



Issue Date: 09 March 2016

OALJ Case No.: 2016TLN00019  
ETA Case No.: H-400-15302-918993

*In the Matter of:*

**WHITTLE, INC.,  
DBA ANTLERS LODGE, LLC,**  
*Employer.*

Certifying Officer: Charlene G. Giles  
Chicago National Processing Center

Appearances: Christopher Flann, Esq.  
Immigration Law of Montana, P.C.  
Shepherd, Montana  
*For the Employer*

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U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

Before: Alice M. Craft  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Whittle, Inc.’s<sup>1</sup> (“Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter.<sup>2</sup> The H-2B

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<sup>1</sup> Whittle Inc., dba Antlers Lodge, LLC. According to its *Application for Temporary Employment Certification*, the Employer’s legal business name is Cooke City Antlers. AF 112.

<sup>2</sup> 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 and 29 C.F.R. Part 503). 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

program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis.<sup>3</sup> 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”).<sup>4</sup> A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.<sup>5</sup>

## STATEMENT OF THE CASE

The Employer is a small resort located in Cooke City, Montana. AF 95-96.<sup>6</sup> On October 29, 2015, 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 2014-2015 revenue statement; (4) an “Explanation of Need for H-2B Worker;” (5) a copy of job order number 10162237; and (6) ETA Form 9141, *Application for Prevailing Wage Determination*. AF 94-115. The Employer requested certification for one “Front Desk Clerk/Housekeeper”<sup>7</sup> from January 15, 2016 until October 15, 2016,<sup>8</sup> based on an alleged seasonal need during that period. AF 94.

On November 9, 2015, the CO issued a Notice of Deficiency, pursuant to 20 C.F.R. § 655.31. AF 79-93. Following a response from the Employer, the CO issued a Second Notice of Deficiency on November 30, 2015. AF 60-67. After some correspondence between the CO and the Employer, the CO issued a Notice of Acceptance on January 4, 2016. AF 41-48. The CO notified the Employer that it had to complete recruitment of U.S. workers within fourteen calendar days from the date of the Notice of Acceptance. AF 43. On January 20, 2016, the Employer filed a recruitment report and copies of newspaper advertisements, which were published on two consecutive days. AF 28-36.

On February 9, 2016, the CO issued a Final Determination, denying the Employer’s request for temporary labor certification. AF 22-27. The CO explained that in accordance with 20 C.F.R. § 655.48, the Employer was required to prepare, sign, and date a recruitment report as mandated by 20 C.F.R. §§ 655.42(a)-(b). Although the Employer submitted a recruitment report, the CO concluded it did not: (1) name each recruitment source, such as the job order number, name of the State Workforce Agency (“SWA”), and newspaper source; (2) include information

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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.

<sup>3</sup> 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).

<sup>4</sup> 8 C.F.R. § 214.2(h)(6)(iii).

<sup>5</sup> 20 C.F.R. § 655.61(a).

<sup>6</sup> In this Decision and Order, “AF” refers to the Appeal File.

<sup>7</sup> SOC (O\*Net/OES) occupation title “Hotel, Motel, and Resort Desk Clerks,” and occupation code 43-4081. AF 94.

<sup>8</sup> The Employer later amended its Application to reflect an end date of need of October 1, 2016. AF 56.

confirming that former U.S. employees were contacted regarding the job opportunity, and by what means; and (3) state that the job opportunity was posted in two conspicuous locations in the Employer's workplace. AF 26. Therefore, the CO concluded the Employer did not satisfy the regulatory recruitment report requirements. *Id.*

Furthermore, in her Final Determination, the CO explained that the Employer failed to comply with the advertising requirements contained 20 C.F.R. § 655.41. AF 26-27. Although the CO acknowledged that the Employer submitted copies of two newspaper advertisements, she found they did not contain all of the assurances required by the regulations. AF 26. Specifically, the CO found that the newspaper advertisements did not: (1) contain the Employer's contact information; (2) specify that the job opportunity was full-time; (3) list the workdays of the job opportunity; and (4) state that the Employer would provide all work tools, supplies, and equipment to the worker at no charge. AF 26-27. For both of the abovementioned reasons, the CO denied the Employer's Application. AF 22-27.

On February 18, 2016, the Employer requested administrative review of the CO's Final Determination, as permitted by 20 C.F.R. § 655.61.<sup>9</sup> AF 1-21. On February 19, 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 seven business days of receiving the Appeal File.<sup>10</sup> On February 25, 2016, BALCA received the Appeal File from the CO. The Solicitor filed a brief on March 7, 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 was actually submitted to the CO before the date the CO issued a Final Determination.<sup>11</sup> 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.<sup>12</sup>

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<sup>9</sup> 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.

<sup>10</sup> 20 C.F.R. § 655.61(c).

<sup>11</sup> 20 C.F.R. § 655.61.

<sup>12</sup> 20 C.F.R. § 655.61(e).

The Employer bears the burden of proving that it is entitled to temporary labor certification.<sup>13</sup> 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.<sup>14</sup>

#### Failure to Submit a Complete Recruitment Report

In her Final Determination, the CO concluded that the Employer failed to submit a complete recruitment report, as required by 20 C.F.R. § 655.48. AF 22-27. A recruitment report "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."<sup>15</sup> As such, the recruitment report must contain all of the information outlined in 20 C.F.R. § 655.48(a).<sup>16</sup> Having reviewed the record in its entirety, I agree with the CO's conclusion that the Employer did not submit a complete recruitment report.

Although the Employer submitted a recruitment report on January 20, 2016 (AF 31), it did not name each recruitment activity or source (such a job order number and the name of the newspaper in which it advertised), as required by 20 C.F.R. § 655.48(a)(1). Moreover, the recruitment report did not provide the name and contact information of each U.S. worker who applied for or was referred to the job opportunity, as required by 20 C.F.R. § 655.48(a)(2). Finally, the recruitment report failed to specify that former U.S. employees were contacted about the job opportunity, and by what means, as required by 20 C.F.R. § 655.48(a)(3). Because the Employer failed to submit a complete recruitment report, the CO could not make a factual determination that the employment of a foreign worker as a "Front Desk Clerk/Housekeeper"

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<sup>13</sup> 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).

<sup>14</sup> 20 C.F.R. § 655.1(a).

<sup>15</sup> 80 Fed. Reg. 24042, 24079 (Apr. 29, 2015); *see also Chateau on the Lake*, 2010-TLN-00062, slip op. at 2 (June 11, 2010); *Gary Cross Racing Stable*, 2015-TLN-00055, slip op. at 6 (Sept. 2, 2015).

<sup>16</sup> 20 C.F.R. § 655.48(a) requires a recruitment report to contain the following: (1) the name of each recruitment activity or source (e.g., job order and the name of the newspaper); (2) 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 recruitment report, and the disposition of each worker's application. The employer must clearly indicate whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined; (3) confirmation that former U.S. employees were contacted, if applicable, and by what means; (4) 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; (5) confirmation that the community-based organization designated by the CO was contacted, if applicable; (6) if applicable, confirmation that additional recruitment was conducted as directed by the CO; and (7) if applicable, for each U.S. worker who applied for the position but was not hired, the lawful job-related reason(s) for not hiring the U.S. worker.

would not adversely affect the wages and working conditions of similarly employed U.S. workers. Therefore, the CO properly denied the Employer's Application.

#### Failure to Meet the Regulatory Advertising Requirements

The CO also determined that the Employer did not meet the regulatory advertising requirements. AF 22-27. The regulation at 20 C.F.R. § 655.41(a) provides that all recruitment conducted under 20 C.F.R. §§ 655.42-655.46 "must contain terms and conditions of employment that are not less favorable than those offered to the H-2B workers and, at a minimum, must comply with the assurances applicable to job orders as set forth in § 655.18(a)." Moreover, 20 C.F.R. § 655.41(b) requires all advertising to contain detailed information regarding the job opportunity for which an employer is advertising. In this case, the CO determined that the Employer's newspaper advertisements did not meet the requirements outlined in 20 C.F.R. § 655.41. Having reviewed the evidence of record, I agree that the Employer failed to comply with the regulatory advertising requirements.

In this case, the Employer submitted newspaper advertisements, which were published on January 9, 2016 and January 10, 2016. However, the record reveals the newspaper advertisements failed to list the Employer's contact information, which is required by 20 C.F.R. § 655.41(b)(1). In its request for administrative review, the Employer acknowledged "that not every subpart of 20 C.F.R. § 655.41 was technically complied with in the sense that Whittle did not list its contact information, but did give its address." AF 2. Although the newspaper advertisements listed the SWA's contact information, it provided no way for prospective applicants to contact the Employer directly. Therefore, the CO properly concluded that the Employer's newspaper advertisements were lacking information required by the regulations.

Furthermore, the Employer did not indicate which days per week it needed someone to work, as required by 20 C.F.R. § 655.41(b)(3). Although in its response to the CO's Second Notice of Deficiency, the Employer indicated it was seeking someone to work from Wednesday through Sunday (AF 52), such information was not included in the newspaper advertisements. AF 32-35. Not including the workdays in the newspaper advertisements may have prevented a prospective applicant from applying for the job, as, by simply reading the advertisement, he or she would not have known which days of the week the Employer expected him or her to work. Thus, I find the CO correctly concluded that the newspaper advertisements failed to include all of the information required by 20 C.F.R. § 655.41(b)(3).

Finally, the Employer did not state that it would provide the worker with tools, supplies, and equipment at no charge, which is a requirement of 20 C.F.R. § 655.41(b)(11). In its request for administrative review, the Employer emphasized that the newspaper advertisement specifically stated the job opportunity was for a "Clerk/Housekeeper," and the Employer alleged that no person reading a classified employment advertisement would "infer that a clerk would need tools or supplies to carry out" the job duties or would "conceive of the idea that an employer would charge for these items if necessary." AF 2-3. I disagree with the Employer's characterization, as according to its own job description, the worker would need to check guests in and out of the hotel, respond to inquiries (including minor maintenance), answer the telephone

and take reservations, handle accounting, clean all rooms, and wash and dry linens, towels, etc. on a daily basis. AF 52. Such tasks require tools, supplies, and equipment, and without information stating that the Employer would supply those resources at no cost, a prospective applicant may have been discouraged from applying for the job opportunity.

Although the CO found the Employer failed to indicate that the job opportunity was full-time, I note that the Employer indicated it was “40hours/week.” AF 32-35. I agree with the Employer that it is reasonable to assume that a forty hour-per-week job is a full-time job. AF 2. Nonetheless, given the other deficiencies in the Employer’s recruitment efforts, I find the CO properly concluded that the Employer did not meet the regulatory advertising requirements.

Although the Employer urges BALCA to find that it substantially complied with the advertising requirements, newspaper advertisements must comply with 20 C.F.R. § 655.41 in order to adequately test the domestic labor market. BALCA has strictly enforced the H-2B newspaper advertisement requirements in order to protect domestic workers.<sup>17</sup> The instant case is no exception. Because the Employer has failed to meet the advertising requirements contained in 20 C.F.R. § 655.41, I find that the CO properly denied certification.

### **ORDER**

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

For the Board:

ALICE M. CRAFT  
Administrative Law Judge

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<sup>17</sup> See *Culinary Advisors, Inc. dba Evo Italian*, 2014-TLN-00026, slip op. at 6 (April 24, 2014); see also *Turf Specialties, Inc.*, 2015-TLN-00007 (Jan. 14, 2015); *Burnham Companies*, 2014-TLN-29 (May 19, 2014).