



Issue Date: 14 November 2014

BALCA Case No.: 2015-TLN-00002

ETA Case No.: H-400-14275-887095

In the matter of:

J & J PINE NEEDLES, LLC,
Employer

Certifying Officer: Chicago National Processing Center

Appearances: Andrew M. Jackson, Esquire
Clinton, North Carolina
For the Employer

Stephen R. Jones, Esquire
Washington, D.C.
For the Solicitor

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to J & J Pine Needles, LLC’s (Employer) request for administrative review of the Certifying Officer’s (CO) denial of temporary labor certification under the H–2B program. For the following reasons, the Board reverses the CO’s denial of certification.

BACKGROUND

On October 2, 2014, the Certifying Officer (“CO”) accepted for filing the Employer’s ETA Form 9142, H2-B Application for Temporary Employment Certification for the position of Pine Straw Gatherer. The Employer attached, *inter alia*, the recruitment report, which identified two U.S. workers who had been hired, and the South Carolina job order. (AF 33-58).¹

The CO sent a Request for Further Information to the Employer on October 7, 2014. (AF 28-32). Specifically, the CO noted that the job order did not include work hours and days or

¹ In this decision, AF is an abbreviation for Appeal File.

expected start and end dates of employment and did not apprise U.S. applicant that the job is temporary. (AF 28-32).² On October 7, 2014, the Employer responded and attached the SC Works Pee Dee form. The job order request form indicated that the Employed checked the “temporary” box, provided a start date of 11/14/2014 and end date of 07/30/2015, and noted the job is a full-time, day shift position. The Employer noted that the job order and advertisement were nearly identical to the prior year’s certification application, which had been approved by the CO. (AF 22-27).

On October 30, 2014, the CO denied certification because the job order did not include work hours and days or expected start and end dates of employment and did not apprise U.S. applicant that the job is temporary. The CO acknowledged that the job order request form “did include fields showing work shifts, an available date and closing date, and that the job was temporary; however, this information was not in the published job order....” The CO added, “If required information does not appear due to peculiarities of a SWA job order system, the employer should utilize free text fields, such as the one for job duties, to add any further required information.” (AF 17-21).

The Employer requested administrative review on October 30, 2014, arguing that it submitted the required information to the South Carolina State Workforce Agency. The Employer further argued that the failure of the SWA to include the provided information on the job order is not under the Employer’s control and should not be detrimental to the H2-B application. (AF 1-16).

BALCA received and docketed the appeal file on November 4, 2014, and issued a Notice of Docketing on November 6, 2014. The Employer filed its Brief in Support of Reversal on November 6, 2014. The Solicitor filed a brief on behalf of the CO on November 13, 2014.

DISCUSSION

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* (“ETA Form 9142”) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20 (2008).³ After an employer’s application has been accepted for processing, it is reviewed

² The CO also noted an issue with the recruitment report. The Employer corrected the error. (AF 22, 31).

³ All citations to 20 C.F.R. Part 655 refer to the Final Rule promulgated in 2008. Although the Department promulgated a new Final Rule in February 2012, the U.S. District Court for the Northern District of Florida has issued an order enjoining the Department from implementing or enforcing this rule. *See Bayou Law & Landscape Services et al. v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (April 26, 2012). Accordingly, on May 16, 2012, the Department announced the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the district court’s order. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States*; Guidance, 77 Fed. Reg. 28764, 28765 (May 16, 2012).

by a Certifying Officer (“CO”), who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

Employers must satisfy certain pre-filing recruitment steps before filing an ETA Form 9142. Specifically, the regulations require: “The job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.17.” 20 C.F.R. § 655.15(e)(2). Section 655.17 lists the following requirements that employers must include in these advertisements:

- (a) The employer’s name and appropriate contact information for applicants to send resumes 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.

20 C.F.R. § 655.17.

In this case, the posted SWA job order failed to reflect the information required by subsections (f) and (h). The Employer had submitted a job order request which included all of the above required information. The CO acknowledged this but, nonetheless, denied certification because the posted job order did not include the required and submitted information. The Employer first argues that it did, in fact, comply with the regulations, particularly 20 C.F.R. § 655.15(e)(2), which require an employer’s job order submission to include the enumerated

information. Secondly, the Employer argues that the SWA was solely responsible for publishing the job order as submitted, and the failure of the SWA to do so should not be held against the Employer. The CO argues that the purpose of a job order is to test the U.S. market, and a deficient job order “compromises that test,” regardless of the SWA’s putative role in this situation.

The Board has addressed circumstances similar to the present case. In *Deer Ridge, Inc.*, 2014-TLN-13 (Mar. 5, 2014), the CO found that the Employer failed to comply with Section 656.17 because the job order did not indicate the expected work hours, the expected start and end dates for the job opportunity, or whether overtime would be available. The employer argued that information provided in the SWA job order request was limited by drop-down menu selections. The SWA’s website does not allow the employer to input the specific information required by Section 656.17. The Board vacated the CO’s denial, noting that “the record reveals that the Employer did the best it could to include the content required by section 656.17 within the limited options provided by the drop down menus on the SWA’s website.” Further, there was no section or description box for the employer to provide the missing information. *Id.*, slip op. at 5.

The Board distinguished the facts in *Deer Ridge* from *Larry’s Oysters, LLC*, 2012-TLN-18 (Mar. 2, 2012). In that case, the Board affirmed the CO’s denial of certification, holding “The SWA job order form may not have a specific prompt requesting this information, but it is clear that the Employer could have included all of the required information within the job description section of the online job order form, which is where it included other specifics about the job opportunity.” *Id.*, slip op. at 5.

As in *Larry’s Oysters*, the job order request form in *A & W Builders of Jacksonville, Inc.*, 2012-TLN-44 (Aug. 17, 2012) did not include prompts for all the required information but did include a “job summary” section. The Board held that the employer should have included the missing information in this section. *Id.*, slip op. at 5.

Here, the facts are easily distinguished from *Larry’s Oysters* and *A & W Builders*, and are even more compelling than *Deer Ridge*. The Employer in this case actually provided all of the required information in the job order request form. There is no indication that any of the provided information would not transfer to the posted SWA job order or that there would be any reason for the Employer to duplicate the provided information in the “job description” section. Like the *Deer Ridge* employer, the Employer in the case *sub judice* “did the best it could to include the content required by section 656.17” and did, in fact, include all required content. As in *Deer Ridge*, although the job order in this case was deficient, the Employer’s full compliance with the regulations excuses that deficiency. Notably, in the face of a defective job order, the Employer contacted eleven U.S. workers for the advertised position and hired two. The CO was, therefore, unreasonable in denying certification.

Furthermore, to penalize an employer for omissions made by a state workforce agency, particularly in light of that employer’s full compliance with the regulations, offends notions of fundamental fairness. The Board has previously found that it would offend fundamental fairness to deny certification where a deficient form prevents an employer from complying with the

regulations. *See e.g., Federal Insurance Co.*, 2008-PER-37 (Feb. 20, 2009); *Cognizant Technology Solutions*, 2011-PER-1697 (Nov. 28, 2012); *Deer Ridge, Inc.*, slip op. at 5.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's Final Determination denying the Employer's ETA Form 9142, H2-B Application for Temporary Employment Certification for the position of Pine Straw Gatherer is **REVERSED**.

For the Board:

LARRY W. PRICE
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR EN BANC 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 en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc consideration is necessary to secure or maintain uniformity of the Board's decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

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 en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition, the Board may order briefs.