



**Issue Date: 02 September 2015**

**BALCA Case No.: 2015-TLN-00055**  
ETA Case No.: H-400-15083-199480

*In the Matter of:*

**GARY CROSS RACING STABLE,**  
*Employer.*

Certifying Officer: Charlene G. Giles  
Chicago National Processing Center

Appearances:

Santiago E. Juarez, Esq.  
The Law Offices of Santiago E. Juarez  
Albuquerque, New Mexico  
*For the Employer*

Stephen R. Jones, Esq.  
Jeffrey L. Nesvet, Esq.  
U.S. Department of Labor  
Office of the Solicitor  
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 Gary Cross Racing Stable’s request for review of the Certifying Officer’s Final Determination in the above-captioned H-2B temporary labor certification matter.<sup>1</sup> The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis, as defined by Department of Homeland Security regulations.<sup>2</sup> Employers who seek to hire foreign workers

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<sup>1</sup> On April 29, 2015, the Department of Labor (the “Department”) 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. 80 Fed. Reg. 24042 (Apr. 29, 2015). Pursuant to this rule, the Department will “continue to process an *Application for Temporary Employment Certification* submitted prior to April 29, 2015 in accordance with 20 C.F.R. Part 655, Subpart A, revised as of April 1, 2009.” *See id.* at 24109 (to be codified at 20 C.F.R. § 655.4). The Employer filed an *Application for Temporary Employment Certification* on May 5, 2015, with a start date of need before October 1, 2015. Accordingly, the Interim Final Rule, 80 Fed. Reg. 24042 (Apr. 29, 2015), applies to this case. Pursuant to 20 C.F.R. § 655.4(d) of the Interim Final Rule, an employer with a start date of need before October 1, 2015 may file its H-2B *Application for Temporary Employment Certification* and job order under the emergency situations provisions outlined in 20 C.F.R. § 655.17.

<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).

under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).<sup>3</sup> A Certifying Officer (“CO”) in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.<sup>4</sup>

## STATEMENT OF THE CASE

### H-2B Application

Gary Cross Racing Stable (the “Employer”) is a horse racing stable in Albuquerque, New Mexico. AF 90-108.<sup>5</sup> On May 5, 2015, the Employer filed with the CO the following documents: (1) ETA Form 9142B, *Application for Temporary Employment Certification* (“Application”); (2) Appendix B to ETA Form 9142B; (3) a copy of job order number 327816; and (4) ETA Form 9141, *Application for Prevailing Wage Determination*. AF 90-108. The Employer requested certification for four horse grooms<sup>6</sup> from April 13, 2015 until December 1, 2016,<sup>7</sup> based on an alleged seasonal need during that period. AF 90.

### CO’s Notice of Deficiency & Employer’s Response

On May 14, 2015, the CO issued a Notice of Deficiency, pursuant to 20 C.F.R. § 655.31. AF 79-89. The CO described eight deficiencies in the Employer’s Application, and explained that pursuant to 20 C.F.R. § 655.31(b)(2), the Employer was permitted to submit a modified Application within ten business days of the date of the Notice of Deficiency. *Id.*

On May 23, 2015, the Employer responded to the CO’s Notice of Deficiency via e-mail. AF 55-78. The Employer included the following information in its response:

- (1) A copy of job order number 330953 from the New Mexico State Workforce Agency;
- (2) Business identification documents;
- (3) Pay schedules from the Employer’s 2014-2015 season;
- (4) A State of New Mexico Racing Commission authorization number for Gary Wayne Cross;
- (5) Authorization from the Employer permitting the CO to make various amendments to its Application; and
- (6) A copy of the Notice of Deficiency, dated May 14, 2015.

AF 55-78.

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

<sup>4</sup> 20 C.F.R. §655.61(a).

<sup>5</sup> In this Decision and Order, “AF” refers to the Appeal File.

<sup>6</sup> SOC (O\*Net/OES) occupation title “Nonfarm Animal Caretakers” and occupation code 39-2021. AF 90.

<sup>7</sup> The Employer later amended its Application to reflect its end date of need as December 1, 2015. AF 68.

On June 1, 2015, the CO sent the Employer an e-mail identifying deficiencies that remained outstanding even after the Employer responded to the Notice of Deficiency dated May 14, 2015. AF 44-45. The CO asked the Employer to:

- (1) Amend or properly complete ETA Form 9141, Section B, Item 6, so that it was consistent with the start date of need listed in the job order;
- (2) Amend or properly complete ETA Form 9142, Section F.b., Item 5, so that it listed all of the Employer's terms and obligations and stated they would be equally applied to both U.S. and H-2B workers;
- (3) Amend or properly complete ETA Form 9142, Section F.b., Item 5, so that it listed all of the Employer's special requirements; and
- (4) Request an amendment to job order number 330953, with all of the required assurances, and send a copy of the revised version to the Chicago National Processing Center.

AF 44.

On June 4, 2015, the Employer responded to the CO's Notice of Deficiency dated June 1, 2015. AF 46-54. The Employer included a copy of a new job order, number 332167, from the New Mexico State Workforce Agency and it authorized the CO to amend the deficiencies listed in its Application. AF 46-54.

#### CO's Notice of Acceptance & Employer's Response

On June 8, 2015, the CO issued a Notice of Acceptance informing the Employer it had reviewed and accepted the Employer's Application for processing. AF 37-43. A Notice of Acceptance provides an employer the opportunity to recruit U.S. workers and prepare and submit a recruitment report in accordance with 20 C.F.R. §§ 655.40-655.48, as modified by the transition procedures in 20 C.F.R. § 655.4. The CO concluded the Employer's Application was timely and contained the required conditions of employment necessary to ensure that the wages and working conditions of U.S. workers similarly employed would not be adversely affected. AF 38.

In the Notice of Acceptance, the CO explained that the Employer needed to comply with various requirements before the CO could issue a Final Determination. *Id.* The CO provided the Employer with detailed information regarding recruiting U.S. workers, accepting referrals, considering U.S. applicants, and completing a recruitment report. AF 37-43. Specifically, the CO indicated the Employer needed to recruit U.S. workers and prepare and submit a recruitment report in accordance with 20 C.F.R. §§ 655.40-655.48, as modified by the transition procedures in 20 C.F.R. § 655.4. AF 39. Moreover, the CO explained that the Employer needed to complete all of the recruitment steps within fourteen days of the date of the Notice of Acceptance. *Id.* Finally, the CO clarified that the Employer needed to complete the recruitment steps in addition to placing a job order with the State Workforce Agency for at least ten calendar days. *Id.*

On June 22, 2105, the Employer filed with the CO a recruitment report, a copy of a newspaper advertisement published in the Hobbs News-Sun, and a copy of job order number 332167. AF 31-36.

### CO's Final Determination

The CO issued a Final Determination denying the Employer's Application on July 29, 2015. AF 22-30. The CO concluded the Employer did not provide enough documentation to demonstrate that it complied with the post-acceptance recruitment requirements contained in 20 C.F.R. §§ 655.40-655.48, as modified by the transition procedures in 20 C.F.R. § 655.4. AF 30. Although the CO acknowledged the Employer included a copy of the job order in its Application, it found the Employer filed the job order in accordance with the requirements of the H-2B regulations published on December 19, 2008, rather than in accordance with 20 C.F.R. § 655.4(d)(2) of the Interim Final Rule, 80 Fed. Reg. 24042 (Apr. 29, 2015). AF 26. Specifically, the CO stated the newspaper advertisement the Employer published in the Hobbs News-Sun did not include the Employer's name. AF 30. Moreover, the CO determined that job order number 332167 did "not include a detailed description of how the worker will be provided with or reimbursed for transportation and subsistence from the place from which the worker has come to work for the employer to the place of employment, as required by 20 C.F.R. 655.18(b)(12)." *Id.* For both of the above-mentioned reasons, the CO denied certification.

### Employer's Appeal

In a letter dated August 6, 2015, the Employer requested administrative review of the CO's Final Determination, pursuant to 20 C.F.R. § 655.61.<sup>8</sup> AF 1-21. On August 13, 2015, the undersigned issued a Notice of Docketing and Order Setting Briefing Schedule permitting the Employer and the Solicitor to file briefs within seven business days of receiving the Appeal File. On August 18, 2015, BALCA received the Appeal File from the CO. The Solicitor filed a Statement of Position on behalf of the CO on August 26, 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. 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

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<sup>8</sup> Under 20 C.F.R. § 655.61(a), within ten (10) business days of the CO's adverse determination, an employer may request that BALCA review the CO's denial. Within seven (7) business days of receipt of an employer's appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO's decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO's brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

was actually submitted to the CO before the date the CO issued a Final Determination.<sup>9</sup> After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action.<sup>10</sup>

The Employer bears the ultimate burden of proving that it is entitled to temporary labor certification.<sup>11</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 to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.<sup>12</sup>

The transition procedures outlined in 20 C.F.R. § 655.4 govern an *Application for Temporary Employment Certification* submitted on or after April 29, 2015 when the employer has a start date of need prior to October 1, 2015.<sup>13</sup> Such employers are permitted to file an *Application for Temporary Employment Certification* job order with the National Processing Center using the emergency situations provisions at 20 C.F.R. § 655.17.<sup>14</sup> Moreover, 20 C.F.R. § 655.4 (d)(2) provides that recruiting U.S. workers on an expedited basis consists of placing a new job order with the State Workforce Agency serving the area of intended employment, for a period of not less than ten calendar days, which contains the job assurances and contents set forth in 20 C.F.R. § 655.18. Because the Employer filed an Application on May 5, 2015, with a start date of need before October 1, 2015, the emergency situations provisions outlined in 20 C.F.R. § 655.17 are applicable to this case.

In its Final Determination, the CO determined that the Employer failed to meet the job order requirements contained in 20 C.F.R. § 655.18(b)(12) and the advertising requirement contained in 20 C.F.R. § 655.41(b)(1). AF 22-30. Each job order placed in connection with an *Application for Temporary Employment Certification* must meet various requirements outlined in 20 C.F.R. § 655.18. Furthermore, all advertisements must contain the information required by 20 C.F.R. § 655.41(b).

As to the job order deficiency, the CO acknowledged that the Employer submitted a new job order, number 332167, on June 2, 2015. However, the CO concluded the job order did "not include a detailed description of how the worker will be provided with or reimbursed for transportation and subsistence from the place from which the worker has come to work for the employer to the place of employment, as required by 20 C.F.R. 655.18(b)(12)." AF 30.

In its request for administrative review, the Employer acknowledged it was "undeniable" that the job order "overlooked" how the worker would be reimbursed for transportation and

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<sup>9</sup> 20 C.F.R. § 655.61.

<sup>10</sup> 20 C.F.R. § 655.61(e).

<sup>11</sup> 8 U.S.C. § 1361; *see also* *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>12</sup> 20 C.F.R. § 655.1(a).

<sup>13</sup> 20 C.F.R. § 655.4(d).

<sup>14</sup> 20 C.F.R. § 655.4(d)(1).

subsistence.<sup>15</sup> The Employer explained it was seeking to “comply fully” while feeling the pressure of the newly revised H-2B regulations.<sup>16</sup> *Id.* Although I agree with the Employer that operating under newly revised regulations can be confusing and cumbersome, that does not excuse noncompliance with the applicable regulations. Moreover, in the Notice of Deficiency dated May 14, 2015, the CO explained to the Employer that the job order needed to meet all of the requirements listed in 20 C.F.R. § 655.18. AF 71-72. Thus, the Employer was given an opportunity to modify the job order and adhere to the revised regulations before the CO issued a Final Determination. I find that the CO correctly concluded that the job order failed to include information regarding how the worker would be provided with or reimbursed for transportation and subsistence, as required by 20 C.F.R. § 655.18(b)(12).

In addition to finding the job order deficient, the CO concluded the newspaper advertisement the Employer published in the Hobbs News-Sun did not include the Employer’s name. AF 30. The regulation at 20 C.F.R. § 655.41(b)(1) provides that all advertising must contain, among other things, the Employer’s name and contact information. In its request for administrative review, the Employer alleged, “the contact information for the [E]mployer is correct and bears the same name, Marcy Cross, as is the title of the Racing Stable. Further, the job order number in the advertisement leads one directly to this job and recruitment effort.”<sup>17</sup>

In this case, it is undisputed that the newspaper advertisement the Employer used to recruit job applicants failed to list the Employer’s name. The Employer contended that “Marcy Cross” and “Gary Cross Racing Stable” bear the same name.<sup>18</sup> While both contain the name “Cross,” it is unlikely that a prospective job applicant interested in submitting a job application directly to the Employer would have any way of knowing that “Marcy Cross” and “Gary Cross Racing Stable” are the same employer. Although the Employer has argued the advertising error is minor, newspaper advertisements must comply with 20 C.F.R. § 655.41 in order to adequately test the domestic labor market. I find that the CO correctly concluded that the newspaper advertisement failed to include the Employer’s name, as required by 20 C.F.R. § 655.41(b)(1).

As the Certifying Officer noted in its brief, “BALCA has strictly enforced the H-2B job order and newspaper advertisement content requirements in order to protect domestic workers.”<sup>19</sup> The instant case is no exception. Because the Employer has failed to meet the job order requirement contained in 20 C.F.R. § 655.18(b)(12) and the advertising requirement contained in 20 C.F.R. § 655.41(b)(1), I find the CO properly denied certification.

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<sup>15</sup> *Employer’s Administrative Appeal* at 2.

<sup>16</sup> On April 29, 2015, the Department of Labor (the “Department”) 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. 80 Fed. Reg. 24042 (Apr. 29, 2015). Only a few days later, on May 5, 2015, the Employer filed the Application at issue in this case.

<sup>17</sup> *Employer’s Administrative Appeal* at 2 (emphasis in original).

<sup>18</sup> *Id.* at 1-2.

<sup>19</sup> *Certifying Officer’s Statement of Position* at 2 (citing *Culinary Advisors, Inc. d/b/a Evo Italian*, 2014-TLN-00026, slip op. at 6 (April 24, 2014)). See also *Turf Specialties, Inc.* 2015-TLN-00007 (Jan. 14, 2015); *Burnham Companies*, 2014-TLN-29 (May 19, 2014).

**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