



Issue Date: 10 February 2015

OALJ Case No.: **2015-TLN-20**
ETA Case No.: H-400-14353-233830

In the Matter of:

HARVEST TIME SEAFOOD, INC.,
Employer.

Certifying Officer: Charlene G. Giles
Chicago National Processing Center

Appearances:

Kevin E. Dartez
208 West Elina St.
Abbeville, Louisiana 70510
For the Employer

Jeffrey Nesvet, Esq.
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Department of Labor
Office of the Solicitor
Washington, D.C. 20210
For the Certifying Officer

Before: ALICE M. CRAFT
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF
TEMPORARY LABOR CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Harvest Time Seafood Inc.’s (the “Employer”) request for review of the Certifying Officer’s (“CO”) denial in the above-captioned H-2B temporary labor certification matter.¹ The H-2B

¹ 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 issued a preliminary injunction enjoining DOL from implementing or enforcing it. *See* 77 Fed. Reg. 28764 (May 16, 2012) (announcing the continuing effectiveness of

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

STATEMENT OF THE CASE

H-2B Application

The Employer processes crab and crawfish during the Louisiana crab and crawfish season. (AF 32).⁶ On December 19, 2014, the Employer filed an H-2B *Application for Temporary Employment Certification* (“Application”). AF 32-48. The Employer requested certification for forty-six crawfish and crab seafood processing workers and dockworkers, SOC (O*Net/OES) occupation title “Hand Packer & Packager,” occupation code 53-7064, for the period of February 20, 2015 until December 20, 2015. AF 32.

Request for Further Information

On December 24, 2014, 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 27-31. The CO noted three deficiencies in the Employer’s Application and instructed 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 27.

First, the CO stated the Employer failed to submit a recruitment report along with its Application, as required by 20 C.F.R. § 655.20(a) and 20 C.F.R. § 655.15(j). AF 29. The CO informed the Employer that it “must have prepared, signed, and dated a written recruitment report no fewer than two calendar days after the last date on which the job order was posted and no fewer than five calendar days after the date on which the last newspaper or journal advertisement appeared.” *Id.* The CO notified the Employer that pursuant to the regulatory requirements, the written recruitment report must:

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 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).

² 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).

³ 8 C.F.R. §214.2(h)(6)(iii).

⁴ 20 C.F.R. §655.23.

⁵ 20 C.F.R. §655.33(a).

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

1. Identify each recruitment source by name;
2. State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker, including any applicable laid-off workers; and
3. If applicable, explain the lawful job-related reasons for not hiring each U.S. worker[] who applied or was referred to the position.

Id.

Second, the CO determined that the Employer did not comply with the pre-filing recruitment requirements contained in 20 C.F.R. § 655.15(e)(2) and 20 C.F.R. § 655.15(f)(3), which mandate that the job order and newspaper advertisements satisfy the requirements specified at 20 C.F.R. § 655.17.⁷ AF 29-30. The CO stated that because the Employer did not submit a recruitment report, it needed to submit the job order in order for the CO to verify whether it complied with the pre-filing recruitment requirements. AF 30. The CO further advised that in accordance with 20 C.F.R. § 655.15(a), all recruitment, including newspaper advertisements, must have occurred prior to December 19, 2014, which is when the Employer filed its Application. *Id.*

Third, the CO determined the Employer failed to submit a complete and accurate Application, as required by 20 C.F.R. § 655.20(a). AF 31. The CO informed the Employer that Section H.2b of its Application states the job order the Employer placed in connection with its Application would close on December 15, 2015. *Id.* The CO informed the Employer that its job order must remain open for no less than ten days, and the Employer must complete and sign the recruitment report no fewer than two calendar days after the last date on which the job order was posted. *Id.* The CO requested the Employer's permission to amend the Application to reflect a job order closure date of December 24, 2014, or the date on which the job order actually closed. *Id.* The CO noted it needed the Employer's permission to make administrative corrections to the Application. *Id.*

⁷ 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."

Employer's Response

On January 6, 2014, Kevin E. Dartez, a Seafood Processor who works for the Employer, responded to the CO's RFI. AF 18-26. The response included: (1) a hand-written note from Mr. Dartez explaining that his response to the RFI was delayed due to electrical and internet connectivity problems; (2) an e-mail from Mr. Dartez to TLC.Chicago@dol.gov; (3) an invoice from Lester's Air Conditioning, Inc.; (4) two resumes, one from Sam Q. Guidry and the other from Latasha J. Broussard; and (5) a job application from Sever Renard. AF 18-26.

Final Determination

On January 16, 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 were available and capable of performing the job opportunity for which the Employer was seeking temporary labor certification; and/or (2) employing H-2B workers would not adversely affect the wages and working conditions of U.S. workers similarly employed. AF 12. The CO noted the Employer failed to correct any of the deficiencies contained in the RFI. AF 14. Thus, the CO denied the Employer's Application because all three of the deficiencies outlined in the RFI remained uncorrected.

Appeal

On January 24, 2015, Mr. Dartez mailed the Employer's request for administrative review, as permitted by 20 C.F.R. § 655.33.⁸ AF 1-2. Mr. Dartez stated he sent the CO a list of all of the individuals who applied for the job order number 514680. AF 1. He also specified he was unsure about what form to complete in response to the CO's RFI, so he attached a completed "Applicant Record for FLC Job Orders" to his request for administrative review. AF 2.

On February 2, 2015, BALCA received the Appeal File from the CO. On February 3, 2015, I issued a Notice of Docketing and Expedited Briefing Schedule permitting the Employer and the Solicitor to file briefs within five business days of receipt of the Appeal File. The Solicitor filed a brief on behalf of the CO on February 6, 2015.

DISCUSSION

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 review, which may only contain legal

⁸ 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 will 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.

arguments and evidence that was actually submitted to the CO in support of the application.⁹ After considering the evidence of record, BALCA must: (1) affirm the CO's denial of the temporary labor certification; (2) direct the CO to grant certification; or (3) remand the case to the CO for further action.¹⁰

The Employer bears the ultimate burden of proving that it is entitled to labor certification.¹¹ The CO may only grant an employer's application to admit H-2B workers for temporary nonagricultural employment if insufficient qualified U.S. workers are available for the job opportunity for which the employer is seeking certification, and if employing H-2B workers will not adversely affect the benefits, wages, and working conditions of similarly employed U.S. workers.¹²

Failure to Submit a Recruitment Report:

In the RFI and the Final Determination, the CO found that the Employer failed to submit a copy of its recruitment report, which is required by 20 C.F.R. § 655.20(a).¹³ The CO specified that the Employer's recruitment report must satisfy the requirements outlined in 20 C.F.R. § 655.15(j).¹⁴ When an employer files its application, it must submit a recruitment report detailing its pre-filing recruitment activities and agree to abide by the terms and conditions of employment that are enumerated in the regulations.¹⁵ The employer's compliance with these attestations forms the basis of the CO's factual determination that employing foreign workers in the specified position will not adversely affect the wages and working conditions of similarly employed U.S. workers.

I note that in Section H of its Application, entitled "Recruitment Information," the Employer identified that the Louisiana State Workforce Agency ("SWA") serves the area of intended employment and processed the Employer's job order number 514680 from December 3, 2014 until December 15, 2015. AF 36. Furthermore, under "Additional Recruitment Activities,"

⁹ The Employer submitted a completed "Applicant Record for FLC Job Orders" form with its request for administrative review. Because the Employer did not submit this evidence to the CO in support of its Application, I have not considered it.

¹⁰ 20 C.F.R. § 655.33(e).

¹¹ See e.g. *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).

¹² 20 C.F.R. § 655.32(b).

¹³ 20 C.F.R. 655.20(a) provides: "An employer who desires to apply for labor certification of temporary employment for one or more nonimmigrant foreign positions must file a completed *Application for Temporary Employment Certification* form, and a copy of the recruitment report completed in accordance with § 655.15(j)."

¹⁴ 20 C.F.R. § 655.15(j) provides: "(j) *Recruitment report*. (1) No fewer than 2 calendar days after the last date on which the job order was posted and no fewer than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare, sign, and date a written recruitment report. The employer may not submit the H-2B application until the recruitment report is completed. The recruitment report must be submitted to the NPC with the application. The employer must retain a copy of the recruitment report for a period of 3 years.(2) The recruitment report must:(i) Identify each recruitment source by name;(ii) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker, including any applicable laid-off workers;(iii) If applicable, explain the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position."

¹⁵ 20 C.F.R. §§ 655.20(a), 655.22; see generally, 73 Fed. Reg. 78020, 78056-57 (Dec. 19, 2008).

the Employer identified the names, addresses, and contact information for three individuals it “will hire,” and specified whether the Louisiana SWA or Abbeville Meridional Newspaper referred them. *Id.* Furthermore, the Employer’s Application indicates the Abbeville Meridional Newspaper printed the job advertisement from December 5, 2014 until December 7, 2014. (AF 36). The Employer attached to its Application copies of the job advertisements printed in the Abbeville Meridional Newspaper on December 5, 2014 and December 7, 2014. (AF 45-46).

I find that the information the Employer included in Section H of its Application identified each recruitment source by name, stated the names and contact information for each worker who applied for the job opportunity, and noted the intended disposition of each worker. Although the Employer included much of the necessary recruitment information in its Application, it failed to submit a separate signed and dated recruitment report completed in accordance with 20 C.F.R. § 655.15(j). Therefore, I affirm the CO’s determination that the Employer failed to submit a completed recruitment report with its Application, as required by 20 C.F.R. § 655.20.

Failure to Follow Pre-Filing Recruitment Requirements:

In the RFI and the Final Determination, the CO determined the Employer failed to satisfy certain pre-filing recruitment procedures. Employers must satisfy certain pre-filing recruitment steps before filing an Application. 20 C.F.R. § 655.15(e)(1) provides that an employer must place an active job order with the SWA “serving the area of intended employment no more than 120 calendar days before the employer’s date of need for H-2B workers, identifying it as a job order to be placed in connection with a future application for H-2B workers.” Furthermore, 20 C.F.R. § 655.15(e)(2) provides that the job order an employer submits to the SWA must satisfy all the requirements for newspaper advertisements contained in 20 C.F.R. § 655.17.

The CO stated that because the Employer did not submit a recruitment report, it needed to submit the job order in order for the CO to evaluate whether the newspaper advertisements satisfy the requirements specified at 20 C.F.R. § 655.17. After the CO issued the RFI, the Employer did not submit either the recruitment report or the job order. Therefore, I agree with the CO that it is not possible to discern whether the Employer satisfied all of the pre-filing recruitment steps contained in 20 C.F.R. § 655.15(e)(2) and 20 C.F.R. § 655.15(f)(3), which mandate that the job order and newspaper advertisements satisfy the requirements specified at 20 C.F.R. § 655.17.

Failure to Submit a Complete and Accurate Application:

In the RFI and the Final Determination, the CO requested the Employer’s permission to amend the Employer’s Application to reflect a job order closure date of December 24, 2014, or the date on which the job order actually closed. In its response to the RFI, the Employer did not give the CO permission to amend its Application. Therefore, because the Employer did not submit a complete and accurate Application, the CO properly denied certification.

ORDER

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

For the Board:

Alice M. Craft
Administrative Law Judge