



Issue Date: 05 April 2016

BALCA Case No.: 2016-TLN-00025
ETA Case No.: H-400-16011-440348

In the Matter of:

UNGALE, LLC,
Employer.

Certifying Officer: Charlene G. Giles
Chicago National Processing Center

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Ungale Inc.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peak load, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).³ A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews

¹ On April 29, 2015, the Department of Labor 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. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24042 (Apr. 29, 2015) (to be codified at 20 C.F.R. Part 655). Pursuant to this rule, the Department will process an *Application for Temporary Employment Certification* filed on or after April 29, 2015, with a start date of need after October 1, 2015, in accordance with all application filing requirements under the IFR. *Id.* at 24110. The Employer filed an *Application for Temporary Employment Certification* after April 29, 2015, with a start date of need after October 1, 2015. Therefore, the IFR applies to this case. All citations to 20 C.F.R. Part 655 refer to the IFR.

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). The definition of temporary need is now governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113) § 113 (Dec. 18, 2015).

³ 8 C.F.R. § 214.2(h)(6)(iii).

applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.⁴

STATEMENT OF THE CASE

The Employer is a restaurant located in Cedar Creek, Texas. AF 19.⁵ On January 11, 2016, the Employer filed with the CO the following documents: (1) ETA Form 9142B, *Application for Temporary Employment Certification* (“Application”); (2) Appendix B to ETA Form 9142B; (3) a document entitled “Emergency Filing Request for Waiver;” (4) a copy of job order number 0850794; and (5) ETA Form 9141, *Application for Prevailing Wage Determination*. AF 18-34. The Employer requested certification for three First Line Supervisors⁶ from January 25, 2016 until October 24, 2016, based on an alleged one-time occurrence during that period. AF 18.

On March 2, 2016, the CO issued a Final Determination on Emergency Waiver Request (“Final Determination”), denying the Employer’s request for temporary labor certification. AF 14-17. The CO explained that the Employer filed its Application on January 11, 2016, which was only fourteen days before the date it needed temporary workers to start working. AF 14. The CO emphasized that pursuant to 20 C.F.R. § 655.15(b), the Employer was required to file its Application no more than ninety calendar days and no less than seventy-five calendar days before its start date of need. AF 14-15. The CO concluded that the Employer’s reasons for filing its Application outside of the regulatory timeframe did “not constitute good and substantial cause” to waive the regulatory filing requirements. AF 15. Moreover, the CO explained that pursuant to 20 C.F.R. § 655.15, it was returning the Employer’s Application without reviewing it because the Employer did not file with its Application a valid Prevailing Wage Determination (“PWD”). AF 16.

On March 9, 2016, the Employer requested administrative review of the CO’s Final Determination, as permitted by 20 C.F.R. § 655.61.⁷ AF 1-13. The Employer accused the CO of processing its Application in an untimely manner. AF 1. Furthermore, the Employer indicated it was resubmitting a PWD, and requested that the CO reconsider its Application. *Id.*

On March 21, 2016, I issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within

⁴ 20 C.F.R. § 655.61(a).

⁵ In this Decision and Order, “AF” refers to the Appeal File.

⁶ SOC (O*Net/OES) occupation title “First-Line Supervisors of Food Preparation and Serving Workers” and occupation code 35-1012. AF 18.

⁷ Under 20 C.F.R. § 655.61(a), within ten (10) business days of the CO’s adverse determination, an employer may request that BALCA review the CO’s denial. Within seven (7) business days of receipt of an employer’s appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO’s decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO’s brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

seven business days of receiving the Appeal File.⁸ That same day, BALCA received the Appeal File from the CO. The Solicitor filed a brief on March 29, 2016, urging BALCA to affirm the CO's decision to deny temporary labor certification. The Employer did not file a brief.

DISCUSSION AND APPLICABLE LAW

BALCA's standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued a Final Determination.⁹ After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action.¹⁰

The Employer bears the burden of proving that it is entitled to temporary labor certification.¹¹ The CO may only grant the Employer's Application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.¹²

Failure to Meet the Application Filing Requirements

The H-2B regulations provide that a "completed Application for Temporary Employment Certification must be filed no more than 90 calendar days and no less than 75 calendar days before the employer's date of need." 20 C.F.R. § 655.15(b). Acknowledging that emergency situations arise, the regulations also provide that the "CO may waive the time period(s) for filing an *H-2B Registration* and/or an *Application for Temporary Employment Certification* for employers that have good and substantial cause, provided that the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination as required by [20 C.F.R.] § 655.50."¹³ 20 C.F.R. § 655.17(a). Furthermore, 20 C.F.R. § 655.17(b) provides that "[g]ood and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside of the employer's control, unforeseeable changes in market conditions, or pandemic health issues."

In this case, the Employer filed its Application on January 11, 2016, which was only fourteen days prior to the date it requested to have temporary workers start working, January 25, 2016. AF 18. The Employer acknowledged that it filed its Application less than seventy-five days prior to its start date of need, but explained that it had been "nearly impossible to meet the

⁸ See 20 C.F.R. § 655.61(c).

⁹ 20 C.F.R. § 655.61.

¹⁰ 20 C.F.R. § 655.61(e).

¹¹ 8 U.S.C. § 1361; see also *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009).

¹² 20 C.F.R. § 655.1(a).

¹³ 20 C.F.R. § 655.17(a).

timelines” because it was “forming the business,” “waiting for [its] EIN,” and “closing on property.” AF 28. Other than providing this explanation in its “Emergency Filing Request for Waiver,” the Employer did not offer the CO any evidence that it faced an unforeseeable event that was wholly outside of its control. Struggling to form a business, waiting for an Employer Identification Number, and closing on property are not unforeseeable catastrophic events contemplated by 20 C.F.R. § 655.17. Consequently, I find that the Employer did not establish “good and substantial cause” for its waiver request.

Moreover, as the Solicitor emphasized in its brief on behalf of the CO, the preamble to the IFR explains that one purpose of the recruitment process is to “better serve the public by providing U.S. workers more access to available job opportunities, and assist employers in obtaining the workers that they require in a timelier manner.” 80 Fed. Reg. 24042, 24059 (Apr. 29, 2015); Certifying Officer’s Brief at 3. I agree with CO that by filing its Application only fourteen days prior to its start date of need, the Employer did not provide the CO adequate time to test the domestic labor market. AF 15.

I find that the Employer has failed to show “good and substantial cause” that would justify the CO waiving the regulatory application timeline. Moreover, the Employer did not give the CO sufficient time to test the domestic labor market on an expedited basis. Therefore, I find that the CO properly concluded that the Employer’s Application was untimely pursuant to 20 C.F.R. § 655.15(b).

Failure to Submit a Valid Prevailing Wage Determination

The regulations provide that except for employers that qualify for the emergency procedures at 20 C.F.R. § 655.17, “employers that ... fail to submit a PWD obtained under [20 C.F.R.] § 655.10 will not be eligible to file an *Application for Temporary Employment Certification* and their applications will be returned without review.” 20 C.F.R. § 655.15. The preamble to the IFR states that the application filing requirements outlined in 20 C.F.R. § 655.15 mandate that all employers “first obtain a prevailing wage determination” under 20 C.F.R. § 655.10, and register under the procedures outlined in 20 C.F.R. § 655.11. 80 Fed. Reg. 24042, 24059 (Apr. 29, 2015). The preamble to the IFR further explains that exceptions apply only if an employer meets the requirements of the “[t]ransition procedures” in 20 C.F.R. § 655.4, which are not applicable in this case, or the “[e]mergency situations” provisions in 20 C.F.R. § 655.17. *Id.*

I have already found that because the Employer failed to show “good and substantial cause” for filing an untimely Application, it has not met the emergency procedures requirements in 20 C.F.R. § 655.17. Therefore, the exception contemplated by 20 C.F.R. § 655.15 does not apply in this case. I find that because the Employer did not submit a valid PWD with its Application, the CO properly returned the Employer’s Application to the Employer without reviewing it.

Because the Employer’s Application did not include a valid PWD, as required by 20 C.F.R. § 655.610, the CO correctly returned the Employer’s Application without reviewing it, as mandated by 20 C.F.R. § 655.15.

ORDER

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

For the Board:

Larry A. Temin
Administrative Law Judge