



ISSUE DATE: 10 FEBRUARY 2015

OALJ CASE NO: 2015-TLN-00017
ETA CASE NO: H-400-14336-045681

In the matter of :

Andres Patricio Candelario (Bale Pine Straw)

Decision and Order Affirming Denial

Andres Patricio Calendario (Calendario), a farm labor contractor, has asked the Board of Alien Labor Certification Appeals (BALCA) to review the denial of a request for temporary alien employment certification.¹ His application of December 2, 2014 seeks visas for 25 citizens of Mexico to enter the United States as non-immigrant workers under the H-2B visa program to bale pine straw in the forests of north Florida.² Calendario would employ them in the 11 months from January 25, 2015 to December 15, 2015. The denial of the application is affirmed.

A. Labor Certifications

The Secretary of Labor's certification is a precondition for an alien worker to obtain H-2B immigration status from the Department of Homeland Security.³ Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. 1101(a)(15)(H)(ii)(b), creates the H-2B visa classification for temporary workers not employed in agriculture. The visa is available to a worker who has "a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other [than

¹ The denial is found at Administrative Record (Admin. R.) P29–P38; 20 C.F.R. § 655.33(a). Calendario applied through an agent, but I refer in this decision to the actual the applicant, Calendario.

² Administrative Record (Admin. R.) P74 –P129. The date stamp appears at P74.

³ 8 U.S.C. § 1184(c)(1); 8 C.F.R. § 214.2(h)(6)(iii) (2008).

agricultural] temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.”⁴

Section 214(c)(1) of the INA, as amended,⁵ requires an employer to petition the Department of Homeland Security to determine whether to classify a prospective temporary worker as an H-2B non-immigrant. The adjudication of that petition allows the worker to obtain an H-2B visa from the Secretary of State, or be granted H-2B status.

U.S. Citizenship and Immigration Services (USCIS), an agency within the Department of Homeland Security, adjudicates petitions for H-2B status.⁶ Section 214(c)(1) of the INA requires the Secretary of Homeland Security to consult with “appropriate agencies of the Government” in its H-2B decisions. The Secretary of Homeland Security consults with the Secretary of Labor because the Department of Labor is in the best position to advise Homeland Security on whether “unemployed persons capable of performing such service or labor cannot be found in this country.”⁷

The Secretary of Homeland Security and the Secretary of Labor have jointly determined⁸ that the best way to consult is to require that, before an employer files an H-2B petition at Homeland Security, it must first obtain a temporary labor certification from the Secretary of Labor.⁹ Certification by the Secretary of Labor demonstrates two things:

1. that the employer has indeed made unsuccessful efforts to recruit a U.S. worker for the job it seeks to admit an H-2B worker to perform, and
2. an H-2B worker, and any U.S. worker the employer successfully recruits for the work, will be paid no less than the prevailing wage for that work in the geographic area of the job, a wage level the Secretary of Labor sets.

The Secretary of Labor thereby assures USCIS that U.S. workers capable of performing the services or labor are unavailable, and admission of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers.

A Certifying Officer of the Office of Foreign Labor Certification, a part of the Employment and Training Administration of the U.S.

⁴ 8 U.S.C. 1101(a)(15)(H)(ii)(b).

⁵ 8 U.S.C. 1184(c)(1).

⁶ See 8 CFR 214.2(h)(6) et seq.

⁷ 8 U.S.C. 1101(a)(15)(H)(ii)(b).

⁸ See 78 Fed.Reg. at 24048 (Apr. 21, 1913).

⁹ 8 CFR 214.2(h)(6)(iii)(A).

Department of Labor, disposes of applications for temporary labor certifications.¹⁰

B. This application

The Certifying Officer allowed Calandario to remedy omissions in his application of December 2, 2014 through a Request for Further Information.¹¹ Calandario's response¹² failed to remedy all the deficiencies—one recruitment problem proved impossible to remedy as a matter of chronology. All the failures led to the Certifying Officer's denial.

After Calandario sought review, the Certifying Officer presented the appeal file here on January 29, 2015. The written arguments from the Department of Labor and the non-attorney agent for Calandario were received by February 6, 2015.

The Secretary's regulations authorize a Judge of the Board of Alien Labor Certification Appeals to affirm a denial, direct the Certifying Officer to grant temporary employment certification, or remand the matter to the Certifying Officer for additional action.¹³

C. Only temporary work qualifies under the H-2B visa program

The H-2B program allows an employer to hire a foreign worker to perform temporary, nonagricultural work within the United States in four situations:

1. a one-time occurrence (*i.e.*, the employer demonstrates it has not needed the labor or service in the past and will not need it in the future, but needs it at the present time);
2. a seasonal need (*i.e.*, the employer shows it requires the service or labor on a recurring basis, traditionally tied to a season of the year);

¹⁰ 20 C.F.R. § 655.23(c)(3) (2008). The U.S. District Court for the Northern District of Florida entered a stay on May 16, 2012 that blocked revisions the Secretary of Labor published on Feb. 21, 2012 to H-2B program regulations, which would have been codified as 20 CFR Part 655, Subpart A. *See* 77 Fed. Reg. at 10038-10109 and 10147-10169. The notice the Secretary gave that those revisions would not go into effect was published at 77 Fed. Reg. at 28764 (May 16, 2012). In *Bayou Lawn & Landscape Services v. Sec. of Labor*, 713 F3d 1080 (11th Cir. 2013), the Court of Appeals affirmed the stay. This leaves the regulations first published at 73 Fed. Reg. at 78020-78069 (Dec. 19, 2008) as the controlling regulations. All references are to the 2009 version of the Secretary's H-2B regulations in the C.F.R., which codified the late 2008 Federal Register publication, unless stated otherwise.

¹¹ A Request for Further Information is described at 20 C.F.R. § 655.23(c). This one, dated December 9, 2014, is found at Admin. R. P65–P73.

¹² Admin. R. P39–P64.

¹³ 20 C.F.R. § 655.33(e).

3. a peak load need (*i.e.*, the employer needs to temporarily supplement its permanent staff due to a short-term increase in demand); or
4. an intermittent need (*i.e.*, the employer shows it occasionally or intermittently needs the services of temporary workers for short periods).¹⁴

D. The Department's application implements the immigration statute

The application for H-2B temporary alien labor certification¹⁵ is designed to require specific proof that addresses the two overarching goals of Congress. First, there must not be enough able and qualified U.S. workers available to fill the temporary job(s). The INA makes an H-2B visa available to an alien only "if unemployed persons capable of performing such service or labor cannot be found in this country."¹⁶

Second, the employment of the foreign worker(s) must not adversely affect the wages and working conditions of similarly employed U.S. workers.¹⁷

Essential elements for an application to the Secretary of Labor for H-2B certification include a Job Order that a state workforce agency circulates in an effort to find U.S. workers who will do the work; newspaper advertisements the employer must place seeking U.S. workers; and a report from the employer that details the results of the efforts to recruit U.S. workers. All elements must be completed before an application for alien labor certification is submitted to the Secretary of Labor.¹⁸ These required steps test the domestic job market to determine whether U.S. workers are available, or would be adversely affected by admitting an alien H-2B visa holder to do the work.

E. The original submission

Calendario filed the application on December 2, 2014. The Certifying Officer sent Calendario a request for further information on December 9, 2014. The Officer was concerned that the application had several categories of shortcomings, which he related to the regulations

¹⁴ 8 C.F.R. § 214.2(h)(1)(ii)(D); 8 C.F.R. § 214.2(h)(6)(ii)(B), and 20 C.F.R. § 655.6(b).

¹⁵ ETA Form 9142.

¹⁶ 8 U.S.C. § 1101(a)(15)(H)(ii)(b); see also 8 C.F.R. § 214.2(h)(6)(iv)(1) that requires a petitioner to obtain from the Secretary of Labor a certification that "qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers."

¹⁷ 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 U.S.C. 1184(c)(1).

¹⁸ The H-2B regulations, at § 655.15(e)(2), require that "[t]he job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.17.

in his request. The ones resolved are not discussed in this decision. The unresolved ones were that that the application failed to:

1. establish that the nature of need was temporary (20 C.F.R. §§ 655.6 and 655.21(a)).
2. comply with the pre-filing recruitment requirements (20 C.F.R. §§ 655.15(e)(2), 655.15(f)(1) and 655.15(f)(3)); and
3. submit the necessary pre-filing recruitment information, including the recruitment report (20 C.F.R. §§ 655.15(f)(1), 655.15(j) and 655.20(a)).

On the first issue, the application failed to justify adequately why Calendario needed these 25 workers for 11 months.¹⁹ Other entries on the application were just missing. For example, essential information about the Job Order in the application's Section H.2 were blank.²⁰ These deficiencies are discussed in that order.

F. This is not temporary work

The dates of need requested in the application were from January 25, 2015 through December 15, 2015.²¹ In the space on the application requesting a Statement of Temporary Need, Calendario said the jobs “were seasonal because the time of year where the [pine] trees are in the middle of the bitter cold season in the winter time.”²² The Florida panhandle where the jobs were to be located (near Live Oak, Florida which is halfway between Jacksonville and Tallahassee) isn't known for what even a Floridian would characterize as “bitter cold,” and any consecutive 11 months of the year will include many months that are nothing but hot. The explanation is nonsensical. No better one was offered in response to the Certifying Officer's inquiry.²³

Calendario's request that the aliens work 11 months raised red flags. Ten months is the usual cut-off for a “temporary” need under any of the four situations enumerated earlier.²⁴ The applicant has to justify why a “temporary” job would last longer.

This application shows the opposite. The letter from Bobby Nelson Farms in the application says Calendario is operating under an

¹⁹ The work period is stated at Application Sections B.5 and B.6 (Admin. R. P74).

²⁰ Admin. R. P78.

²¹ See the application, Section B., Items 5 and 6.

²² Admin. R. P74.

²³ See Admin. R. P5, ¶2.

²⁴ *Grand View Dairy Farm*, 2009-TLC-2, slip op at 6–7 (November 3, 2008) (upholding 10 months “as a threshold at which the [Certifying Officer] will require an employer to either modify its application or prove that its need is, in fact, of a temporary or seasonal nature”). See also *Alter and Son General Engineering*, 2012-TLN-0003/0004/0005, slip. op at 3–4 (November 9, 2012); *Triangle Maintenance Service, LLC*, 2009-TLN-97, slip. op. at 6 (October 7, 2009).

arrangement that provides work “52 weeks of the year (all year round.)”²⁵ These workers would be “temporary” in only one sense: they would be the temporary incumbents of permanent jobs. This is not what the H-2B program is meant for.

G. Insufficient recruitment of U.S. workers

Calandario’s efforts to recruit U.S. workers before resorting to alien labor are described at paragraph six of the application.²⁶ The efforts described fell short. The job advertisements to inform U.S. workers the jobs would be available, which Calandario placed in the Suwannee Democrat²⁷ on August 15 and August 22, 2014, were deficient and untimely.

The advertisements were deficient because they failed to include the minimum elements the regulation²⁸ requires. These newspapers advertisements didn’t specifically state that the position is temporary, or the total number of job openings the employer intends to fill.²⁹ The advertisement says nothing about work hours and days, expected start and end dates of employment, and whether or not overtime will be available.³⁰ The ad doesn’t disclose the full range of the applicable wages because Calandario included a piece rate, but neglected to guarantee that he will pay at least the prevailing wage rate of \$10.86. All these are necessary elements of the advertisement under 20 C.F.R. § 655.17(f), (g) and (h). The advertisement copy read:

Farm Labor Contractor needs farm workers to bale pine straw in Suwanee County, FL. Wages paid weekly at the rate of 60 cents per bale. Bale weighs 6 lbs. Free transportation & housing if needed, tools supplied free of charge. Please Call Andres Calandario at [phone number] or Tito Gonzales at [phone number].³¹

The August advertisements can’t be timely when they were placed before the date of the Job Order (Number 9965892)—December 4, 2014.³² Advertisements must run after the date of the Job Order. Florida’s “State Workforce Agency” circulated the Job Order from

²⁵ Admin. R. P126.

²⁶ Admin. R. P78.

²⁷ The claim of advertising is made in section H of application at paragraph 15. Admin. R. P78. The tear sheet for the advertisement run on the dates stated is at Admin. R. P51–P54.

²⁸ The H-2B regulations, at § 655.15(e)(2), require that “[t]he job order submitted by the employer to the SWA [State Workforce Agency] must satisfy all the requirements for newspaper advertisements contained in § 655.17.

²⁹ 20 C.F.R. § 655.17(h).

³⁰ 20 C.F.R. § 655.17(f).

³¹ Admin. R. P51.

³² Admin. R. P58.

December 4 through December 15, 2014. Calandario knew this. He wrote in his answer to ¶17 of the application:

“a referral . . . will be posted in the Advertising that will Start as soon as we get the Job order number, so the [American] candidate interested to work with us, will have at least three telephone number[s] to refer [to] and speak his intention of coming to work.”³³

Calandario’s effort to correct the deficiencies with advertisements run in the same newspaper on and after December 17, 2014 don’t save the application. Advertisements run in local newspapers in North Florida and South Georgia on days between December 17 through 26 were submitted.³⁴ They are almost identical to those run on August 15th and 24th, and although changed to give the hourly wage instead of the piece rate, they suffer identical infirmities. The December advertisements said:

Farm Labor Contractor needs farm workers to bale pine straw in Suwanee County, FL. Job Order #9965892. Wage \$10.86/hr paid weekly. Free transportation & housing if needed, tools supplied free of charge. Please Call Andres Calandario at [phone number] or Tito Gonzales at [phone number].

Calandario was aware that advertisements run after December 2, 2014 won’t do. Only recruitment efforts before the date of the application are considered.³⁵ The Certifying Officer pointed out in his request for additional information that any advertisements run after the date the H-2B application had been filed with the National Processing Center in Chicago (December 2, 2014) could not cure pre-filing advertisement errors. The remedy is to refile, after the necessary recruitment efforts have been made within the time periods the regulations describe. This application is beyond salvage.

Calandario argues there is no 20 C.F.R. § 655.17—but there is. He seems not to understand that, by notice published in the Federal Register, the Secretary of Labor withdrew the H-2B regulations published February 21, 2012. After a U.S. District Court invalidated the 2012 regulations, the Secretary substituted the former H-2B regulations first published in December 2008.³⁶

³³ Admin. R. P98.

³⁴ Admin. R. P51–P54.

³⁵ “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. . .” See the introductory text to 20 C.F.R. § 655.17.

³⁶ *See supra* note 10. The notice in the Federal Register included the statement that “employers must file H-2B labor certification applications under the 2008 H-2B

H. Deficiencies in the recruitment report

The recruitment report dated December 16, 2014³⁷ Calendario submitted in reply to the request for information remained deficient. The Certifying Officer was correct that each applicant's name, contact information, and final hiring disposition are not found there.³⁸ Calendario did say that one inquiry was received on August 18, 2014, but that came from an untimely advertisement.³⁹ The more complete statement Calendario offers at page four his brief about job inquiries received from six U.S. workers, and their disposition, comes too late. The brief cannot amend an insufficient response to the Certifying Officer's request for information.

Order

Unremedied deficiencies leave the application wanting. The Certifying Officer's denial is correct, and affirmed.

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

Rule, using those procedures and forms associated with the 2008 H-2B Rule for which the Department has received an emergency extension under the Paperwork Reduction Act." 77 Fed.Reg. 28765 (May 16, 2012).

³⁷ Admin. R. P57.

³⁸ See the portion of the Denial at Admin. R. P38.

³⁹ Admin. R. P4.