



**Issue Date: 02 April 2015**

OALJ Case No.: 2015-TLN-00039  
ETA Case No.: H-400-14336-950222

In the Matter of:  
**FOUR CORNERS MASONRY, INC.,**  
Employer.

Certifying Officer: Charlene G. Giles  
Chicago National Processing Center

Appearances:

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Twin Falls, Idaho  
*For the Employer*

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Department of Labor  
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Washington, D.C. 20210  
*For the Certifying Officer*

Before: Peter B. Silvain, Jr.  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Four Corners Masonry, Inc.’s request for review of the Certifying Officer’s (“CO”) final determination in the above-captioned H-2B temporary labor certification matter.<sup>1</sup> The H-2B

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<sup>1</sup> All citations to 20 C.F.R. Part 655, Subpart A refer to the Final Rule published in the Federal Register on December 19, 2008 (“2008 Rule”), 73 Fed. Reg. 78020. The Department of Labor (“DOL”) indefinitely delayed implementation of the Final Rule published on February 21, 2012 (“2012 Rule”), 77 Fed. Reg. 10038, after the United States District Court for the Northern District of Florida (“District Court”) issued a preliminary injunction enjoining DOL from implementing or enforcing it. *See* 77 Fed. Reg. 28764 (May 16, 2012) (announcing the continuing effectiveness of the 2008 Rule “until such time as further judicial or other action suspends or otherwise nullifies the order in the Bayou II litigation”); *Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183, Order at 8 (N.D. Fla. Apr. 26, 2012) (issuing order temporarily enjoining DOL from implementing or enforcing the

program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peak load, or intermittent basis, as defined by the Department of Homeland Security.<sup>2</sup> Employers who seek to hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL” or “Department”).<sup>3</sup> A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification.<sup>4</sup> If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA.<sup>5</sup>

## STATEMENT OF THE CASE

### H-2B Application

Four Corners Masonry, Inc. (the “Employer”) specializes in stonemason, brickmason, and other masonry work in Teton County, Wyoming. AF 50.<sup>6</sup> On January 28, 2015, the Employer filed an ETA Form 9142, *Application for Temporary Employment Certification* (“Application”). AF 50-59. The Employer requested certification for eight “Helpers-Brickmasons, Stonemasons”<sup>7</sup> for the period of April 1, 2015 until November 30, 2015. AF 50.

### Request for Further Information

On February 4, 2015, the CO sent the Employer a Request for Further Information (“RFI”) after determining that the Employer failed to satisfy all of the requirements of the H-2B program. AF 44-49. The CO explained there were three deficiencies in the Employer’s Application, and notified the Employer that it had seven calendar days from the date of the RFI to submit additional information and documentation to remedy the deficiencies. AF 44.

As to the Employer’s deficiencies, the CO first found that the Employer failed to submit a complete and accurate recruitment report with its Application, as required by 20 C.F.R. §§

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2012 Rule), *affirmed by* 713 F.3d 1080 (11th Cir. 2013). *See also Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183 (N.D. Fla. Dec. 18, 2014) (vacating the 2012 Rule and permanently enjoining DOL from enforcing it). On March 4, 2015, the District Court also vacated the DOL’s 2008 H-2B regulations, and permanently enjoined the DOL from enforcing them. *See Perez v. Perez*, No. 14-cv-682 (N.D.Fla. Mar. 4, 2015) (2015 U.S. Dist. LEXIS 27606). On March 12, 2015, the Certifying Officer requested that further proceedings be suspended indefinitely. On March 13, 2015, Administrative Law Judge Stephen R. Henley, the Acting Chair of BALCA, put all pending H-2B temporary labor certification matters in abeyance until further notice while the DOL considered its options in light of the District Court’s decision in *Perez v. Perez*. On March 19, 2015, the Certifying Officer filed a status report with BALCA, stating that the District Court granted the Secretary of Labor’s motion requesting a stay of the District Court’s injunction order until and including April 15, 2015. On March 20, 2015, Judge Henley issued an order lifting the stay in all pending H-2B temporary labor certification matters, including the above-captioned matter. The March 20, 2015 order noted that although the above-captioned matter was not listed in the March 13, 2015 order staying administrative proceedings, it is nonetheless an H-2B matter subject to the *Perez v. Perez* injunction.

<sup>2</sup> *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).

<sup>3</sup> 8 C.F.R. § 214.2(h)(6)(iii).

<sup>4</sup> 20 C.F.R. § 655.23.

<sup>5</sup> 20 C.F.R. § 655.33(a).

<sup>6</sup> In this Decision and Order, “AF” refers to the Appeal File.

<sup>7</sup> SOC (O\*Net/OES) occupation title “Helpers--Brickmasons, Blockmasons, Stonemasons, and Tile and Marble Setters,” occupation code 47-3011.

655.20(a) and 655.15(j). AF 46. Specifically, the CO determined the Employer's recruitment report did not accurately identify each recruitment source by name. *Id.* The CO also requested that the Employer amend its Application to reflect the correct start date of the Wyoming State Workforce Agency job order ("Job Order"). *Id.*

Second, the CO determined the Employer failed to submit a complete and accurate Application, as required by 20 C.F.R. § 655.20(a). AF 47-48. The CO informed the Employer that various sections of its Application were incomplete. AF 47. The CO also noted that it was unable to determine if the Employer's three-month experience requirement was consistent with the newspaper print advertisements and Job Order. *Id.* Furthermore, the CO notified the Employer that its attorney failed to provide a signed and dated copy of Appendix B to ETA Form 9142. AF 47-48.

Third, the CO determined the Employer did not comply with the pre-filing recruitment requirements described in 20 C.F.R. §§ 655.15(e)(2) and 655.15(f)(3), which mandate that the job order and newspaper advertisements satisfy the requirements specified at 20 C.F.R. § 655.17. AF 48-49. The CO explained it was unable to determine if the Employer apprised job applicants of the correct experience requirements. AF 48. In order to verify that the Employer complied with the pre-filing recruitment requirements, the CO requested that the Employer submit a copy of the Job Order and copies of all published newspaper advertisements. AF 48-49. The CO further advised that, in accordance with 20 C.F.R. § 655.15(a), all recruitment, including the Job Order and newspaper advertisements, must have been published prior to the date the Employer filed its Application, which was January 28, 2015. AF 49.

#### Employer's Response

On February 10, 2015, the Employer responded to the CO's RFI via facsimile. AF 24-43. The Employer included the following information in its response:

- (1) a copy of the RFI, which the CO issued on February 4, 2015;
- (2) a statement from the Employer clarifying that it prefers to hire individuals with three months of experience in masonry, but does not require such experience;
- (3) permission from the Employer to amend various sections of its Application;
- (4) an invoice from the Jackson Hole Daily newspaper, including the text that was published in the print advertisements on January 2, 2015 and January 3, 2015;
- (5) copies of the print advertisements published in the Jackson Hole Daily and Post Register;<sup>8</sup>
- (6) a copy of Job Order number 2573670; and
- (7) a signed and dated copy of Appendix B to ETA Form 9142.

AF 24-43.

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<sup>8</sup> Although the Employer submitted the advertisements published in the Idaho Falls Post Register, I find the text of the advertisements unreadable. AF 35-36. Thus, I have not considered them.

### Final Determination

On February 27, 2015, the CO issued a Final Determination denying the Employer's Application on the basis that the Employer failed to establish that: (1) insufficient qualified U.S. workers are available and capable of performing the job opportunity for which the Employer is seeking temporary labor certification; and/or (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. AF 19-23. The CO explained that the Employer cured the first two deficiencies outlined in the RFI. AF 21. However, the CO determined the Employer failed to meet certain pre-filing recruitment requirements. AF 22. Specifically, the CO noted the Job Order included two application requirements that the Employer did not list in either its print advertisements or its Application. AF 23. Furthermore, the CO clarified that it views the Employer's "preference" for three months of work experience as a "requirement." *Id.* Thus, because the Employer failed to fulfill all of the pre-filing recruitment requirements, the CO denied the Employer's Application. AF 19-23.

### Employer's Appeal

On March 4, 2015,<sup>9</sup> the Employer requested administrative review of the CO's Final Determination ("Employer's Appeal"), as permitted by 20 C.F.R. § 655.33.<sup>10</sup> AF 1-18. In its appeal, the Employer summarized its position and attached the documents it submitted to the CO in response to the RFI. On March 24, 2015, BALCA received the Appeal File from the CO. On March 25, 2015, I issued a Notice of Docketing and Expedited Briefing Schedule permitting the Employer and Solicitor to file briefs within five business days of receiving the Appeal File. The Solicitor filed a Statement of Position on behalf of the CO on April 1, 2015, urging BALCA to affirm the CO's decision to deny certification. The Employer did not file a brief.

### **DISCUSSION AND APPLICABLE LAW**

BALCA's standard of review in H-2B cases is limited. Specifically, 20 C.F.R. § 655.33 provides that BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence that was actually submitted to the CO in support of the Employer's Application. After considering the evidence of record, BALCA must: (1) affirm the CO's decision to deny temporary labor certification; (2) direct the CO to grant certification; or (3) remand the case to the CO for further action.<sup>11</sup>

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<sup>9</sup> The Employer mailed its request for administrative review on March 4, 2015; BALCA received it on March 17, 2015.

<sup>10</sup> Under 20 C.F.R. § 655.33, within ten (10) calendar days of the CO's adverse determination, an employer may request that BALCA review the CO's denial. Within five (5) business days of receipt of the employer's appeal, the CO shall assemble and submit to BALCA an administrative appeal file. Within five (5) business days of receipt of the appeal file, counsel for the CO may submit a brief in support of the CO's decision. The Chief Administrative Law Judge may designate a single member or the three member panel of BALCA to consider the case. BALCA must notify the employer, CO, and counsel for the CO of its decision within five (5) business days of the submission of the CO's brief, or ten (10) days after receipt of the appeal file, whichever is earlier, using means that ensure same day or overnight delivery.

<sup>11</sup> 20 C.F.R. § 655.33(e).

The Employer bears the ultimate burden of proving that it is entitled to labor certification.<sup>12</sup> The CO may only grant the Employer's Application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available for the job opportunity for which it is seeking certification; and (2) employing H-2B workers will not adversely affect the benefits, wages, and working conditions of similarly employed U.S. workers.<sup>13</sup>

#### Failure to Follow Pre-Filing Recruitment Requirements

The Employer must satisfy specific pre-filing recruitment procedures before filing an Application. Specifically, the regulations at 20 C.F.R. § 655.15(e)(2)<sup>14</sup> and § 655.15(f)(3)<sup>15</sup> mandate that the Employer's job order and newspaper advertisements meet the requirements specified in 20 C.F.R. § 655.17.<sup>16</sup> Recruitment requirements are "designed to reflect what the Department has determined, based on program experience, are most appropriate to test the labor market."<sup>17</sup>

In explaining its reasons for denying certification, the CO explained that the job requirements the Employer listed in the Job Order and newspaper advertisements were inconsistent with those listed in the Employer's Application. AF 23. The CO emphasized that the Employer's Job Order stated applicants were required to have an operator driver's license and undergo a drug test/screening, but the Employer did not list those requirements in its Jackson

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<sup>12</sup> See *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., d/b/a Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009).

<sup>13</sup> 20 C.F.R. § 655.32(b).

<sup>14</sup> 20 C.F.R. § 655.15(e)(2) provides: "The job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.17."

<sup>15</sup> 20 C.F.R. § 655.15(f)(3) provides: "The newspaper advertisements must satisfy the requirements contained in § 655.17. The employer must maintain copies of newspaper pages (with date of publication and full copy of advertisement), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication containing the text of the printed advertisements and the dates of publication furnished by the newspaper."

<sup>16</sup> 20 C.F.R. § 655.17 provides: "All advertising conducted to satisfy the required recruitment steps under § 655.15 before filing the *Application for Temporary Employment Certification* must meet the requirements set forth in this section and must contain terms and conditions of employment which are not less favorable than those to be offered to the H-2B workers. All advertising must contain the following information: (a) The employer's name and appropriate contact information for applicants to send résumés 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."

<sup>17</sup> See 73 Fed. Reg. 78,020, 78,031 (Dec. 19, 2008). See also *Chateau on the Lake*, 2010-TLN-00062 (June 11, 2010).

Daily News advertisement, Post Register advertisement, or Application. *Id.* In its statement of position, the Solicitor argued, “[b]y omitting one of the advertising components, the Employer did not conduct a proper test of the labor market to determine if labor certification was required.”<sup>18</sup>

Upon a complete review of the record, I agree with the CO’s finding that the minimum job requirements contained in the Job Order are inconsistent with the Employer’s Application and the text of the Employer’s job advertisements. The regulations at 20 C.F.R. §§ 655.15 (e)(2) and 655.15(f)(3) provide that the job order and the newspaper advertisements must satisfy the requirements contained in 20 C.F.R. § 655.17, which specifies that all advertising must contain terms and conditions of employment that *are not less* favorable than those to be offered to the H-2B workers.<sup>19</sup> In this case, the Employer’s Job Order specifically listed “Drug Testing/Screening” and “Operator License” as job requirements. AF 37. Thus, a potential applicant reading the Job Order could reasonably conclude that undergoing a drug screening and having an operator driver’s license are prerequisites to being considered for the Employer’s job opportunity.

In its request for administrative review, the Employer alleged it “requires any foreign citizens who may apply to pass a drug test and have a driver’s license and so these requirements are the same of U.S. applicants.” (Employer’s Appeal at 2). In contrast to the Employer’s assertion, the record demonstrates that neither the Employer’s Application nor the newspaper advertisements specified that applicants needed to pass a drug test or have an operator driver’s license. Specifically, the advertisements published in the Jackson Hole Daily on January 2, 2015 and January 3, 2015 did not mention anything pertaining to a drug screening, drug testing, or driver’s license. AF 33. Similarly, in its Application, the Employer did not list drug testing and a driver’s license as minimum job requirements. AF 53. In defense of its failure to include these two job requirements in its Application, the Employer argued that the ETA Form 9142 “does not request this information.” (Employer’s Appeal at 2). Nevertheless, I find that the Employer could have listed the two additional job requirements in section F.b.5. of its Application, entitled, “Special Requirements – List specific skills, licenses/certifications, and requirements of the job opportunity.” AF 53.

In sum, I find that requiring each applicant to have an operator driver’s license and undergo drug testing and/or screening is more stringent than the job requirements that would be advertised to H-2B workers, as evidenced by the Employer’s Application. These two additional hiring requirements could have limited the number of U.S. workers eligible for the Employer’s job opportunity. That the Employer did not include these hiring requirements in its newspaper advertisements does not assist it, as the requirements were included in the Job Order and, therefore, they could have discouraged U.S. applicants who may have been otherwise eligible to apply.

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<sup>18</sup> CO’s Statement of Position at 3 (quoting *Freemont Forest Systems, Inc.*, 2010-TLN-00038 (March 11, 2010)). See also *Quality Construction & Production LLC*, 2009-TLN-00077 (August 31, 2009); *Metompkin Bay Oyster Co., Inc.*, 2009-TLN-00100 (October 9, 2009); *East Bernstadt Cooperage Inc.*, 2010-TLN-00004 (October 30, 2009).

<sup>19</sup> See 20 C.F.R. § 655.17 (emphasis added).

Also at issue in this appeal is the Employer's preference to hire individuals with three months of experience in masonry. In its Final Determination, the CO clarified that although the Employer listed three months of experience as a preference, and not a requirement, "the Department views an employer's preference as a requirement." AF 23.

In its Application, the Employer initially specified it was seeking individuals with three months of employment experience. AF 53. However, in its response to the RFI, the Employer gave the CO permission to amend its Application to reflect that it does not require applicants to have any experience. AF 31-32. Notwithstanding the correction to its Application, in the advertisement published in the Jackson Hole Daily on January 2, 2015 and January 3, 2015, the Employer stated it "prefer[s] 3 months experience in masonry." AF 33. Similarly, in its Job Order, the Employer stated it "[p]refer[s] 3 months experience in masonry," but listed "0" next to "Months of Experience" required for the job. AF 37. Consistent with the CO's position, BALCA has interpreted employer preferences as job requirements.<sup>20</sup> I find that the Employer's preference for workers with three months of experience in masonry, as listed in the newspaper advertisements and Job Order, reasonably could have excluded eligible U.S. workers who did not have any experience.

In conclusion, I find that the Employer has failed to satisfy all of the pre-filing recruitment requirements contained in 20 C.F.R. §§ 655.15(e)(2) and 655.15(f)(3), which require the job order and newspaper advertisements to satisfy the requirements specified at 20 C.F.R. § 655.17.

### **ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision denying certification be, and hereby is, **AFFIRMED**.

For the Board:

PETER B. SILVAIN, JR.  
Administrative Law Judge

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<sup>20</sup> See *Sodette Simeonidis*, 2013-TLN-00055 (July 2, 2013). See also *Golden Construction Services, Inc.*, 2013-TLN-00030 (Feb. 26, 2013).