



Issue Date: 29 April 2014

BALCA Case No.: 2014-TLN-00027

ETA Case No.: H-400-14067-505536

In the Matter of:

DRIFTWOOD HOSPITALITY,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

DECISION AND ORDER

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the 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, 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 ("BALCA" or "the Board"). 20 C.F.R. § 655.33(a).

I. STATEMENT OF THE CASE

On March 8, 2014, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Driftwood Hospitality ("the Employer") for four maid and housekeeping cleaners. The Employer stated that it has a seasonal need for the workers from June 1, 2014 to November 1, 2014. The Employer indicated that it placed a job order with the State Workforce Agency ("SWA") from January 29, 2014 to February 11, 2014. (AF 25-39).¹

On March 14, 2014, the CO issued a Request for Further Information ("RFI"), notifying the Employer that the Employer failed to satisfy all the requirements of the H-2B program. The CO identified two deficiencies with the Employer's application, only one of which is at issue on appeal. The CO determined that the Employer failed to comply with the required pre-filing

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

recruitment obligations under 20 C.F.R. § 655.15(e) because the Employer's SWA job order was placed more than 120 days before the Employer's date of need for the workers. The CO requested that the Employer provide evidence that it satisfied the pre-filing advertisement requirements, and reminded the Employer that all recruitment must have occurred prior to the date that it filed its application. (AF 21-24).

The Employer responded to the RFI on March 14, 2014. The Employer submitted a copy of the job order, which reflected its posting date of January 31, 2014 and expiration date of February 11, 2014. (AF 12-20)

On April 1, 2014, the CO denied certification on the ground that the Employer's job order was placed 124 days before its date of need of H-2B workers in violation of Section 655.15(e). The ETA Form 9142 indicated that the job order opened on January 29, 2014 and that the Employer's first day of need is June 1, 2014. (AF 8-11)

The Employer requested BALCA review on April 10, 2014. It conceded placing the job order one day before the 120-day period because it expected a 24-hour posting period before the job order would be active. The Employer noted that ten days of recruitment were held within the 120-day period from January 31, 2014 through February 11, 2014. (AF 1-7)

BALCA received the administrative file from the CO on April 16, 2014. The CO has not filed a brief. The Employer filed its brief on April 18, 2014. The Employer noted that it placed the first advertisement on February 8, 2014 but did not sign and date the recruitment report until February 25, 2014, which allowed four additional days of recruitment.

II. DISCUSSION

The CO may only grant an employer's petition to admit nonimmigrant workers on H-2B visas for temporary nonagricultural employment in the U.S. 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. § 655.5(a)(1). Therefore, 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. 20 C.F.R. § 655.15.

One such recruitment step relates to the placement of the active job order with the State Workforce Agency. 20 C.F.R. § 655.15(e) provides, in pertinent part:

The employer must place an active job order with the SWA serving the area of intended employment no more than 120 calendar days before the employer's date of need for H-2B workers, identifying it as a job order to be placed in connection with a future application for H-2B workers. Unless otherwise directed by the CO, the SWA must keep the job order open for a period of not less than 10 calendar days. Documentation of this step shall be satisfied by maintaining a copy of the SWA internet job listing site, a copy of the job order provided by the SWA, or

other proof of publication from the SWA containing the text of the job order and the start and end dates of posting.

The Employer submitted a copy of the SWA job order in response to the CO's request for further information. The job order was posted on Friday, January 31, 2014. Employer's need for seasonal workers begins on Sunday, June 1, 2014, which is 122 days after the job order posting date. (AF 20). The Employer explained that it expected a 24-hour processing period before the job order would be posted, giving it a start date of Saturday, February 1, 2014. (AF 1). The Employer also noted that it circulated two advertisements and held the job order open for 10 days during the 120 days preceding the job start date.

The Employer's posting of the job order two days early violates 20 C.F.R. § 655.15(e), notwithstanding its compliance with the regulations in all other respects. The regulations require exact compliance in order to protect domestic workers. Moreover, it is not unreasonable to deny an application because the Employer failed to follow the regulatory requirements properly. *See Chris Orser Landscaping*, 2010-TLN00031 (Feb. 5, 2010). Accordingly, the CO properly denied certification.

III. ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer's denial of H-2B certification is **AFFIRMED**.

SO ORDERED.

For the Board:

LARRY W. PRICE
Administrative Law Judge