TLN-77 (Aug. 31, 2009). The Employer's job order with the Florida SWA did not list anticipated start and end dates, and Employer has acknowledged that fact. (AF 1-2, 28, 46-78). As Employer did not satisfy the requirements of 20 C.F.R. § 655.17 and 20 C.F.R. § 655.15(e)(2), the CO properly denied the application.

ORDER

In light of the foregoing discussion, it is hereby **ORDERED** that the CO's denial of labor certification in this matter is **AFFIRMED**.

For the Board:

CLEMENT J. KENNINGTON
Administrative Law Judge