

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 05 March 2014

BALCA Case No.: 2014-TLN-00013
ETA Case Nos.: H-400-14001-946295

In the Matter of:

DEER RIDGE INC.,

Employer.

Appearances: Jeffery C. Tracey, President
Deer Ridge Inc.
Freeland, Maryland
Pro se, for the Employer

Gary M. Buff, Associate Solicitor
Vincent C. Costantino, Senior Trial Attorney
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 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 guest worker program permits foreign workers to enter 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 and receive a “labor certification” from the U.S. Department of Labor (“DOL” or the “Department”). 8 C.F.R. § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer in the Employment and Training Administration (“ETA”). 20 C.F.R. § 655.23. If the Certifying Officer denies certification, in

whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a). For the reasons set forth below, the Certifying Officer's denial of temporary labor certification in this matter is VACATED.

BACKGROUND

Deer Ridge, Inc. ("Employer") filed an *Application for Temporary Employment Certification* (ETA Form 9142) on January 2, 2014, seeking H-2B temporary labor certification for eight Landscaping and Groundskeeping workers. AF 74-95. An H-2B Certifying Officer ("CO") denied the application on January 28, 2014, on the ground that the Employer had not satisfied the pre-filing recruitment required by 20 C.F.R. § 655.17. AF 16-20. In particular, the CO took issue with the job order that the Employer placed with the Maryland State Workforce Agency ("Maryland SWA"), since it did not contain all of the information required by 20 C.F.R. § 656.17, specifically, the work hours associated with the employment opportunity, the expected start and end dates of employment, and whether overtime will be available. AF 18-20. The Employer had explained the cause of this deficiency in response to the CO's *Request for Further Information* ("RFI")—informing the CO that the job order was a product of the information it entered into the Maryland SWA's website on a screen-by-screen basis, and that the Department had approved a job order with the same information last year—but the CO did not address this explanation in the denial. AF 22. Rather, the CO simply stated:

The employer has failed to overcome the pre-filing deficiency. The job order provided in the RFI response did not include the expected work hours, the expected start and end dates for the job opportunity, or whether overtime would be available. These items must be included in order to provide a clear and accurate description of the job opportunity.

The employer did not satisfy the requirements specified at 20 CFR sec, 655.17 therefore the deficiency remains with the application and the application is denied.

AF 20. The Employer requested administrative review of the denial before BALCA by letter dated February 4, 2014. AF 1-15. The undersigned Administrative Law Judge issued a Notice of Docketing on February 10, 2014, setting forth an expedited briefing schedule. BALCA received a copy of the Administrative File on February 28, 2014.¹ The CO filed a statement of position on February 24, 2014; Pacific Coast filed a Brief in Support of Reversal on February 26, 2014.

¹ On February 14, 2014, BALCA received a CD-Rom that purported to contain the Administrative File. A BALCA staff member was not able to access the file on this CD-Rom, however, and contacted Counsel for the Certifying Officer on February 28, 2014 to obtain an additional copy. Counsel for the Certifying Officer provided BALCA a copy of the Administrative File that same day.

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 resume's 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).

In the instant case, the CO found that the Employer failed to comply with Section 656.17 because the job order did not indicate the expected work hours, the expected start and end dates for the job opportunity, or whether overtime would be available. The Employer argues that

BALCA should reverse the CO's denial on this basis for two reasons: (1) the Department has approved job orders that have omitted this information in the past; and (2) the website that the Maryland SWA relies on to post job orders is driven by text blocks and drop down menu selections and did not allow the Employer to insert all of the information required by Section 656.17. AF 2.

With respect to the specific information that the CO alleged to be missing, the Employer stated that it tried to convey the required information as closely as possible by selecting the following options from the dropdown menu provided by the Maryland SWA:

Pay Comments:

- None Selected
- DOE (Depends on Experience)
- Will Discuss With Applicant**
- Commission Only
- Salary & Commission
- Not Applicable
- Piece Rate
- Salary & Tips
- Salary & Bonus
- Pier Diem Only

Hours Per Week:

- None Selected
- Hours Not Specified
- Hours Vary**
- Hours Are Specific

Shift:

- None Selected
- Day Shift**
- Evening/Swing Shift
- Night/Graveyard Shift
- Rotating Shift
- Split Shift
- Other, See Job Description
- Not Applicable

AF 2. The Employer defended its selection of these options as follows:

To address the specific deficiency on work hours and days, we selected Hours Vary and Day Shift. Our normal working schedule is Monday through Saturday during daylight hours and our hours can vary depending on weather conditions as outlined in our newspaper advertisement. Our type of work is governed by environmental conditions, which can change day-to day and that is the reason for

the selection of "Hours Vary". Nowhere in the Maryland Workforce Exchange website does it give you the opportunity to specifically indicate the exact hours to be worked with start and end times.

To address the overtime availability deficiency; we selected "Will Discuss With Applicant." Depending on weather conditions and contractual landscaping jobs, we may work overtime which is why we selected "Will Discuss With Applicant" on Pay Comments. Due to the volatility of our business, we can lose contracts as well as gain contracts during the season. This would dictate whether overtime would be available.

To address the expected start and end dates deficiency, there is no option on the Maryland Workforce Exchange website to appropriately identify start and end dates. The only dates required to enter into the Maryland Workforce Exchange website is the start and end dates of the job posting. This would have been addressed verbally with any applicant that applied for the job posting.

AF 3. In addition, the Employer asked how it could possibly rectify the deficiency cited by the CO when the SWA's website does not allow the Employer to input the specific information required by section 656.17.

The CO relies on this Board's decision in *Larry's Oysters LLC*, 2012-TLN-18 (Mar. 2, 2012), to argue that the Board should not overturn the CO's denial in this matter. In *Larry's Oysters LLC*, the Employer's SWA job order did not contain information regarding the work hours or work days, the expected start and end dates of employment, whether or not overtime will be available, and a statement that the position is temporary in nature. *Id.*, slip op. at 4-5. The Board rejected the Employer's argument that the SWA's online job order form did not permit the Employer to include this information, stating: "The SWA job order form may not have a specific prompt requesting this information, but it is clear that the Employer could have included all of the required information within the job description section of the online job order form, which is where it included other specifics about the job opportunity." *Id.* at 5.

The Board's decision in *Larry's Oysters LLC*, however, is distinguishable from the case *sub judice*. Here, the record reveals that the Employer did the best it could to include the content required by section 656.17 within the limited options provided by the drop down menus on the SWA's website. The job order for the Landscaping and Groundskeeping worker positions accurately indicates that the work hours will "vary" and that the position is temporary but will last over 150 days. Moreover, by selecting "will discuss with applicants" under the Pay Comment drop down menu, the Employer did not foreclose the possibility that overtime might be available. Finally, unlike the CO in *Larry's Oysters LLC*, the CO in the instant case did not point to a different section where it would have been appropriate for the Employer to include information the missing information.

Under these circumstances, it was not reasonable for the CO to deny the Employer's application for failure to comply with section 656.17. The Board has previously found that it would offend fundamental fairness to deny certification where a deficient form prevents an employer from complying with the regulations. *See e.g., Federal Insurance Co.*, 2008-PER-37 (Feb. 20, 2009); *Cognizant Technology Solutions*, 2011-PER-1697 (Nov. 28, 2012). I therefore decline to affirm the CO's denial in this matter.

ORDER

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

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge