



Issue Date: 14 January 2015

Case No.: 2015-TLN-00007

ETA Case No.: H-400-14314-620296

In the Matter of

TURF SPECIALITIES, INC.
Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

The above-captioned case arises from a request for review by Turf Specialties, Inc. (“the Employer”) of a United States Department of Labor (“DOL”) Certifying Officer’s denial of its application for temporary alien labor certification under H-2B non-immigrant program. The H-2B program permits employers to hire farm workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peak load, or intermittent basis. *See* 8 U.S.C. §1101 (a)(15)(H)(ii)(b); 8 CFR §214.2 (h)(6)(i); 20 CFR part 655, subpart A.

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).¹

After an employer’s application has been accepted for processing, it is reviewed 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

¹ 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).

certification, in whole or in part, the employer may seek administrative review before the Board of Alien Labor Certification Appeals (“BALCA” or “Board”). 20 C.F.R. § 655.33(a).

Statement of the Case

On November 11, 2014, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from the Employer. *See* Administrative File (“AF”) at P138-P150. The Employer requested certification for 20 landscaping and grounds-keeping laborers from February 4, 2013 to December 1, 2013. *Id.*

On November 17, 2014 the CO noted three deficiencies with the Employer’s H-2B application and issued a request for further information (“RFI”). AF at P133-P137. The three deficiencies were as follows: (1) failure to comply with recruitment requirements, (2) failure to comply with pre-filing recruitment requirements, and (3) failure to submit a complete and accurate ETA Form 9142. In the RFI, the CO requested *inter alia*, that the Employer submit evidence showing (1) the wage offered in section G item 1 of the ETA Form 9142 application equals or exceeds the prevailing wage or the legal federal state or local minimum wage (whichever is higher), (2) an amended ETA Form 9142 with section G item 1 accurately completed to reflect the appropriate wage, (3) the advertisements and job order verifying that the Employer’s compliance with the pre-filing recruitment requirements, and (4) and amended recruitment report or section H item 2 (B) of the ETA Form 9142 to indicate the job orders correct an date.

On November 18, 2014 the Employer submitted a response to the RFI. AF at P72-P132. In that response the Employer indicated that the Department of Labor have the permission to correct the ETA Form 9142 section G, item 1 to reflect the correct wage of \$13.04 and that the \$13.01 wage reflected in the enclosed advertisements is a typographical error. The Employer also stated that the November 24, 2014 date on the recruitment report was a typographical error and that the job order enclosed reflected the correct in date of October 24, 2014 and granted DOL the permission to correct the ETA Form 9142, section H, item 2 (B) to reflect the correct date of October 24, 2014.

On December 11, 2014, the CO issued a final determination denying the Employer’s application on a single ground: failure to comply with recruitment requirements, citing 20 CFR § 655.22 (e). AF at P67-P70. The CO noted that the Employer’s newspaper advertisements submitted as proof of its compliance with the applicable pre-filing advertising requirement showed the Employer offering a basic rate of pay of \$13.01 per hour for the landscaping and groundskeeping laborer positions at issue. The CO further noted the highest of the prevailing wage and the applicable minimum wage is \$13.04 as determined by the CNPC. Because the wage listed in the Employer’s newspaper advertisements is lower than the prevailing wage determination, the CO denied the Employer’s application. The instant appeal followed.

I issued a Notice of Docketing Assignment and Order dated December 16, 2014 directing the Employer and the Solicitor to submit briefs by no later than the close of business on December 22, 2014. To date, no briefs have been submitted.²

Discussion

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 SWA³ 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*

² My Notice of Docketing, Assignment and Order erroneously stated that the appeal file had been received by this office on December 15, 2014. What was actually received on that date was the Employer's request for an expedited review of the H-2B application to require denial (i.e., the Employer's appeal). The appeal file from the CO electronically up loaded into the Department of Labor's case tracking system on January 5, 2015.

³ “SWA” denotes the local State Workforce Agency.

(h) That the position is temporary and the total number of job openings the employer intends to fill.

20 C.F.R. § 655.17 (emphasis added).

When conducting domestic recruitment under the H-2B program, the Employer must —offer a wage that equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and local minimum wage, and the employer must pay the offered wage during the entire period of the approved H-2B labor certification. 20 C.F.R. § 655.22(e). Furthermore, the job posting listed with the SWA must contain all the requirements for newspaper advertisements, including the offered wage. 20 C.F.R. §§ 655.15(e)(2) and 655.17(g).

In its request for review of the CO's final determination, the Employer acknowledges that the \$.03 error in its newspaper advertisements was a typographical one. In that request, the Employer also contends that re-advertising for these landscaping laborer positions at any wage under \$20 an hour would be fruitless given the current labor market for unskilled labor in Midland, Texas. In sum, the Employer argues its newspaper advertisement error was harmless.

In this case, it is undisputed that the newspaper advertisements used by the Employer to recruit job applicants failed to reflect the information required by subsection (g). Newspaper advertisements that comply with § 655.17 are required to adequately test the domestic labor market. By relying on newspaper advertisements with erroneous wage information, I find the Employer did not conduct a proper test of the labor market to determine if labor certification was required. While the Employer may consider the error harmless, DOL has determined that these steps are necessary in order to protect domestic workers.

BALCA's review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. Based on the information provided to the CO in response to the RFI, it appeared that the Employer was not offering a wage equal or exceeding the highest of the prevailing wage or applicable minimum wage. Specifically, the Employer did not advertise the proper hourly wage for its landscape and groundskeeping laborer positions at issue; the newspaper advertisements for those positions listed the wage offer as \$13.01, but the highest of the prevailing wage and applicable minimum wage as determined by the CNPC was \$13.04.

Because the documentation submitted to the CO indicated the Employer recruited at a wage below that required by regulations, I find that the CO properly denied certification.

ORDER

In light of the foregoing, the Certifying Officer's decision is **AFFIRMED**.

For the Board:

LYSTRA A. HARRIS
Administrative Law Judge