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Issue Date: 19 July 2016

BALCA Case No.: 2016-TLN-00055

ETA Case No.: H-400-16068-135987

In the Matter of:

MAHANEY ROOFING COMPANY,
Employer.

Certifying Officer: William L. Carlson, Ph.D.
Chicago National Processing Center

Appearances: Lesli Downs (Lay Representative)
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Before: **JONATHAN C. CALIANOS**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from the Employer's request for review before the Board of Alien Labor Certification Appeals ("BALCA") of a denied *H-2B Application for Temporary Employment Certification* ("Application"). See 20 C.F.R. § 655.61 (explaining administrative review).¹ For the reasons discussed below, the CO's denial of the Employer's Application is affirmed.

¹ On April 29, 2015, the Department of Labor ("DOL") and the Department of Homeland Security ("DHS") jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A, established by the "2008 Rule" found at 73 Fed. Reg. 78020 (Dec. 19, 2008). See 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) ("2015 IFR"). Where the Employer filed its Application after April 29, 2015, and its period of need begins after October 1, 2015, the process outlined in the 2015 IFR applies. See 20 C.F.R. § 655.4(e) (explaining transition procedures).

STATEMENT OF THE CASE

On March 8, 2016, Employer Mahaney Roofing Company (“Employer” or “Mahaney”) filed an *H-2B Application for Temporary Employment Certification* (“Application”) with the DOL’s Employment and Training Administration. (AF at 57, 59-80).² Mahaney seeks temporary certification to hire eight full-time seasonal “Helpers--Roofers” at an hourly rate of \$13.14, the applicable prevailing wage, with an original start date of May 22, 2016, and an end date of December 31, 2016. (AF at 59, 63). On March 29, 2016, Mahaney requested that its Application receive emergency treatment pursuant to 20 C.F.R. § 655.17, and the Certifying Officer (“CO”) approved the request that same day. (AF at 57-58).

On May 20, 2016, the CO issued a “Notice of Deficiency” (“NOD”) that alleged Mahaney’s Application failed to satisfy the obligations of H-2B employers on three different grounds pursuant to 20 C.F.R. §§ 655.20(a)(1), (b), (c), (e), and (o). (AF at 38-44). According to the CO, the deficiencies stemmed from language contained in Section G, Item 3, of Mahaney’s Application, which reads as follows:

All domestic and H2B new hires go through a drug screen and physical costing \$100. This amount is taken out of the employee’s check during the first 6 weeks of employment totaling \$16.67/week. After the worker is employed for 90 days, they receive a full reimbursement of the \$100.”

(AF at 41-43, 63). The CO concluded that the cited deduction in Mahaney’s Application is impermissible because it constitutes an involuntary deduction, primarily for the benefit of the employer, that reduces the actual weekly wage to an amount below the required rate. (AF at 41); *see also* 20 C.F.R. § 655.20(c). Additionally, the deduction means Mahaney is not paying its H-2B workers “free and clear” during the entire period of employment as required. (AF at 42); *see also* 20 C.F.R. §§ 655.20(a)(1), (b), and (o). Lastly, the CO purported that the “required deduction appears to be a condition of employment which workers must accept prior to hiring; however, this requirement does not appear to be normal and accepted for the occupation of Roofer Helpers.” (AF at 42-43); *see also* 20 C.F.R. § 655.20(e).

Mahaney responded that it was “unwilling to change a business model that has been in place for years with the simple purpose of financial protection of the company that in no way creates a hardship for employees.” (AF at 33). Thus, on June 17, 2016, the CO denied Mahaney’s Application based on its failure to satisfy the obligations of H-2B employers pursuant to 20 C.F.R. §§ 655.20(a)(1), (b), (c), (e), and (o), as cited in the NOD from May. (AF at 19, 22-25, 41-43). Four days later, on June 21, 2016, Mahaney faxed BALCA a request for expedited administrative review of the CO’s denial of its Application. (AF at 1); *see also* 20 C.F.R. § 655.61(a) (discussing procedure for requesting administrative review).

On June 23, 2016, this case was assigned to me for disposition. *See* 20 C.F.R. § 655.61(d) (“The Chief ALJ may designate a single member or a three member panel of the

² References to the Appeal File appear as “(AF at [#]).”

BALCA to consider a particular case.”). On June 29, 2016, I held a telephonic status conference with the parties, to discuss how the case would proceed, given the expedited nature of the proceeding. 20 C.F.R. § 655.61(f) (providing BALCA must decide case within strict timeframe). That same day, BALCA received the Appeal File, which was transmitted by the CO. *See* 20 C.F.R. § 655.61(b) (indicating CO has seven days to submit Appeal file upon receipt of request for review). On July 5, 2016, I issued a Notice of Docketing and Order Setting Briefing Deadline requiring the parties to submit briefs no later than 5 p.m. EST on July 11, 2016. *See* 20 C.F.R. § 655.61(c) (explaining mandatory briefing schedule). On July 11, 2016, both parties submitted briefs.³

DISCUSSION

Mahaney has not satisfied the requirements necessary to obtain temporary labor certification. Granting an employer’s request for temporary labor certification for the employment of foreign workers in the H-2B nonimmigrant classification of the Immigration and Nationality Act (“INA”) reflects that the Secretary of Labor (“Secretary”) has made the following two determinations:

- (1) There are no sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to hire foreign workers, and that
- (2) The employment of the H-2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.⁴

20 C.F.R. § 655.1(a). In making the foregoing determinations, the Secretary is aided by 20 C.F.R. Part 655, Subpart A, which outlines the procedures that control the temporary labor certification process. 20 C.F.R. § 655.1(b). “It also establishes obligations with respect to the terms and conditions of the temporary labor certification with which H-2B employers must comply, as well as their obligations to H-2B workers and workers in corresponding employment.” 20 C.F.R. § 655.1(b).

³ References to the CO’s brief appear as “(CO Br. at [page number]),” and Mahaney’s brief is cited as “(Empl. Br. at [page number]).”

⁴ A nonimmigrant foreign worker that would fall under the H-2B nonimmigrant classification of the INA is as follows:

An alien . . . having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country .

. . .

8 U.S.C. § 1101(a)(15)(H)(ii)(b). Under the INA, the DHS must confer with appropriate agencies before permitting any alien to be classified as an H-2B worker. 20 C.F.R. § 655.1; *see also* 8 U.S.C. § 1184(c)(1). DHS regulations designate the Secretary as a consultative authority responsible for issuing regulations governing the issuance of temporary labor certifications. 8 C.F.R. § 214.2(h)(6)(iii)(D); 20 C.F.R. § 655.1. Further, an employer’s petition to employ H-2B nonimmigrant workers for temporary non-agricultural work in the United States must be coupled with an approved temporary labor certification from the Secretary. 8 C.F.R. § 214.2(h)(6)(iv); 20 C.F.R. § 655.1.

For example, an employer's job order must include an offered wage that equals or exceeds the required rate – i.e., the highest of the following: the prevailing wage, the Federal minimum wage, State minimum wage, or local minimum wage. 20 C.F.R. § 655.20(a)(1); *see also* 80 Fed. Reg. at 24064-24065. “The employer must pay at least the offered wage, free and clear, during the entire period of the *Application for Temporary Employment Certification* granted by OFLC.” 20 C.F.R. § 655.20(a)(1) (emphasis in original); *see also* 20 C.F.R. § 655.20(o). Wage payment requirements are satisfied if workers are paid “finally and unconditionally and ‘free and clear’” in a timely manner either in cash or negotiable instrument. 20 C.F.R. § 655.20(b); *see also* 20 C.F.R. § 655.20(o).

Notwithstanding the foregoing pay requirements, there are certain circumstances where it may be appropriate for an employer to reduce H-2B workers' wages. For example, 20 C.F.R. § 655.20(c) lists the following as authorized deductions:

Those required by law, such as taxes payable by workers that are required to be withheld by the employer and amounts due workers which the employer is required by court order to pay to another; deductions for the reasonable cost or fair value of board, lodging, and facilities furnished; and deductions of amounts which are authorized to be paid to third persons for the worker's account and benefit through his or her voluntary assignment or order or which are authorized by a collective bargaining agreement with bona fide representatives of workers which covers the employer.

20 C.F.R. § 655.20(c).

Permissible deductions are not limited to those deemed “authorized,” however. An employer may still deduct costs from H-2B workers' wages so long as the deduction does not reduce the workers' wages to below the required rate. *Id.* Regardless, the 2015 IFR directs that any deduction for a cost that is primarily for the employer's benefit is never reasonable and never permissible. 80 Fed. Reg. at 24064.

Mahaney's Application does not comport with the pay obligations and assurances required of H-2B employers as it pertains to workers' wages. *See* 20 C.F.R. §§ 655.20(a)(1), (b), (c), and (o). The applicable prevailing wage is \$13.14, and is therefore the required rate for the position of “helpers--roofers” because it exceeds Federal, State, and local minimum wages in the area of intended employment. (AF at 63); *see also* 20 C.F.R. § 655.20(a)(1); 80 Fed. Reg. at 24064-24065. Section G, Item 3, of Mahaney's Application, reads as follows:

All domestic and H2B new hires go through a drug screen and physical costing \$100. This amount is taken out of the employee's check during the first 6 weeks of employment totaling \$16.67/week. After the worker is employed for 90 days, they receive a full reimbursement of the \$100.”

(AF at 41-43, 63). Where the deduction would reduce the actual weekly wage to a rate below the prevailing wage, thereby preventing timely payment of the required rate “finally and unconditionally and ‘free and clear’” during the entire Application period, it is only permissible

if it qualifies as an authorized deduction. *See* 20 C.F.R. §§ 655.20(a)(1), (b), (c), and (o). To conclude otherwise would undermine the prevailing wage concept, thereby jeopardizing the wages and working conditions of U.S. workers similarly employed. *See* 80 Fed. Reg. at 24065.

The deduction in Mahaney's Application does not fall under one of the authorized deductions as described in 20 C.F.R. § 655.20(c). Mahaney mistakenly argues that the authorized deduction for "amounts which are authorized to be paid to third persons for the workers' account and benefit through his or her voluntary assignment or order" applies. (Empl. Br. at 2-3). In support, Mahaney argues that "[a] drug/physical screen is a policy implemented to protect the worker from injury to himself or others while on the job." (Empl. Br. at 3).

Yet, as the CO correctly points out, the drug/physical screen is "a business model that has been in place for years with the simple purpose of financial protection of the company" (AF at 33); *see also* (CO Br. at 10). To be specific, in response to the CO's NOD from May, Mahaney explained its drug testing policy as follows:

In order to protect themselves from substantial monetary loss, Mahaney Roofing (Mahaney) has a long standing policy as described in the job order. Considering the current labor market and work ethic of US workers, many US workers quit or abscond from employment after just a few hours or days of employment. If Mahaney didn't have a protection policy in place, they would lose hundreds/thousands of dollars by paying for drug screens and physicals for workers who turn around and quit.

(AF at 33). Despite any potential, incidental benefit that may flow to H-2B workers from the drug testing policy, Mahaney cannot escape its own admission that the proposed deduction is primarily for its own benefit. *See id.*

Based on the foregoing, Mahaney fails to satisfy the assurances and obligations required of H-2B employers as it pertains to workers' wages. *See* 20 C.F.R. §§ 655.20(a)(1), (b), (c), and (o). Preliminarily, the drug testing cost is not an authorized deduction under 20 C.F.R. § 655.20(c). Additionally, the drug testing cost is an involuntary deduction primarily for Mahaney's benefit that reduces the actual weekly wage to below the prevailing wage such that it would prevent timely payment of the required rate "finally and unconditionally and 'free and clear'" during the entire Application period. *See* 20 C.F.R. §§ 655.20(a)(1), (b), (c), and (o). In light of this finding, it is unnecessary to address any other reasons cited by the CO for denying Mahaney's Application. *See In re Gulf Coast Crawfishing Supply, LLC*, 2012-TLN-00003, at 7.

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's determination is **AFFIRMED**.

For the Board:

JONATHAN C. CALIANOS
Administrative Law Judge