

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 25 March 2014

BALCA Case No.: 2014-TLN-00017
ETA Case No.: H-400-14028-987829

In the Matter of:

DOWNEY DRILLING,

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Lesli Downs, Agent
Southern Impact
Fairview, Oklahoma
For the Employer

Gary M. Buff, Associate Solicitor
Stephen R. Jones, Senior Trial Attorney
Division of Employment and Training Legal Services
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U.S. Department of Labor
For the Certifying Officer

Before: **PAUL R. ALMANZA**
Administrative Law Judge

**DECISION AND ORDER VACATING AND REMANDING
CERTIFYING OFFICER'S 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 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. *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 review by the Board of Alien Labor Certification Appeals ("Board"). 20 C.F.R. § 655.33(a).

STATEMENT OF THE CASE

On January 28, 2014, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Downey Drilling ("the Employer"). AF 52-63.¹ The Employer requested certification for five Construction Laborers from February 1, 2014, to November 30, 2014. AF 52.

On February 4, 2014, the CO issued a *Request for Further Information* ("RFI"), notifying the Employer that it was unable to render a final determination for the Employer's application because the Employer did not comply with all requirements of the H-2B program. AF 45-51. The CO identified four deficiencies resulting in denial of certification: (1) "Failure to satisfy obligations of H-2B employers" under 20 C.F.R. §§ 655.20(d) and 655.4; (2) "Pre-filing recruitment requirements" under 20 C.F.R. §§ 655.15(e)(2) and (f)(3); (3) "Failure to submit a complete and accurate recruitment report" under 20 C.F.R. §§ 655.20(a) and 655.15(j); and (4) "Pre-filing recruitment requirements" under 20 C.F.R. § 655.15(d)(4). AF 48-51.

By email of February 5, 2014, the Employer submitted a response to the RFI. AF 15-44. In his Final Determination of February 26, 2014, the CO determined that while the Employer had corrected three of the four deficiencies outlined above, the second deficiency – "Pre-filing recruitment requirements" under 20 C.F.R. §§ 655.15(e)(2) and (f)(3) – remained and thus required denial of the application. AF 10-14. Specifically, the CO found that the newspaper advertisements Employer submitted as part of the response to the RFI, which ran on January 1 and 4, 2014, and which state "[t]ravel to various work site [sic] in NE," AF 18-19, "did not properly apprise applicants of the travel requirements involved with the job opportunity and where applicants would likely have to reside in order to perform the job" in violation of the requirement of 20 C.F.R. § 655.17(b) that advertisements include "[t]he geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to provide the services or labor" because "[t]he newspaper advertisements and job order indicate that applicants will travel throughout the entire state of Nebraska." AF 14.

Moreover, the CO stated in the Final Determination that the newspaper advertisements incorrectly stated a wage rate in violation of 20 C.F.R. § 655.17(g) because the advertisements listed a wage rate of \$10.84 to \$11.92 per hour when the application lists a wage rate of \$11.92 per hour. AF 14.

On March 2, 2014, the Employer requested administrative review of the denial of certification on the grounds that "the job order and newspaper ads specifically state the location of the job in Lexington, NE to apprise applicants of where they will likely need to reside in order to perform the job" and also that the reference to travel "was also included to apprise applicants of travel associated with the job." Employer also argued that the CO misconstrued the advertisements' language in concluding that the advertisements referenced "travel throughout the entire state of Nebraska." AF 1. The Employer also stated that it inadvertently included the wrong newspaper advertisements in the response to the RFI and submitted the correct

¹ Citations to the 63 page appeal file will be abbreviated "AF" followed by the page number.

advertisements, which ran on January 15 and 18, 2014, with its appeal. AF 1-9. These advertisements state the wage rate is \$11.92 per hour. AF 8-9.

The Board received the request for review on March 3, 2014, and the appeal file on March 12, 2014.² On March 19, 2014, the Board received a position statement on behalf of the CO.³ As of March 24, 2014, the Board has received no further submission on behalf of the Employer.

DISCUSSION

In this case, the CO denied the Employer's application based on one of the four original deficiencies identified in the RFI (advertisement failed to state geographic area of employment with sufficient specificity) and also on an additional deficiency that the CO found in reviewing the Employer's response to the RFI (incorrect wage rate listed in the January 1 and January 4, 2014, advertisements submitted as part of the Employer's response to the RFI). As explained below, both of these grounds for denial are invalid.

The scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e). In this case, however, it is appropriate to consider newly-submitted evidence as further explained below.

Area of Intended Employment

In reviewing the newspaper advertisements in this case,⁴ the CO concluded that the advertisements "indicate that applicants will travel throughout the entire state of Nebraska." AF 7. It is unclear how the CO reached this conclusion, which required him not only to insert a word ("entire") into the advertisement, but also to disregard the advertisement's statement that the Employer is located in Lexington, Nebraska. An advertisement stating that an Employer is located in Lexington, Nebraska and that the job requires travel to various work sites in Nebraska is reasonably understood to mean that the base of operations, and thus where employees would have to reside in order to perform the job, is in the Lexington, Nebraska area and that employees travel to worksites in Nebraska from the Lexington, Nebraska area. This language is sufficient to meet the requirements of 20 C.F.R. § 655.17(b) in that it "apprises applicants of any travel requirements" by informing them that the job involves travel to worksites in Nebraska and also "apprises applicants of ... where applicants will likely have to reside to perform the services or labor" by informing them that they will likely have to live in the Lexington, Nebraska, area.

² This is the date we received the password to the electronic file containing the appeal file.

³ The position statement was received by fax after the close of business on March 18, 2014.

⁴ Both the advertisements Employer submitted in its response to the RFI and with its request for review contain identical language concerning the location of the Employer and travel requirements. *Compare* AF 8-9 with AF 18-19. Accordingly, the differences in the advertisements concerning the wage rate issue are not relevant to the area of intended employment issue.

A contrary reading, that the advertisements neither inform applicants of where they likely have to live to perform the job nor the extent of the travel associated with the job, would require the reader to make two assumptions that appear unreasonable given the facts of this particular case. The first assumption would be that the advertisements' statement that the Employer's location in Lexington, Nebraska has no significance whatsoever in informing applicants as to where they would likely have to reside for the job. While this might be the case concerning an advertisement placed by a large employer with many locations stating that applications should be submitted to a location other than that where the advertised job is located, there is no indication whatsoever in this record that such an assumption is appropriate here.

The second assumption would be that the advertised job involves work sites "throughout the entire state of Nebraska," AF 7, regardless of how far those work sites are from Lexington, Nebraska. This assumption would also require the reader to assume there is little, if any, link between the Employer's location in Lexington, Nebraska, and the sites in Nebraska where work is performed. Not only is there nothing in this record that supports such an assumption, the CO had before him as he made his decision in this case the following statement in the Employer's response to the RFI, which should have indicated that such an assumption was not appropriate given the facts of this particular case: "All worksite[s] are within [a] 100 mile radius of home base [Lexington, Nebraska] and are considered a normal commuting distance from headquarters [again, Lexington, Nebraska]; workers have traditionally returned home at the end of each work day for years." AF 15.

As I am unwilling to make either of the two assumptions that would be required for me to affirm the CO's conclusion that the advertisements "did not properly apprise applicants of the travel requirements involved with the job opportunity and where applicants would likely have to reside in order to perform the job," AF 7, I find that this ground for denial is invalid. This finding is fact-specific, and is limited to the precise circumstances of this particular case.

Incorrect Wage Rate

With respect to the CO's ground for denial based on an incorrect wage rate, which was not specifically identified in the RFI as a deficiency that required the submission of additional information,⁵ the Board has previously found it "problematic" when "the CO appears to have denied the application due to additional deficiencies found in the Employer's response to the RFI" because failing to list in the RFI the specific ground on which the denial is based "denie[s] the Employer notice and an opportunity to address th[e] issue." *Fabulous Flavors, Inc., d/b/a Baskin Robbins*, 2009-TLN-35, slip op. at 3 (Apr. 14, 2009). Here, with respect to the wage rate issue, the RFI failed to note the specific deficiency in the advertisement that was one of the

⁵ In the "Additional Information Requested" portion of the RFI, the CO simply asked for the job order and advertisements "list[ing] with adequate specificity, all worksite locations, which must be located within the same area of intended employment...." AF 50. Had the CO identified the wage rate as an issue concerning which he requested additional information, the Employer would have been on notice that the wage rate listed in the advertisements was an issue. As we have seen, once the Employer was on notice that the CO identified the wage rate in the advertisements as a deficiency in the Final Determination, the Employer provided the newly-submitted advertisements listing the correct wage rate. It is reasonable to conclude that had the Employer been on notice at the RFI stage that the wage rate in the advertisements was an issue, it would have provided the correct advertisements in its response to the RFI.

grounds upon which the Final Determination of denial was ultimately based and thus the Employer had no notice of the wage rate deficiency until the Final Determination was issued.

Accordingly, a strict application of the scope of review regulation precluding any consideration of the Employer's evidence at AF 8-9 would deny the Employer its only opportunity to argue and present evidence demonstrating that it had, in fact, met its obligation to include the proper wage rate in its newspaper advertisements. Ordinarily, procedural due process and considerations of fundamental fairness would require a remand to the CO for the consideration of the newly-submitted newspaper advertisements at AF 8-9 on the grounds that an employer should be permitted to respond to a ground for denial of an application where the employer did not previously have the opportunity to establish the relevant facts.

A remand is unnecessary in this case, however, because the CO agrees that the \$11.92 wage offer as listed in the newly-submitted newspaper advertisements at AF 8-9 is the right one, by stating in the Final Determination that "[i]t is noted that the employer's job order contains the appropriate wage offer of \$11.92 per hour...." AF 7. As the CO has already stated that \$11.92 per hour is the correct wage offer, there is no need for me to remand this matter to the CO for the consideration of the newly-submitted newspaper advertisements at AF 8-9 as I would simply be asking him to re-affirm what he has already stated in the Final Determination.

Accordingly, based on the newly-submitted newspaper advertisements at AF 8-9, I find that the Final Determination's ground for denial based on the newspaper advertisements stating an incorrect wage rate is invalid. This finding is fact-specific, and is limited to the precise circumstances of this particular case.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's denial of labor certification is **VACATED** and **REMANDED** to the Certifying Officer with instructions to **GRANT** Downey Drilling's application.

For the Board:

PAUL R. ALMANZA
Administrative Law Judge