

**U.S. Department of Labor**

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**Issue Date: 20 June 2016**

**BALCA Case No.:** 2016-TLN-00049  
**ETA Case No.:** H-400-15345-495591

*In the Matter of:*

**Running Sports, Inc. DBA TriBikeRun,**  
*Employer.*

Before: Richard A. Morgan  
Administrative Law Judge

**DECISION AND ORDER**

This matter arises under the temporary non-agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A.<sup>1</sup> The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States “if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(15)(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). For the reasons set forth below, I affirm the Certifying Officer’s denial of this H-2B application for temporary labor certification.

**STATEMENT OF THE CASE**

**H-2B Application**

On February 5, 2016, Running Sports, Inc., DBA TriBikeRun (“Employer”) filed an H-2B Application for Temporary Employment Certification for the job title of “Bicycle

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<sup>1</sup>On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that have a start date of need after October 1, 2015.” IFR, 20 C.F.R. §655.4(e). As the application in this case meets these conditions, the IFR applies to this case. All citations to 20 C.F.R. Part 655 in this order are to the IFR.

Technician.” AF 42-64.<sup>2</sup> Employer requested one full-time worker from April 20, 2016 to April 20, 2017, for job duties consisting of “Assembly and servicing of highly intricate bicycles, maintaining a fleet of rental bicycles, knowledge of using computer point of sale system, excellent customer service skills. Small parts and bicycle accessories.” AF 42-44. Employer indicated that the job was a “one time occurrence.” AF 42. The basic hourly rate for the 40-hour week was \$13.68 per hour with no applicable overtime rate. AF 46. Employer required a high school diploma or GED and twelve months of experience as a “Bicycle Mechanic technician” for all applicants. AF 45.

### Notice of Deficiency

By letter dated April 5, 2016, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) for “Failure to submit an acceptable job order” as required by the regulations at 20 C.F.R. § 655.16 and 20 C.F.R. § 655.18. AF 36-41. The NOD informed the Employer that to be in compliance with 20 C.F.R. § 655.16, the Employer must 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 CNPC (Chicago National Processing Center). The NOD also pointed out that the Employer had failed to include the minimum and maximum amounts provided for daily travel subsistence. The NOD further stated that in order to be in compliance with the regulation at 20 C.F.R. § 655.18 the Employer must submit an amended job order which indicates the amount for daily subsistence will be at least \$12.09 per day during travel to a maximum of \$51.00 per day with receipts. Employer was given ten (10) business days from the date of the Notice of Deficiency to modify its application to correct the above mentioned deficiencies.

In an email sent to the Chicago Processing Center by the Employer on April 8, 2016 Employer indicated in relation to 20 C.F.R. § 655.16 that it would not provide daily transportation to the worker and that the application should be modified to indicate this. Employer also requested further information regarding § 655.18. AF 34.

### Notice of Acceptance

By notice dated April 11, 2016, Employer was notified that its application had been reviewed and accepted for processing. Employer was informed that it needed to comply with the regulatory requirements listed in the Notice of Acceptance in order to receive a final determination on its application for temporary employment certification. AF 27.

Employer was specifically informed of its regulatory obligations which included conducting recruitment of U.S. Workers and submitting a recruitment report in accordance with 20 C.F.R. §§ 655.40 and 655.48, as well as other specific information regarding the necessary recruitment process. Employer was further informed that all recruitment steps must be conducted within 14 calendar days from the date of the April 11, 2016 Notice. AF 27-33.

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<sup>2</sup>For purposes of this opinion, “AF” stands for “Appeal File.”

### Employer's Response

Employer responded to the Notice of Acceptance on April 22, 2016 by emailing the Certifying Officer its "recruitment report" which merely consisted of a copy of a newspaper advertisement which Employer posted in the local newspaper (TC-TC News Press Tribune) for the position of full time bike technician. AF 22-25. No other required information was submitted by the Employer at that time.

On May 4, 2016 the Certifying officer notified the employer of deficiencies in the submitted "recruitment report" which prevented further processing including that Employer had failed to indicate whether it had received any applicants from its recruitment efforts, as well as specific information regarding applicants' names, contact information and disposition of application. Employer also failed to comply with the regulations by indicating whether it had posted the availability of the job opportunity to all employees in the job classification and area in which the work will be performed. Employer's report also failed to indicate whether it had contacted a bargaining representative. Employer also failed to indicate whether former U.S. employees were contacted and by what means. In order to be in compliance with the regulations the CO directed Employer to submit an amended recruitment report confirming the following regulatory requirements:

- 1) Indicating whether it received any applicants from its recruitment efforts, with the applicant's names, contact information, and disposition of application;
- 2) Confirming the job opportunity was posted to all employees in the job classification; and
- 3) Confirming that former U.S. employees were contacted and by what means.

Employer was notified that it should supply the required information by email to [TLC.Chicago@dol.gov](mailto:TLC.Chicago@dol.gov) no later than 2 pm on May 6, 2016. AF 19-21.

On May 10, 2016, the CO emailed the Employer again notifying it that the CO had not received an amended report or any response correcting the above noted "minor deficiencies." Employer was again told to email the requested information to [TLC.Chicago@dol.gov](mailto:TLC.Chicago@dol.gov) or fax the information "as soon as possible." AF 18.

The CO received no response from the Employer addressing the above mentioned deficiencies. On May 18, 2016 a final determination letter was issued denying this application for H-2B labor certification for failure to submit a recruitment report covering the above outlined items by the date of May 5, 2016, the date originally specified in the April 11, 2016, Notice of Acceptance. AF 9-17.

### Administrative Review

On June 1, 2015 Employer submitted a request for Administrative Review of the May 18, 2016 Final determination denying Employer's H-2B application. Employer alleges in its request for review that it had sent information to an incorrect email address on May 5, 2016, May 11,

2016 and May 18, 2016. Employer also submitted information (new evidence) with its request for review regarding a posted job order. This information was not before the CO at the time the final determination was issued and is not contained in the Appeal file, except in so far it was attached to the Employer's request for administrative review. This information relates to a job order posted with "Employ Florida" but does not appear to address the deficient items listed in the CO's emails or final determination.

This appeal was assigned to the undersigned administrative law judge on June 2, 2016. The appeal file was received by the undersigned on June 6, 2016. On June 7, 2016 an Order was issued notifying the parties that they could file written briefs with the undersigned by June 15, 2016. The Solicitor filed a timely brief on behalf of the CO on June 15, 2016. No further argument was received from the Employer other than that which was submitted with its June 1, 2016 request for administrative review.

Attorney C. Cleveland Fairchild of the U.S. Department of Labor Associate Solicitor's Office for Employment and Training Legal Services ("Solicitor") filed a brief in this matter on June 15, 2016 on behalf of the Certifying Officer. The Solicitor argues that Employer did not meet its burden of proof to establish its eligibility for employing foreign workers under the H-2B program, and in particular, did not fulfill the regulatory requirement that it submit a recruitment report which "allows DOL to ensure the employer has met its obligation and the agency has met its responsibility to determine whether there were insufficient U.S. workers who are qualified and available to perform the job for which the employer seeks certification," quoting *Whittle, Inc.*, 2016-TLN-00019, slip op. at 4 (Mar. 9, 2016)(citing ETA H-2B Rule, 80 Fed. Reg. 24042, 24079 (Apr. 29, 2015)).

Specifically, the Solicitor argues that the Employer's April 28, 2016 recruitment report did not satisfy the regulatory requirements outlined in the CO's Notice of Acceptance. Employer only submitted copies of a newspaper advertisement which it had placed advertising the open position. Solicitor points out that employer failed to address the Florida SWA as a recruitment source as required by 20 C.F.R. § 655.48(a)(2). Employer also failed to address whether U.S. applicants applied or were referred, and if so, the disposition of their applications as required by 20 C.F.R. § 655.48(a)(2). The Employer's response also failed to mention former employees and also whether it had contacted a bargaining representative or posted the ad in its shop as required by 20 C.F.R. § 655.48(a)(3)-(4).

The Solicitor also points out that any amendments to Employer's report which were sent to the wrong email, as alleged by the Employer, were not in the file before the Certifying officer and therefore are not properly considered in this appeal. The Solicitor points out alternatively, even if the Employer's amended report which was attached to its request for review were considered, it did not address or cure all of the deficiencies noted by the CO.

For these reasons the Solicitor requests that the denial of Employer's H2B application be affirmed.

## SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, 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 contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO's determination; or
- (2) Reverse or modify the CO's determination; or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.61(e).

## ISSUE

Whether the Certifying Officer properly denied the Employer's application for an H-2B worker because it failed to supply a complete recruitment report in a timely manner by the date specified in the Notice of Acceptance.

## 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)(H)(ii)(b); *Burnham Companies*, 2014-TLN-29 (May 19, 2014). Consequently, before filing an *Application for Temporary Employment Certification*, employers must satisfy certain pre-filing recruitment steps designed to inform American workers about the job opportunity. *J & J Pine Needles, LLC*, 2015-TLN-00002 (Nov. 14, 2014). Specifically, the employer is required to engage in certain positive recruitment efforts directed at U.S. workers as outlined in the regulations as well as comply with certain regulatory time deadlines. See 20 C.F.R. § 655.40-§ 655.46. In order to show that it has complied with these positive 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 and be submitted "by a date specified 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 part of this burden requires the employer to submit a recruitment report. *Whittle, Inc.*, 2016-TLN-00019, slip op. at 4 (Mar. 9, 2016)(citing ETA H-2B Rule, 80 Fed. Reg. 24042, 24079 (Apr. 29, 2015); *Select Event Rentals*, 2010-TLN -00036, slip op. at 3 (Mar. 5, 2010)(The employer's recruitment report is essential for allowing the CO to "determine if the Employer adequately tested the domestic labor market.")

Although we do not want to make compliance with the regulatory requirements of the H-2B program so overly burdensome that employers are required to thread a bureaucratic needle, in this case it is clear that the Employer's recruitment report failed to comply with several

requirements of the regulations. As stated in the CO's May 4, 2016 notice to the Employer the Employer's report failed to provide the following information:

- 1) Indicate whether it received any applicants from its recruitment efforts, with the applicant's names, contact information, and disposition of application;
- 2) Confirm the job opportunity was posted to all employees in the job classification;
- and 3) Confirm that former U.S. employees were contacted and by what means.

In the CO's May 4, 2016 emailed letter the CO provided the Employer the opportunity to submit an amended recruitment report correcting the deficiencies by May 6, 2016. Although Employer claims that it emailed a response to the wrong email address, any evidence supporting Employer's claim which was not submitted to the CO may not properly be considered by the undersigned in this administrative review. See 20 C.F.R. § 655.61; *Fullerton Landscape Architects, LLC*, 2014-TLN-00030, slip op. at 3 (May 23, 2014)(denial upheld where employer sent an email with no attachment).

However, as pointed out by the Solicitor, even assuming that Employer had inadvertently submitted its amended report to the wrong email address, information submitted by the Employer with its request for review does not appear to cure the deficiencies outlined by the CO which are specific requirements listed in the regulations. See 20 C.F.R. § 655.48.

Therefore, Employer's errors in this case are not limited to sending information to an incorrect email. Employer did not submit a proper and complete recruitment report as required by Section 655.48 of the regulations for the reasons outlined by the CO in the April 11, 2016 Notice of Acceptance and the CO's emailed communication dated May 4, 2016. Further, the Employer did not provide the required information by the deadline specified in the regulations, that is, the date specified in the CO's Notice of Acceptance (May 5, 2016), nor did the Employer comply with the CO's extended deadlines for submitting an amended report correcting the deficiencies. The CO extended the deadline on May 4, 2016 to May 6, 2016 and notified the employer on May 10, 2016 that it had not received the required information which it requested Employer submit as soon as possible. The CO actually allowed the Employer up until May 18, 2016 to submit an amended recruitment report, as the CO did not issue its final determination until May 18, 2016, noting that nothing was submitted by Employer through that date. Finally, even assuming that the missed deadlines could be excused due to Employer inadvertently sending its response to the wrong email address, the information included with employer's request for review, still does not cure the deficiencies noted by the CO. For these reasons the CO's denial of the Employer's H-2B application is affirmed.

### **CONCLUSION**

Employer has failed to meet its burden of establishing its need for a foreign worker under the H-2B program because it failed to supply a complete recruitment report in a timely manner by the date specified in the Notice of Acceptance as required by 20 C.F.R. § 655.48. Accordingly, the CO's decision to deny Employer's application for a temporary foreign worker is affirmed.

**ORDER**

**IT IS HEREBY ORDERED** that the Certifying Officer's Decision is **AFFIRMED**.

For the Board of Alien Labor Certification Appeals:

RICHARD A. MORGAN  
Administrative Law Judge