

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 May 2015

BALCA Case No.: 2015-TLN-00045
ETA Case Nos.: H-400-15051-318651

In the Matter of:

CRAWFISH PROCESSING, LLC,
Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Ashley Foret Dees
Lake Charles, Louisiana
For the Employer

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U.S. Department of Labor
For the Certifying Officer

Before: Paul R. Almanza
Administrative Law Judge

**DECISION AND ORDER DIRECTING
CERTIFYING OFFICER TO GRANT CERTIFICATION**

This case arises from a request for review of the Certifying Officer's ("CO") decision to deny 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).¹ Following the CO's denial

¹ On April 29, 2015, the Department of Labor ("DOL") and the Department of Homeland Security jointly published an Interim Final Rule amending the standards and procedures that govern the H-2B temporary labor certification program. *See* 80 Fed. Reg. 24042 (Apr. 29, 2015). Pursuant to this rule, DOL will "continue to process an *Application for Temporary Employment Certification* submitted prior to April 29, 2015, in accordance with 20 CFR

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). For the reasons explained below, the CO’s Final Determination denying certification is vacated and I direct the CO to grant certification.

STATEMENT OF THE CASE

On February 20, 2015, the Department of Labor’s Employment and Training Administration (“ETA”) received an *Application for Temporary Employment Certification* from Crawfish Processing, LLC (the “Employer”). AF 41-57.² The Employer requested certification for forty-five Packers and Packagers, Hand, from April 21, 2015, to June 30, 2015. AF 41.

On February 27, 2015, the CO issued a *Request for Further Information* (“RFI”), notifying the Employer that it was unable to render a final determination on the Employer’s application because the Employer did not comply with all requirements of the H-2B program. AF 34-40. The CO identified three deficiencies: (1) failure to satisfy pre-filing requirements under 20 C.F.R. §§ 655.10 and 655.22(e) because the Prevailing Wage Determination (“PWD”) associated with the Employer’s application was not valid when recruitment began or when the application was filed; (2) failure to comply with pre-filing recruitment requirements under 20 C.F.R. §§ 655.15(e)(2) and (f)(3) because the CO “ha[d] reason to believe that the employer is offering a wage which does not equal or exceed the highest of the prevailing wage....”; and (3) failure to provide sufficient documentation to establish a temporary need for the number of workers requested under 20 C.F.R. §§ 655.23(b) and 655.22(n). AF 37-40.

By email of March 6, 2015, the Employer submitted a response to the RFI. AF 13-33. In his Final Determination of April 15, 2015, the CO determined that while the Employer had corrected the third deficiency outlined above, the first and second deficiencies – “[p]re-filing requirements” under 20 C.F.R. §§ 655.10 and 655.22(e) and “[p]re-filing recruitment requirements” under 20 C.F.R. §§ 655.15(e)(2) and (f)(3) – remained and thus required denial of the application. AF 8-12.

With respect to the first deficiency, the CO found that the PWD “associated with the employer’s application expired on February 1, 2015” and thus “was not valid on the date that recruitment began (February 5, 2015) or the date of filing (February 20, 2015).” AF 10. The CO noted that in its response to the RFI, “the employer submitted a second PWD ... that was obtained from the NPWC on January 21, 2015,” but found that this second PWD did not cure the deficiency because it had the same validity dates as the first PWD. AF 11.

With respect to the second deficiency, the CO found that the information the employer provided in its response to the RFI, which included newspaper advertisements run on February 12, 2015, and February 15, 2015, did not cure the deficiency for two reasons. First, the CO found that “the wage listed in the newspaper advertisements was determined by an invalid PWD.” AF 12. Second, the CO found that the February 12, 2015 advertisement stated there

part 655, subpart A, revised as of April 1, 2009.” See *id.* at 24109, to be codified at 20 C.F.R. § 655.4. Accordingly, this case will be decided under the regulations at 20 C.F.R. part 655, subpart A (2009).

² Citations to the 57 page appeal file will be abbreviated “AF” followed by the page number.

were five job openings, not forty-five as stated in the other newspaper advertisement, the job order, and the application. AF 12.

On April 24, 2015, the Employer requested administrative review of the denial of certification on the grounds that the CO erred in denying certification because

Employer properly completed all pre-filing recruitment, including newspaper ads and job orders placed in accordance with a wage determination issued to Employer on January 21, 2015. Employer received a redetermination of its prevailing wage on January 21, 2015; that redetermination of the prevailing wage was valid on the date employer filed its ETA 9142B; the wage redetermination was for \$9.63/hr.

AF 1.

The Board received the request for review on April 24, 2015, and the appeal file on April 28, 2015. On May 6, 2015, the Board received letter briefs on behalf of the Employer and on behalf of the CO.

DISCUSSION

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). A review of the record compels a conclusion that the CO erred in denying certification.

As outlined above, the CO denied the Employer's application based on two of the three deficiencies identified in the RFI. The first ground for denial (failure to comply with pre-filing requirements based on use of an expired PWD) is invalid because the PWD at issue had not expired. The second ground for denial (failure to offer the proper wage resulting from use of an expired PWD and failure to comply with requirements for newspaper advertisements) is also invalid, not only because the PWD at issue had not expired but also because the Employer's newspaper advertisements complied with regulatory requirements. I therefore vacate the CO's denial of certification and direct the CO to grant certification.

The PWD Used in the Application Had Not Expired

The CO found that the PWD used in the application was invalid because it expired on February 1, 2015, before the date recruitment began and before the date the application was filed. As recognized by the CO, the Employer obtained a second PWD, which it used in the application and for recruitment, "from the NWPC on January 21, 2015." AF 11. A review of the January 21, 2015 PWD indicates that it does not specify its validity period. AF 28.

The applicable regulation not only states that a PWD must contain a validity period, but also specifies a minimum validity period:

Validity Period. The NPC must specify the validity period of the prevailing wage, which in no event may be more than 1 year or less than 3 months from the determination date.

20 C.F.R. § 655.10(d).

The determination date of the PWD the Employer used in the application and for recruitment was January 21, 2015. AF 28.³ Regardless of whether or not the NWPC erred in not specifying the validity period of the January 21, 2015 PWD as required by the regulation, “in no event” could the January 21, 2015 PWD have been valid for less than three months from January 21, 2015. Accordingly, the January 21, 2015 PWD was valid at least through April 21, 2015.

Because the January 21, 2015 PWD was valid during the time Employer engaged in pre-filing recruitment, and also was valid at the time the Employer submitted the application, the CO erred in denying certification on the ground that the PWD used in the application and in recruitment had expired. Accordingly, I find the CO’s first ground for denial invalid.

Employer’s Newspaper Advertisements Complied With Regulatory Requirements

The CO’s second ground for denial is based on two alleged violations: (1) the PWD issue addressed above; and (2) an issue with the content of the first of two newspaper advertisements Employer submitted as part of its response to the RFI. For the reasons stated above, to the extent the CO’s second ground for denial is based on the PWD at issue having expired, I find it invalid. To the extent the CO’s second ground for denial is based on noncompliance with the regulatory requirements for newspaper advertisements placed as part of pre-filing recruitment, I find the CO erred in concluding the advertisement did not comply with the regulations. Accordingly, I find the second ground for denial invalid.

The regulations require that newspaper advertisements placed as part of pre-filing recruitment state “that the position is temporary and the total number of job openings the employer intends to fill.” 20 C.F.R. § 655.17(h). In this case, a review of the newspaper advertisements submitted by Employer in response to the RFI show that both advertisements comply with this regulatory requirement, despite the CO’s statement to the contrary:

³ I recognize that the CO characterizes the January 21, 2015 PWD as a “redetermination” of the earlier PWD and states that the January 21, 2015 PWD had the same validity dates as the earlier PWD. AF 11. But the “determination date” for purposes of 20 C.F.R. § 655.10(d) would still be January 21, 2015, the date that the NWPC established the PWD the Employer used in the application and for recruitment. Additionally, if the CO’s argument were followed to its logical conclusion, it would mean that on January 21, 2015, the NWPC established a PWD that would only be valid until February 1, 2015 – a mere eleven days. In this case, it would effectively be only ten days, as the record establishes the Employer’s counsel received the January 21, 2015 PWD on January 22, 2015. AF 28. As job orders must be open for at least ten days before an application can be submitted, 20 C.F.R. §§ 655.15(a) and (e)(1), accepting the CO’s position would be to countenance the CO providing an employer very little time to place a job order as part of pre-filing recruitment. If I were to accept the CO’s position, in this case the Employer would have had to place a job order virtually immediately upon its receipt of the January 21, 2015 PWD in order to be able to submit an application on or before February 1, 2015, the date the CO believes the January 21, 2015 PWD expired.

the newspaper advertisement published on February 12 states that the employer has five job openings for the position. This is inconsistent with the newspaper advertisement published on February 15th, the job order, and the employer's application.

AF 7.

In fact, the Employer's February 12, 2015 advertisement correctly stated that the employer is seeking forty-five employees. AF 23 (*see* Employer's advertisement at the bottom left side of the page). I have reviewed Employer's February 12, 2015 advertisement, and find its text is exactly the same as Employer's February 15, 2015 advertisement. *Compare* AF 22 (February 15, 2015 advertisement) and AF 23 (February 12, 2015 advertisement at bottom left side of page). Accordingly, the CO's statement that Employer's February 12, 2015 advertisement stated it "ha[d] five job openings for the position" is factually incorrect because that advertisement correctly stated that Employer "[s]eeks 45 temporary, seasonal workers for crawfish plant as processors." AF 23.

It is possible that the CO, in reviewing Employer's response to the RFI, was confused by an advertisement seeking five crawfish packers and packagers that was on the same newspaper page as Employer's February 12, 2015 advertisement. AF 23 (*see* advertisement placed by "Shirley's Crawfish Pad, LLC" at the top right side of the page). While that advertisement sought employees to process crawfish, and the work location and dates of employment were the same as Employer's February 12, 2015 advertisement, the number to call to apply was different, the job duties were slightly different, and the offered wage was slightly different. Most notably – not least because it was printed in bold font at the top of the advertisement – the advertisement seeking only five workers was placed not by Crawfish Processing LLC, the Employer, but by a different entity, Shirley's Crawfish Pad, LLC. Simply put, the contents of an advertisement placed by an entity other than the Employer are not relevant to whether the Employer's February 12, 2015 advertisement complied with regulatory requirements.

I respectfully believe that, had the CO more carefully read the information that Employer submitted in response to the RFI, the CO would not have asserted that Employer's February 12, 2015 advertisement was deficient in any way. Having myself reviewed the record, I find that to the extent the CO's second ground for denial is based on an alleged deficiency in Employer's February 12, 2015 advertisement, that ground for denial is invalid.⁴

I am requesting that this order be served by fax or e-mail in addition to by regular mail.

⁴ The letter brief submitted on behalf of the CO is silent on the issue of whether Employer's February 12, 2015 advertisement was deficient.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's denial of labor certification is **VACATED** and I direct the Certifying Officer to **GRANT** Crawfish Processing LLC's application.

SO ORDERED.

For the Board:

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.