

U.S. Department of Labor

Board of Alien Labor Certification Appeals
11870 Merchants Walk- Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)



Issue Date: 07 April 2014

OALJ Case No.: 2014-TLN-00020

ETA Case No.: H-400-14003-908490

In the Matter of

RIDGEBURY MANAGEMENT LLC,

Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Appearances: Laura Jasinsky, Esq.
Immigration Law Group, PC
30 Oak Street
Stamford, Connecticut 06905
For the Employer

Gary M. Buff, Associate Solicitor
Jonathan Hammer, Attorney
Office of the Solicitor
Division of Employment and Training
Legal Services
Washington, D.C.
For the Certifying Officer

Before: Kenneth A. Krantz
Administrative Law Judge

DECISION AND ORDER

On March 10, 2014, the Board of Alien Labor Certification Appeals (“BALCA”) received a letter requesting review of the Certifying Officer’s (“CO”) February 28, 2014 denial of the Employer’s application for temporary labor certification. On March 20, 2014, BALCA issued a Notice of Docketing. The Notice directed the CO to assemble the appeal file and transmit it to BALCA. It also informed the Employer and the Solicitor that they would have five business days after receiving the appeal file to submit briefs. The CO transmitted the appeal file on March 28, 2014. In H-2B cases, the BALCA member or panel assigned to conduct the review may only consider the Appeal File and any legal briefs submitted by the parties. 20 C.F.R. § 655.33(e).

This appeal is governed by the 2008 regulations, 73 Fed. Reg. 78020 (Dec. 19, 2008), as amended by the 2013 Interim Final Rule at 78 Fed. Reg. 24047 (Apr. 24, 2013). In February of 2012, the Department of Labor (“Department”) 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 Department 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). On May 16, 2012, the Department 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). 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). 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.

STATEMENT OF THE CASE

Employer, Ridgebury Management LLC, filed an H-2B Application for Temporary Employment Certification ETA Form 9142B on January 28, 2014. (AF 58-73). Employer indicated a temporary need for one “Project Leader.” (AF 58). Employer listed an SOC Code of 11-3031 and a SOC occupation title of “Financial Managers.” (AF 58). In Section F-4, the Employer indicated that it would require 60 months of experience in business and finance of maritime vessel operations. (AF 61). In the addendum, the Employer stated additional requirements.

The Employer stated that it would require:

Master Mariner or Chief Engineers license. Sailing experience as a senior officer (top 4) aboard internationally flagged vessels. Experience with a ship owning company in a corporate development role and an analytical understanding of the product tanker market. Proven ability to carry out business discussions with the C-level management of leading shipping companies, including analyzing and establishing shipping proofs and similar ventures for product tankers. Strong understanding of structuring financial products and their suitability to shipping investments. Extensive travel is required to analyze marine vessel operations, and to meet with the selected partners.

(AF 64).

On February 4, 2014, the CO issued a Request for Further Information (“RFI”). (AF 53-57). The CO listed three application deficiencies. First, the CO noted that it needed to review the advertisements and job order to determine whether the Employer complied with the pre-filing recruitment requirements. (AF 55). Second, the CO stated that the Employer failed to satisfy the obligations of H-2B employers pursuant to 20 C.F.R. § 655.22(h). Specifically, the CO stated that the Employer did not demonstrate that 60 months of financial manager experience, a Master Mariner or Chief Engineer’s License, and sailing experience as a senior officer aboard internationally flagged vessels are normal and accepted qualifications among non-H-2B employers. (AF 56). Third, the CO stated that the Employer failed to submit a complete and accurate ETA Form 9142. Specifically, the CO directed the Employer to explain the need for extensive travel. (AF 57).

The Employer responded to the RFI on February 10, 2014. (AF 28-52). The Employer addressed the CO’s concern that it failed to satisfy the obligations of H-2B employers by failing to demonstrate that the stated qualifications of 60 months experience and licensure were normal and accepted among non-H-2B employers. The Employer stated that the job title for the position is project leader and not financial manager. The Employer reiterated that 60 months of experience in business and finance of maritime vessel operations is the minimum amount of experience for the position. The Employer submitted articles verifying its status as a new tanker company focused on the acquisition and operation of vessels in the tanker sector. (AF 50-51). The Employer did not provide information on whether its stated qualifications are normal and accepted within the industry. As part of the RFI response, the Employer submitted copies of its advertisements. The job order listed the anticipated start date as February 15, 2014 but did not list an anticipated end date. (AF 37). The newspaper advertisement listed the anticipated start and end dates as 02/15/2014 and 02/14/2015. (AF 39-40).

On February 28, 2014, the CO denied the application. The CO gave two reasons for denial. First, the CO explained that the job order failed to list the expected start and end dates of employment in violation of 20 C.F.R. § 655.15(e)(2) and 20 C.F.R. § 655.15(f)(3). (AF 13). Second, the CO stated that the Employer failed to demonstrate that it was offering a job opportunity which is a “bona fide, full-time temporary position, the qualifications of which are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.” (AF 15). The CO noted that the Employer did not provide any documentation or supporting argument to show that its experience requirements are consistent with the normal and accepted qualifications. (AF 17).

On March 10, 2014, the Employer requested administrative review of the denial of the application. In the request for review, the Employer stated, “We concur with the Certifying Officer that the job order failed to include the expected end date of employment.” (Request at 5). The Employer argued that the CO should have issued another RFI or afforded the Employer an opportunity to explain why the end date was not included in the job order. In addition, the Employer argued that its qualifications are acceptable and that O*Net does not provide typical experience requirements for Financial Managers. The Employer argued that the licensure and sailing requirements were special requirements not covered by 20 C.F.R. § 655.22(h). Therefore, it argued that it did not need to demonstrate that these qualifications were normal and accepted. (Request at 8). Employer urged certification of the application. (Request at 8).

The CO submitted a brief on April 4, 2014. The CO noted that it denied the application because the experience requirement was not normal and accepted and because the job order did not contain the ending date of employment. (Brief at 1). Regarding the position qualifications, the CO noted that O*Net divides the position of financial manager into the categories of “Treasurers and Controllers” and “Financial Managers, Branch or Department.” (Brief at 2). Of these two designations, the CO elected to use the “Financial Managers, Branch or Department” designation, which lists an experience requirement of up to 48 months. (Brief at 2). Therefore, the CO argued that the Employer needed to demonstrate that the 60 month requirement was normal and accepted within the industry. Furthermore, the CO noted that the job order failed to list the end date of the opportunity as required under 20 C.F.R. § 655.17(e). The Employer did not submit a brief.

DISCUSSION

The CO may only grant an employer’s application for nonimmigrant 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 State Workforce Agency (“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;
- (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.

ETA carefully considered the newspaper advertisement requirement and determined that the information listed in Section 655.17 is necessary to adequately apprise U.S. applicants of the position. *See* Final Rule, *Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes*, 73 Fed. Reg. 78020, 78034 (Dec. 19, 2008). BALCA has strictly enforced the H-2B newspaper advertisement content requirements in order to protect domestic workers. *See Larry's Oysters, LLC*, 2012-TLN-18; *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 did not list an anticipated end date. (AF 37). In the request for review, the Employer stated, "We concur with the Certifying Officer that the job order failed to include the expected end date of employment." (Request at 5). 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

Accordingly, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the panel:

KENNETH A. KRANTZ
Administrative Law Judge

KAK/ecd/mrc