



Issue Date: 23 May 2014

BALCA Case No.: 2014-TLN-00030
ETA Case No.: H-14085-261994

In the Matter of:

FULLERTON LANDSCAPE ARCHITECTS, LLC,
Employer.

Appearances: Douglas B. Fullerton, Managing Member, *pro se*
For the Employer

Gary M. Buff, Associate Solicitor
Office of the Solicitor of Labor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **COLLEEN A. GERAGHTY**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from the Employer's request for review before the Board of Alien Labor Certification Appeals ("BALCA") of the denial by a Certifying Officer ("CO") for the Employment and Training Administration ("ETA") of its application for H-2B temporary labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), 1184(a)(c); 8 C.F.R. § 214.2(h); 20 C.F.R. Part 655, Subpart A.¹ For the reasons set forth below, the CO's denial of temporary labor certification in this matter is affirmed.

¹ All citations to 20 C.F.R. Part 655, Subpart A refer to the Final Rule promulgated in 2008 ("2008 Rule"), 73 Fed. Reg. 78020 (Dec. 19, 2008), as amended by the Interim Final Rule ("2013 IFR") promulgated in 2013, 78 Fed. Reg. 24047 (Apr. 24, 2013), since the Department has postponed its implementation of the Final Rules promulgated in January 2011, 76 Fed. Reg. 3452 (Jan. 19, 2011) ("2011 Wage Rule") and February 2012, 77 Fed. Reg. 10038 (Feb. 21, 2012) ("2012 Rule"). *See* 79 Fed. Reg. 11450, 11453 (Mar. 5, 2014) (announcing that until such time as the Department finalizes a new wage methodology, the current wage methodology contained in 20 C.F.R. § 655.10(b), as set by the 2013 IFR, will remain unchanged and continue in effect); 78 Fed. Reg. 53643 (Aug. 30, 2013) (indefinitely delaying effective date of 2011 amendment); *Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (ND FL Apr. 26, 2012) (enjoining DOL from implementing or enforcing the 2012 Rule), affirmed by *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013); 77 Fed. Reg. 28764 (May 16, 2012) (announcing "the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the order in the Bayou II litigation").

STATEMENT OF THE CASE

On March 26, 2014, the Employment and Training Administration (“ETA”) received an application for H-2B temporary labor certification from Fullerton Landscape Architects, LLC (“Employer”) for four “Landscape, Grounds Maintenance Worker[s],” for employment from March 21, 2014 to November 30, 2014, due to a shortage of labor during its peak months of April through September. (AF 46).² The Employer attached to its application a recruitment report dated March 26, 2014, stating:

Our recruitment source was Morris County Daily Record and State of New Jersey Department of Labor and Workforce Development website. The employment ad ran on Sunday 3/16/14, Wednesday 3/19/14, Sunday 3/23/14, and Sunday, 3/26/14³ in the Morris County Daily Record. SWA # NJ0902581 started on 03/13/14 and ends on 3/24/14.

To date we have not receive [sic] applicants from any of these sources.

(AF 57).

On April 2, 2014, the CO issued a Request for Further Information (“RFI”), notifying the Employer that its application did not comply with the requirements of the H-2B program and identifying four specific deficiencies with the application. (AF 39-44). One of the deficiencies identified by the CO in the RFI was that the Employer failed to comply with the requirements found at 20 C.F.R. § 655.15(j). (AF 43). Specifically, the CO found that the Employer signed the recruitment report without allowing sufficient time for workers to respond to the job order and newspaper advertisements. (AF 43). The last advertisement ran on March 26, 2014, which was the same date the recruitment report was signed, and under Section 655.15(j), the recruitment report must not be prepared or dated fewer than five days after the date on which the last advertisement appeared. (AF 43). The CO also found that the Employer indicated the wrong start date for the job order on the recruitment report – March 13, 2014, instead of March 14, 2013. (AF 43).

To remedy the deficiency, the CO directed the Employer to submit evidence that it prepared, signed, and dated a written recruitment report within the timeframe allowed and an amended recruitment report indicating the correct date the job order opened. (AF 44).

The Employer responded to the RFI on April 9, 2013. (AF 23-38). As for its compliance with Section 655.15(j), the Employer stated that it attached an amended recruitment report with the correct open date for the job order. (AF 23). The Employer stated that the amended recruitment report was prepared, signed, and dated 15 calendar days after the last day the job order was posted and twelve calendar days after the date on which the last newspaper advertisement appeared. (AF 23). There was no recruitment report attached with the response.

² Citations to the Administrative File will be abbreviated “AF” followed by the page number.

³ I note that March 26, 2014 was a Wednesday, not a Sunday.

On April 28, 2014, the CO issued a Final Determination denying certification. (AF 16-21). The CO found that the Employer corrected 2 of the 4 deficiencies identified in the RFI, but two deficiencies remained. (AF 18). One of the remaining deficiencies was the failure to comply with Section 655.15(j), as outlined above. (AF 20-21). The CO stated that despite Employer's statement that it had attached an amended recruitment report, the amended recruitment report was not received by the Chicago National Processing Center. (AF 21). The CO found that the Employer failed to adequately respond to the RFI and failed to provide sufficient documentation to overcome the deficiency. (AF 21).

The Employer requested administrative review of the denial before BALCA on May 9, 2014. (AF 1-15). The Employer did not address the deficiency with the recruitment report in its request for review. I issued a Notice of Docketing on May 15, 2014, allowing the parties to file briefs within five business days. (AF 1-15). Neither party filed an appellate brief in this matter.

DISCUSSION

To obtain certification under the H-2B program, an applicant must submit a recruitment report that complies with 20 C.F.R. § 655.15(j). *See* 20 C.F.R. § 655.20(a). The recruitment report must be prepared, signed, and dated "no fewer than two calendar days after the last date on which the job order was posted and no fewer than five calendar days after the date on which the last newspaper or journal advertisement appeared." 20 C.F.R. § 655.15(j).

In this case the Employer's last advertisement ran on March 26, 2014. (AF 38, 57). The Employer's recruitment report was signed on the same day as the last day the advertisement ran, in violation of 20 C.F.R. § 655.15(j), which requires no fewer than five days between the last date the newspaper advertisement appeared and the date of the recruitment report. (AF 57).

The CO identified this deficiency in the RFI and directed the Employer to submit evidence that it prepared, signed, and dated a written recruitment report within the timeframe allowed. (AF 44). In its response to the RFI, the Employer stated that it attached an amended recruitment report that was prepared, signed, and dated 15 calendar days after the date on which the last newspaper advertisement appeared. (AF 23). However, the response did not contain such an amended recruitment report,⁴ and the Employer provided no other evidence that it complied with Section 655.15(j), and as a result, the CO denied certification on April 28, 2014. *See* 20 C.F.R. § 655.23(d) ("Failure to comply with an RFI, including not providing all documentation within the specified time period, may result in a denial of the application.").

The Employer's request for review, sent to the ETA, did not mention the requirement report error nor did it provide a copy of an amended recruitment report. In the request for review sent to BALCA, the Employer did send an amended recruitment report dated April 7, 2014, without any supporting legal arguments. The amended recruitment report sent to BALCA is

⁴ In the Employer's emailed response to the RFI, the listed attachments included an amended recruitment report. (AF 23). However, the report is not contained in the appeal file, and the CO states he never received the report. Without argument from the Employer on the issue, we assume the amended recruitment report was not submitted with the RFI response.

barred from consideration under the regulations. 20 C.F.R. § 655.33(a)(5) (requests for review may “contain only legal argument and such evidence as was actually submitted to the CO in support of the application”); 20 C.F.R. § 655.33(e) (“BALCA must review a denial of temporary labor certification only on the basis of the Appeal File, the request for review, and any legal briefs submitted.”).

Even if the amended recruitment report was considered, it does not cure the deficiency. The Employer cannot rectify the violation of Section 655.15(j) by simply resigning a recruitment report at a later date. The recruitment report prepared for submission with the application must have been in accordance with Section 655.15(j) at the time the application was filed. 20 C.F.R. § 655.20(a) (stating an employer must file a completed application “and a copy of the recruitment reported completed in accordance with § 655.15(j)”). The Employer having provided no other evidence that it prepared, signed, and dated a written recruitment report within the timeframe allowed pursuant to Section 655.15(j), I hereby affirm the CO’s denial of the Employer’s application.

ORDER

It is hereby **ORDERED** that the Certifying Officer’s denial of the Employer’s Application for Temporary Employment Certification is **AFFIRMED**.

SO ORDERED.

For the Board:

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, MA