

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 August 2016

BALCA Case No.: 2016-TLN-00058
ETA Case No. H-400-16043-847667

In the Matter of:

MANGKANG, LLC dba ARK CHINESE RESTAURANT
Employer

Certifying Officer: Chicago National Processing Center

Appearances: Mark Malachowski, Esquire
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San Francisco, California
For the Employer

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For the Certifying Officer

Before: CLEMENT J. KENNINGTON
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Mangkang, LLC dba Ark Chinese Restaurant’s (“Employer”) request for administrative review of the Certifying Officer’s (“CO”) denial of temporary labor certification under the H-2B program. For the following reasons, the Board affirms the CO’s denial of certification.

BACKGROUND

On February 15, 2016, Employer applied for temporary employment certification through the H-2B program to fill one position for “Chef/Asian Cuisine Instructor” for the period of May 2, 2016 through May 2, 2017. (AF 255-275).¹

¹ In this decision, AF is an abbreviation for “Appeal File.”

On April 19, 2016, the CO issued a Notice of Deficiency citing deficiencies regarding 20 C.F.R. §§ 655.6(a) and (b), as well as Sections 655.9(a) and (b), 655.16, 655.18, and 655.20(e).² (AF 245-254). Specifically, the CO notified Employer that its H-2B application was deficient pursuant to Sections 655.6(a) and (b) because Employer failed to establish its requested standard of need as well as the period of intended employment. The CO determined that Employer failed to provide supporting documentation to substantiate how Employer calculated its temporary need. Further, Employer did not explain the nature of the temporary need based on its business operations. (AF 249).

Also, the CO requested Employer provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of an H-2B worker in accordance with 20 C.F.R. § 655.9(a) and (b). (AF 254). Additionally, the CO requested the Employer provide a copy of its job order with the nearest SWA office serving the area of intended employment in accordance with 20 C.F.R. § 655.16 and include all information required by 20 C.F.R. § 655.18. (AF 251-252).

Lastly, the CO noted Employer did not include qualifications for its job opportunity that are normal and accepted qualifications imposed by non-H-2B employers in the same occupation and area of intended employment pursuant to 20 C.F.R. § 655.20(e). Specifically, Employer requires workers with 120 months of experience, which exceeds the normal and accepted experience of two years. (AF 253-254).

On April 29, 2016, Employer responded to the CO's request for a copy of the job order via email. Employer also provided a letter of explanation, which included a restaurant menu, business documentation, sales and payroll records, quarterly tax returns, a copy of the job order, and a proposed classified advertisement. (AF 178-244).

On May 23, 2016, the CO issued a Second Notice of Deficiency citing deficiencies regarding 20 C.F.R. §§ 655.6(a) and (b), as well as Sections 655.9(a) and (b), 655.15, 655.16, 655.18, and 655.20(e). Specifically, the CO notified Employer that its H-2B application was deficient pursuant to Sections 655.6(a) and (b) because Employer failed to establish how its need is considered temporary based on a peakload standard. Also, the job order submitted to the CO failed to provide the minimum and maximum amounts provided for daily travel subsistence. Additionally, the CO considered Employer's preferences to be job requirements and additional information was required in order to determine whether those preferences were normal and acceptable. Finally, Employer failed to provide consistent dates of need in its job order. (AF 153-161).

On May 31, 2016, Employer responded to the CO's Second Notice of Deficiency by providing a letter of explanation, an estimated monthly sales and payroll report, a California draft job order, and a proposed classified advertisement listing. (AF 115-152). On June 14, 2016, the CO accepted the application for processing. (AF 102-109). On July 8, 2016, Employer submitted its recruiting report pursuant to 20 C.F.R. § 655.48. (AF 63-88).

² On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. § 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015). These rules are effective and govern this case.

On July 13, 2016, the CO made its final determination regarding Employer's H-2B application. (AF 52-62). The CO denied the application and found Employer failed to show: 1) that there are not sufficient U.S. workers who are capable of performing the temporary services or labor at the time of filing the petition for H-2B classification at the place where the foreign worker is to perform the work; and 2) that the employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

The CO stated that pursuant to 20 C.F.R. § 655.41, all recruitment must contain terms and conditions of employment no less favorable than those offered to H-2B workers and must comply with the assurances applicable to job orders set forth in Section 655.18(a). In particular, Employer's newspaper advertisements did not contain the duties to be performed, the work hours and days, whether Employer will provide tools, supplies, and equipment at no cost, whether transportation and subsistence to and from the place of employment, and any deductions that Employer would make from the worker's paycheck. Thus, the CO determined Employer failed to comply with 20 C.F.R. § 655.18(a) and (b) and denied Employer's application. (AF 56)

On July 20, 2016, Employer submitted a request for administrative review to the Board of Alien Labor Certification Appeals ("BALCA") appealing the CO's Final Determination in the above-captioned H-2B matter. On July 22, 2016, BALCA docketed the appeal and issued a Notice of Docketing. The CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services ("the Solicitor") in accordance with 20 C.F.R. § 655.33(b) on July 28, 2016. Because H-2B appeals are expedited, and in accordance with 20 C.F.R. § 655.33, the parties were given a brief due date of August 9, 2016. Thereafter, briefs were timely submitted by the parties.

DISCUSSION

The H-2B program permits employers to hire foreign workers on a temporary basis to "perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States]." 8 U.S.C. § 1101(a)(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). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* ("ETA Form 9142") with ETA's Chicago National Processing Center ("CNPC"). 20 C.F.R. § 655.20. After an employer's application has been accepted for processing, it is reviewed by a Certifying Officer ("CO"), who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

BALCA's review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-

00017, slip op. at 4-5 (Feb. 21, 2012), “[t]he scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application.” 20 C.F.R. § 655.33(a), (e).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 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). 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. 20 C.F.R. § 655.1(a).

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 20 C.F.R. § 655.18(a).” Also, 20 C.F.R. § 655.41(b) requires all advertising to contain detailed information regarding the job opportunity for which an employer is advertising. This includes, but is not limited to, job duties, work hours and days, all deductions an employer will make from a worker’s paycheck not required by law, whether tools, supplies, and equipment will be supplied to the worker at no charge, and a statement whether transportation and subsistence to and from work will be provided.

In this matter, the CO determined that the Employer’s newspaper advertisement did not meet the requirements outlined in 20 C.F.R. § 655.41. Having reviewed the evidence of record, I agree that Employer failed to comply with the regulatory advertising requirements.

In this case, Employer submitted a newspaper advertisement, which was published on June 26, 2016 and June 30, 2016. However, the record reveals the newspaper advertisement failed to indicate which hours and days per week it needed someone to work, as required by 20 C.F.R. § 655.41(b)(3). Although the advertisement states the job has a one year term of forty hours per week, it does not list the exact hours and days of the week in the advertisement. It also does not include the job duties of the position. Not including the work hours and workdays in the advertisement may have prevented a prospective applicant from applying for the job because he or she would not have known which days of the week Employer expected him or her to work by simply reading the advertisement. Thus, I find the CO correctly concluded that the newspaper advertisement failed to include all of the required information.

Also, Employer did not state whether it would make any deductions from the worker’s paycheck that are not required by law or whether it would provide the worker with tools, supplies, and equipment at no charge. Performing the tasks associated with a chef/cuisine instructor require tools, supplies, and equipment. Without information stating that Employer would or would not supply those resources at no cost, a prospective applicant may have been discouraged from applying for the job opportunity. Further, not including a statement regarding

any deductions from a paycheck for boarding, lodging, and other facilities offered to the worker as well as a statement regarding whether transportation and subsistence will be provided may have also dissuaded a potential applicant from applying. Thus, I find Employer also failed to meet these requirements under 20 C.F.R. § 655.41(b).

Employer argues its advertisement was in compliance with 20 C.F.R. § 655.41(b) by referring applicants to its job order online for additional information. However, I find this argument is without merit. It assumes all prospective applicants have internet access and computer skills to access the additional information. Also, 20 C.F.R. § 655.41 expressly states what information is to be included in the advertisements, and strict compliance is required.

Employer also argues including the additional information would cause an undue expense, would be prohibitive to its business, and would appear to be an unconscious bias. However, I find this argument is insufficient to reverse denial of certification. Nothing in record supports the assertion that certification was denied due to a bias or prejudice. Also, BALCA has previously held that the added cost of advertisement under the H-2B program does not excuse the failure to properly advertise the position. *Transylvania, Inc. dba Transylvania Romanian Restaurant*, 2011-TLN-00019 slip op. at 4 (May 3, 2011).

Although Employer urges BALCA to find that it complied with the advertising requirements, newspaper advertisements must fully 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 advertising requirements in order to protect domestic workers. *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-TLN00029 (May 19, 2014). I find the instant case is no exception.

Given the foregoing discussion, I find and conclude the CO properly denied Employer's H-2B application. It is Employer's burden to demonstrate eligibility for the H-2B program, but Employer has failed to demonstrate it conducted its recruitment in accordance with the regulatory mandate. Thus, the denial of Employer's H-2B certification must be **AFFIRMED**.

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

ORDERED this 16th day of August, 2016 at Covington, Louisiana.

CLEMENT J. KENNINGTON
Administrative Law Judge