



Issue Date: 08 September 2016

BALCA Case No.: 2016-TLN-00061
ETA Case Nos.: H-400-16132-959526

In the Matter of:

H & R DRAINS & WATERPROOFING LLC.

Employer.

Appearances: Roberto Saucedo
Owner/Founder
H & R Drains & Waterproofing LLC
Denver, CO
For the Employer

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Attorney
U.S. Department of Labor
Office of the Solicitor of Labor
Washington, D.C.
For the Certifying Officer

Before: Monica Markley
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 the Employer’s request for review of the Certifying Officer’s denial in the above-captioned H-2B temporary labor certification matter. The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security, “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 8 CFR § 214.2(h)(1)(ii)(D); *see also* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 CFR § 214.2(h)(6)(ii)(B); 20 CFR § 655.1(a)¹ Employers who seek to

¹ The Interim Final Rule revising federal regulations related to the H-2B program, 20 CFR Part 655, Subpart A, was published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015) and is effective as of April 29, 2015.

hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”). 8 CFR § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 CFR § 655.50. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 CFR § 655.53.

STATEMENT OF THE CASE

On May 11, 2016, the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from H & R Drains & Waterproofing LLC (“Employer”) for 10 “Construction Laborers” to be employed from August 19, 2015, through December 31, 2015 [sic], to meet an “intermittent or other temporary need.” (AF² 135-145.) The positions have no experience or education requirements. (AF 138.)

On May 20, 2016, the CO issued a *Notice of Deficiency* (AF 123-134) identifying seven deficiencies in the application, including that the dates of need were in the past, the application failed to establish the job opportunity as temporary in nature, and the Employer’s SOC code and SOC occupation title were inaccurately reported on the ETA Form 9142.

On May 31, 2016, the Employer submitted corrections and supplements to address the deficiencies. Among other things, the Employer corrected the occupation title to “Pipelayers” and the dates of need to August 19, 2016 through December 31, 2016. (AF 97-122.) The Employer requested the temporary labor certification to meet a “peakload” need. (AF 97.)

On June 1, 2016, the CO issued a second *Notice of Deficiency* identifying three deficiencies in the application: the failure to satisfy the application filing timeframe (because the May 11, 2016 application was filed 100 days before the August 19, 2016 date of need, and the regulations require that the application be filed no more than 90 days in advance), the failure to submit an acceptable job order, and the need for additional information about the area of intended employment. (AF 87-96.)

The Employer responded on June 1, 2016, and amended the start date of need to July 30, 2016, bringing the application within the filing timeframe. (AF 79.) The Employer also submitted an updated job order and additional information about the area of intended employment. (AF 79-86.)

On June 3, 2016, the CO sent a *Minor Deficiency Email* (MDE) to the Employer, explaining that the amended job order remained inadequate due to missing, incomplete, and inconsistent entries; and that several locations on the Employer’s submitted work schedule fall outside the area covered by the Employer’s Prevailing Wage Determination. The Employer was permitted to respond by June 7, 2016, regarding those deficiencies. (AF 76-78.)

On June 5, 2016, the Employer responded with a corrected job order and a Form 9141 Addendum addressing the work sites. (AF 71-75.)

² The Appeal File will be cited as “AF” followed by the relevant page number.

On June 7, 2016, the CO sent another *Minor Deficiency Email* explaining that the start date in the amended job order (July 31, 2016) was inconsistent with the start date in the Application (July 30, 2016). (AF 69-70.) Later that day, the Employer submitted an amended job order showing a start date of July 30, 2016. (AF 66-68.)

On June 8, 2016, the CO issued a *Notice of Acceptance*, informing the Employer that its application for temporary labor certification had been accepted for processing. (AF 58-65.) The Notice provided:

Please make sure you read all instructions and information contained in this letter carefully. Before the Department of Labor can issue a final determination on your *Application for Temporary Employment Certification*, you must comply with the requirements listed below.

(AF 59.) The Notice explained that the Employer “must conduct recruitment of U.S. workers and prepare and submit a recruitment report in accordance with 20 CFR 655.40-655.48 and the instructions provided below.” (AF 59.) It stated: “All recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter.” (AF 59 (emphasis in original).) It further stated: “The employer’s recruitment report may not be submitted until the employer-conducted recruitment is complete, including the notice of the job opportunity, which must be posted for 15 consecutive business days, if applicable (see section further below).” (AF 59-60.)

The Notice set forth “Instructions for Recruiting U.S. Workers,” which included the following requirements:

- (1) to place a newspaper advertisement on two separate days, one of which must be a Sunday, in a newspaper of general circulation;
- (2) to contact former employees, inform them of the job opportunity, and solicit their return; and
- (3) to provide notice of the job opportunity either
 - (a) by providing a copy of the Application and Job Order to the bargaining representative for the employer’s employees, or
 - (b) if there is no bargaining representative, by posting a notice in at least two conspicuous locations at the place(s) of employment or by providing reasonable notification to all employees in the area where work will be performed by the H-2B workers (such as on the employer’s internal or external web site) for 15 consecutive business days.

(AF 60-62.) The Notice also set forth requirements for accepting referrals of U.S. workers in connection with these recruitment steps, for interviewing U.S. applicants, and for retaining

documents related to the recruitment efforts. (AF 62-64.) It instructed the Employer to prepare and submit a Recruitment Report by July 5, 2016, and explained the required contents of the report. (AF 63-64.) Among other items, the Employer was instructed that the report must contain “the name of each recruitment activity or source” and “confirmation that the bargaining representative was contacted, if applicable, and by what means, or that the employer posted the availability of the job opportunity to all employees in the job classification and area in which the work will be performed by the H-2B workers.” (AF 63-64.)

On June 24, 2016, the Employer submitted receipts for its newspaper advertisements. (AF 50-52.) On July 5, 2016, the Employer submitted its Recruitment Report and copies of the newspaper advertisements. (AF 53-57.) In the email accompanying the transmission, the Employer stated: “Note: we do not have a bargaining representative.”

On July 7, 2016, the CO sent a *Minor Deficiency Email* identifying deficiencies in the Employer’s Recruitment Report. (AF 48-49.) The CO explained that the Recruitment Report was not complete because it did not show that the Employer had posted the job opportunity “in at least two conspicuous locations for at least 15 consecutive business days at the place(s) of anticipated employment or using a means that provides reasonable notification to all employees in the occupation and area of intended employment,” and it did not provide 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 report and the disposition of those workers’ applications. (AF 49.) The Employer was permitted to file an amended Recruitment Report by July 11, 2016.

On July 12, 2016, the Employer submitted an amended Recruitment Report. (AF 45-47.) The amended report added an entry that read: “No Applicants up to date 07-05-16.” (AF 47.)

Also on July 12, 2016, the CO issued a *Minor Deficiency Email* stating that upon review of the Employer’s July 12 response, the recruitment report was not complete it did not show that the Employer had posted the job opportunity “in at least two conspicuous locations for at least 15 consecutive business days at the place(s) of anticipated employment or using a means that provides reasonable notification to all employees in the occupation and area of intended employment,” and it was not signed and dated by the Employer. (AF 43-44.) The MDE stated: “In its response to this email, the employer must submit an amended recruitment report that attests to having posted the job opportunity in at least 2 conspicuous locations for at least 15 days and that is signed and dated by the employer.” (AF 44.) The Employer was permitted to file its amended Recruitment Report by July 14, 2016. (AF 44.)

On July 13, 2016, the Employer submitted an amended Recruitment Report. (AF 39-42.) The amended report was signed and dated, and added notes about the advertisement placed in the Denver Post (“released 6/26/16 Sunday paper”), the advertisement placed in La Voz (“released 6/29/16 one week”), and its entry on “Connectingcolorado.com,” the website for the Colorado Workforce Center (“open 5-24-16 closed 12-31-16”). (AF 41.)

On July 14, 2016, the CO issued a *Minor Deficiency Email* reiterating that the recruitment report was not complete because it did not show that the job opportunity had been posted in at least two conspicuous locations for at least 15 consecutive business days at the place of anticipated

employment. (AF 37-38.) The MDE permitted the Employer to submit an amended report by July 18, 2016, attesting to “having posted the job opportunity in at least 2 conspicuous locations for at least 15 days AT THE PLACE(S) OF ANTICIPATED EMPLOYMENT.” (AF 38 (emphasis in original).)

On July 18, 2016, the Employer submitted an amended Recruitment Report by email to the CO. (AF 25-27.) The email stated: “I’m sorry if I’m not understanding what is needed. Can I please get more explanation on what is needed if the attachment is not correct this time?” (AF 25.) The attached report added details about the geographical area reached by the ads placed in the Denver Post and La Voz. (AF 27.)

The CO responded by email and pointed the Employer to the Notice of Acceptance, which “includes the recruitment report content requirements.” (AF 29.) The CO’s email also repeated the language of the posting requirement from Section D of the Notice of Acceptance. (AF 29.)

The Employer responded by email and stated: “If I’m understanding this right we have not met the requirement of the 15 consecutive days of posting the announcement. What I have to do is post the job ad in the newspaper again for 2 weeks. Or can I just post a paper announcement at our place of employment where our employees see it. Please advice [sic].” (AF 28-29.)

The CO replied by email and stated:

Thank you for your inquiry. Where there is no bargaining representative of the employer’s employees, the employer must post a notice to its employees of the job opportunities for at least 15 consecutive business days in at least two conspicuous locations at the place of intended employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which work will be performed by the H-2B workers.

Please be advised that our office is unable to provide you with legal advice or suggestions for interpreting or complying with the Federal regulations.

(AF 28.)

On July 19, 2016, the Employer submitted an amended Recruitment Report. (AF 28, 31.) The amended report added four new recruitment activities: (1) “Posted at 3510 Adams St – Home Office” (with a note stating: “Posted announcement at our home office 7-19-16”); (2) “Posted at 3601 E 39th Ave – Employees Site” (with a note stating: “Posted announcement at our employees workplace 7-19-16”); (3) “La Voz Classifieds” (with a note stating: “Working with La Voz to release another ad with them for release 7-27-16 and another 8-3-16”); and (4) “Deluxe For Business” (with a note stating: “Working with Deluxe.com to set up CO webpage and make access to employee applications easier and post job announcement”). (AF 31.) On July 26, 2016, the Employer submitted an invoice showing it had paid for a classified ad to run in La Voz in the 7/27/16 and 8/3/16 issues, and resubmitted its July 19 Recruitment Report. (AF 32-36.)

On August 2, 2016, the CO issued the *Final Determination* letter. (AF 14-24.) The CO denied the application for H-2B temporary alien labor certification for 10 Pipelayers. (AF 15.) The CO stated that certification could not be issued due to a deficiency regarding the job posting. (AF 17.) The CO explained that the Employer's first recruitment report, dated July 4, 2016, "did not state whether or not the job was posted for at least 15 consecutive days at the place(s) of anticipated employment or using a means that provides reasonable notification to all employees in the occupation and area of intended employment." (AF 17.) The CO noted that the Employer submitted an amended report in response to the July 7 MDE, and submitted "a third iteration of its recruitment report on July 13, 2016," but the report "still did not include the requirement of stating whether or not the job was posted for at least 15 consecutive days at the place(s) of anticipated employment or using a means that provides reasonable notification to all employees in the occupation and area of intended employment." (AF 18.) The CO stated that the Employer submitted an amended recruitment report on July 26, 2016, that contained the required information about the job posting, but that report showed that the job posting did not comply with the regulations at 20 CFR 655.40-655.48 for the following reasons:

- The job posting began July 19, 2016 and was scheduled to be posted until after the recruitment report was due to the Chicago NPC. The regulations state that the recruitment report may not be submitted until the employer-conducted recruitment is complete.
- The job posting began 41 days after the Notice of Acceptance was issued to the employer. This is outside of the 14 calendar days within which the regulations state the recruitment action must be conducted.

(AF 18.) For that reason, the Employer's application was denied. (AF 18.)

By letter received on August 16, 2016, the Employer filed a request for administrative review of the denial determination. The Employer's request stated: "The reason I would like for you to review our application is because I feel our company really tried to understand the requirements and have followed through with them as soon as we could."

In response to the *Notice of Assignment and Expedited Briefing Schedule* issued on August 19, 2016, counsel for the CO filed a written brief on August 29, 2016, and the Employer's Founder and Owner filed a written argument on August 30, 2016.

LEGAL STANDARD

The standard of review in H-2B cases is limited. A reviewing judge may consider only "the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The evidence is reviewed de novo, and a reviewing judge must affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action. 20 C.F.R. § 655.61(e). An employer seeking to hire employees under the H-2B program bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361.

DISCUSSION

A CO may only grant an employer's H-2B application if there are not enough available domestic workers in the United States who are capable of performing the temporary labor at the time the employer files its application for certification. 8 U.S.C. § 1101(a)(15)(H)(ii)(b); *Burnham Companies*, 2014-TLN-00029 (May 19, 2014). Consequently, before a temporary labor certification may issue, employers must conduct certain recruitment steps designed to inform U.S. workers about the job opportunity. *See* 20 C.F.R. § 655.40-§ 655.47. In order to show that it has complied with the regulations and conducted these affirmative recruitment efforts, an employer must file a recruitment report addressing the regulatory requirements. *See* 20 C.F.R. § 655.48. The regulation requires that the recruitment report contain specific information detailing the employer's recruitment activity and be submitted "by a date specified by the CO in the Notice of Acceptance." 20 C.F.R. § 655.48(a). It is the employer's burden to prove its eligibility for employing foreign workers under the H-2B program, and the recruitment report assists in determining whether the employer has met its burden. *See Whittle, Inc.*, 2016-TLN-00019 (Mar. 9, 2016).

Here, the CO denied the Employer's H-2B Application after determining that the Employer did not comply with the recruitment requirements set forth in the regulations. Specifically, the CO determined that the Employer's Job Posting was not in compliance because it was made 41 days after issuance of the Notice of Acceptance, which instructed the Employer to conduct all recruitment steps within 14 calendar days, and because the posting began July 19, 2016 and had not been posted for the required 15 consecutive business days before the recruitment report was submitted.

The regulation at 20 C.F.R. § 655.40(a) provides: "Employers must conduct recruitment of U.S. workers to ensure that there are not qualified U.S. workers who will be available for the positions listed in the *Application for Temporary Employment Certification*." The regulation further provides: "Unless otherwise instructed by the CO, the employer must conduct the recruitment described in §§ 655.42 through 655.46 within 14 calendar days from the date the Notice of Acceptance is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.48." 20 C.F.R. § 655.40(b). The recruitment steps described in §§ 655.42 through 655.46 include: newspaper advertisements; contact with former U.S. employees; contact with employees' bargaining representative or posting of the job opportunity; and, when required by the CO, additional reasonable recruitment. After the employer's recruitment activity is complete, the employer must prepare and submit a recruitment report detailing its recruitment activity, as specified in 20 C.F.R. § 655.48.

Here, the Notice of Acceptance was issued on June 8, 2016, and tracked the requirements set forth in the regulations. It required the Employer to conduct the recruitment described in §§ 655.42 through 655.46 (with no additional recruiting steps added by the CO) within 14 calendar days and to submit a recruitment report by July 5, 2016. (AF 59-65.) Therefore, the Employer was required to: place newspaper advertisements in accordance with the regulations; contact former U.S. employees; and provide notice of the job opportunity to the bargaining representative or, if there was no bargaining representative, post the job opportunity in at least

two conspicuous locations at the place of anticipated employment for 15 consecutive business days; and then file a recruitment report detailing this activity.

The Employer placed advertisements with the Denver Post and the bilingual publication La Voz, and it contacted two former employees. It did not post the job opportunity in two conspicuous locations at the place of anticipated employment for 15 consecutive business days, however. The Employer's Recruitment Report submitted on July 5, the amended report submitted on July 12, the amended report submitted on July 13, and the amended report submitted on July 18, all failed to show that the Employer had conducted this recruitment activity. After an email exchange with the CO, the Employer finally posted the job opportunity at two locations (the "Home Office" and the "Employees Site") on July 19, 2016, as reflected in the amended recruitment report filed the same day. This posting failed to comply with the regulations, however, because the Employer was required to conduct its recruitment activity within 14 days of the Notice of Acceptance (issued June 8, 2016), and did not post the job opportunity within that timeframe. See 20 C.F.R. § 655.40(b). Although the CO permitted the Employer to file its recruitment *report* by July 20, 2016 (see AF 29), the recruitment *activity* was required to be conducted in the 14 days following the Notice of Acceptance, and the Employer did not post the job opportunity at the place of anticipated employment within that timeframe.

The July 19, 2016 posting of the job opportunity also failed to comply with the regulations because the regulations require that the job opportunity be posted for 15 consecutive business days (*see* 20 C.F.R. § 655.45(b)) and that the recruitment activity be complete before the recruitment report is submitted (*see* 20 C.F.R. § 655.40(b)). The Employer submitted the amended recruitment report showing the July 19 posting on July 19, 2016 (AF 28-31) and again on July 26, 2016 (AF 32-36). The job opportunity had not been posted for 15 consecutive business days at the time of either of those submissions, and consequently, the recruitment activity was not complete at the time of either of those submissions.

For these reasons, after deliberation, I find that the Employer has failed to meet its burden of establishing that it complied with the recruitment requirements set forth in the regulations. Accordingly, the CO properly denied the Employer's *H-2B Application for Temporary Employment Certification*.

ORDER

It is hereby ORDERED that the Certifying Officer's denial of the Employer's May 11, 2016 Application for Temporary Employment Certification is AFFIRMED.

For the Board:

MONICA MARKLEY
Administrative Law Judge