



Issue Date: 13 August 2015

BALCA Case No.: 2015-TLN-00053
ETA Case No.: H-400-15145-991639

In the Matter of:

Garcia Enterprises, Inc.,
Employe

Appearances: Israel A. Linarte
Crew Readiness Services
Laguna Vista, TX
For the Employer

Jeffery L. Nesvet, Associate Solicitor
Vincent C. Costantino, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **TIMOTHY J. McGRATH**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from Garcia Enterprises, Inc.’s (“Employer”) request for review before the Board of Alien Labor Certification Appeals (“BALCA”) of the denial by a Certifying Officer (“CO”) for the Employment and Training Administration (“ETA”) of its application for H-2B temporary labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), 1184(a)(c); 8 C.F.R. § 214.2(h); 20 C.F.R. Part 655, Subpart A.¹ For the reasons set forth below, the CO’s denial of temporary labor certification in this matter is affirmed.

¹ On April 29, 2015, the Department of Labor 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) (to be codified at 20 C.F.R. § 655.4). Accordingly, I will decide this case under the revised rules provided in the Interim Final Rule and all citations to 20 C.F.R. Part 655, Subpart A refer to the Interim Final Rule. *Id.*

STATEMENT OF THE CASE

On June 5, 2015, the ETA received an application for H-2B temporary labor certification from Employer for forty “Shrimp Boat Deckhand/Header,” to be employed from July 2, 2015 to March 1, 2016, to satisfy its seasonal need. AF 50.²

On June 16, 2015 the CO issued a Notice of Deficiency (“NOD”), notifying Employer that its application failed to meet the criteria for acceptance in light of two deficiencies. AF 44-49. First, Employer failed to submit an acceptable job order. AF 47-49. Employer did not submit a copy of the job order that was submitted to the State Workforce Agency (“SWA”) serving the area of intended employment at the same time it submitted the *Application for Temporary Employment Certification*.³ AF 47; 20 CFR § 655.16. Secondly, Employer did not submit a “complete and accurate ETA Form 9142” because two sections of the form contained inappropriate text. AF 49; 20 CFR § 655.15(a).

On June 23, 2015, Employer responded to the NOD. AF 29-43. Employer’s response included a copy of the CO’s NOD, a letter of explanation (which contained a side-by-side comparison between Employer’s newspaper ad and the requirements of 20 CFR § 655.18), an amended ETA Form 9142B, and copies of the job posting in the *Victoria Advocate*. AF 29-43.

On June 30, 2015, the CO issued Non-Acceptance Denial (“Denial”). AF 22-28. While Employer’s response successfully cured the second deficiency, it still failed to satisfy the requirements outlined in 20 CFR § 655.16 because it did not include a copy of its job order. AF 26-28.

On July 12, 2015, Employer requested administrative review of the denial of certification. AF 1-21. Employer maintained it:

Reviewed the documentation previously provided to DOL . . . and believe[s] that ALL required documentation has been submitted to [the DOL]. It appears that the main issue is the “lack of a job order.” The grounds for our appeal is that the above referenced case **HAS A VALID JOB ORDER NUMBER (SEE PRINTOUT OF WIT CASE)**.

AF 1.

On June 29, 2015, I issued Notice of Docketing. In the Notice of Docketing, I allowed the parties until close of business on August 5, 2015 to file additional briefs. On August 5, 2015, I received briefs on behalf of both Employer and the CO.

² Citations to the Administrative File will be abbreviated “AF” followed by the page number.

³ CO also briefly mentioned Employer’s job order must incorporate the job assurances and contents outlined in 20 CFR § 655.18. AF 47-49; *see* 20 CFR §§ 655.4(d)(2), 655.18.

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 CFR § 655.61(a), (e). A review of the record compels a conclusion that the CO was justified in denying certification.

The regulations explicitly require employers to "submit the job order to the SWA serving the area of intended employment at the same time it submits the *Application for Temporary Employment Certification* and a copy of the job order to the NPC in accordance with § 655.15." 20 CFR § 655.16. In this case, Employer neither submitted a copy of its job order within its initial application nor in response to the CO's NOD. AF 50-76; AF 29-43. In its request for an administrative review before BALCA, Employer submitted a print out of its job order from the Texas Workforce Commission's website. I am restricted, however, from considering this evidence during my review because Employer's request "[m]ay contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued."⁴ 20 CFR § 655.61(a)(5). Accordingly, I affirm the CO's denial of certification.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Board:

TIMOTHY J. McGRATH
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

⁴ My reaffirmation of the CO's denial is limited to this deficiency and I do not infer that the rest of the application, including the amount of detail included within the job order, was sufficient.

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.