



Issue Date: 22 September 2016

BALCA Case No.: 2016-TLN-00066
ETA Case No.: H-400-16133-881804

In the Matter of:

MONTAUK MANOR CONDOMINIUMS
Employer

Appearances: Michelle DeGiorgio, Esquire
For the Employer

Vincent Costantino, Esq.
Office of the Solicitor
Division of Employment and Training Legal Services
Chicago, IL
For the Certifying Officer

Before: **PATRICK M. ROSENOW**
Administrative Law Judges

DECISION AND ORDER AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This matter is before the Board of Alien Labor Certification Appeals (BALCA) pursuant to Employer's request for review of the Certifying Officer's denial in the above-captioned H-2B temporary labor certification matter.¹ The H-2B program allows employers to hire foreign workers to perform temporary, non-agricultural work within the United States on a one-time

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 need after October 1, 2015, in accordance with all application filing requirements under the IFR.

occurrence, seasonal, peakload, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive a labor certification from the U.S. Department of Labor.³ Applications are reviewed by a Certifying Officer (CO) of the Office of Foreign Labor Certification of the Employment and Training Administration (ETA). If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA.⁴

BACKGROUND

On 12 May 16, Employer submitted an H-2B Application for Temporary Employment Certification (ETA Form 9142B) for seven maids and housekeeping cleaners as an intermittent or other temporary need employee for the period from 16 May 16 to 31 Dec 16.⁵ Employer stated the job duties would include making beds, replenishing linens, cleaning rooms and halls, and vacuuming.⁶

On 17 May 16, the CO sent Employer the first Notice of Deficiency (NOD) noting the following deficiencies: failure to satisfy application filing requirements, failure to submit an acceptable job order, failure to establish the job opportunity as temporary in nature, failure to submit a complete and accurate ETA Form 9142, and failure to disclose any foreign worker recruitment.⁷ The CO sent an inquiry email to Employer on 7 Jun 16 for failing to submit a timely response and gave Employer until 8 Jun 16 to do so.⁸

On 8 Jun 16, by fax, Employer submitted its response to the initial NOD including a letter of explanation dated 8 Jun 16, a draft job order, correspondence with State Workforce Agency, payroll analysis, a sign Appendix B, a statement of temporary need dated 1 Feb 16, and an amended ETA Form 9142.⁹

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).

⁴ 20 C.F.R. § 655.61(a).

⁵ Appeal File (AF) at 154-163.

⁶ *Id.*

⁷ AF 143-153.

⁸ AF 142.

⁹ AF 92-141.

The CO sent Employer a second NOD on 14 Jun 16, finding the Employer failed to satisfy application filing requirements by filing its ETA Form 9142 more than 90 days before the date of need, specifically 103 days before the date of need.¹⁰ On 14 Jun 16, Employer responded to the second NOD amending its request for a start date of 28 Jul 16, which is no more than 90 days and no less than 75 days before the Employer's date of need.¹¹

On 15 Jun 16, the CO issued a Notice of Acceptance.¹² On 14 Jul 16, the CO sent Employer an email notifying Employer that the Recruitment Report was due by 11 Jul 16 and as of 14 Jul 16, the CO had not received it.¹³ On 14 Jul 16 and 15 Jul 16, Employer sent the CO emails advising that it did not have its Recruitment Report ready and requested an extension until 29 Jul 16 to do so. Specifically, Employer noted there was a communication error with the advertisement agency. On 19 Jul 16, the CO confirmed receipt of Employer's email requesting an extension to submit its Recruitment Report. The CO noted that "the 2015 Interim Final Rule does not contain provisions for extensions of the recruitment period" and "to avoid further delay in the application process, please submit the Recruitment Report by email . . . as soon as possible."¹⁴

On 26 Jul 16, Employer submitted to the CO the Recruitment Report.¹⁵ On 2 Aug 16, the CO issued an inquiry to Employer requesting Employer provide a recruitment report that includes the name of the newspaper it advertised in.¹⁶ On 4 Aug 16, Employer responded to the CO's inquiry with the name of the newspaper it advertised in.¹⁷

On 10 Aug 16, the CO issued the third NOD finding that Employer failed to comply with newspaper advertisement and recruitment report requirements, specifically it did not conduct its recruitment within 14 calendar days of the 15 Jun 16 Notice of Acceptance and it did not place the advertisement on a Sunday.¹⁸

On 11 Aug 16, Employer submitted to the CO an amended recruitment report including copies of the newspaper ads placed in Newsday on 22 Jul 16 and 24 Jul 16.¹⁹ On 26 Aug 16, the CO denied certification because, pursuant to 20 C.F.R. 655.42(a)-(b) – 655.48, Employer must file a complete recruitment report and to do so, "must place an advertisement on two separate days, which may be consecutive, one of which must be a Sunday, in a newspaper of general circulation serving the area of intended employment. . .".²⁰ The CO also noted that pursuant to 20 C.F.R. 655.40(b), "unless otherwise instructed by the CO, the employer must conduct the

¹⁰ AF 86-91; 20 C.F.R. § 655.15(b).

¹¹ AF 82-85.

¹² AF 74-81.

¹³ AF 67.

¹⁴ AF 68-73.

¹⁵ AF 61-66.

¹⁶ AF 59-60.

¹⁷ AF 56-58.

¹⁸ AF 50-55; 20 C.F.R. § 655.42(a)-(b); 20 C.F.R. § 655.48.

¹⁹ AF 38-49.

²⁰ AF 25-37.

recruitment described in §§ 655.42 through 655.46 within 14 calendar days from the date the Notice of Acceptance is issued.”²¹

In this case, although the Employer provided dated copies of the advertisements demonstrating it placed the ad on a Sunday pursuant to the regulations, it did not conduct the recruitment within 14 days of the NOA. Employer argued that it requested an extension of time to complete the recruitment because of a communication error between their office and the advertisement agency. In the denial, the CO found that “the timely submission of or an extension request to submit the recruitment report did not demonstrate the employer’s endeavor of advertising the job opportunity outside of the 14-day timeframe permitted in Departmental Regulations and the NOA.”²²

On 2 Sep 16, Employer requested administrative review of the denial arguing it did place the advertisements on two days, including a Sunday, and also that it requested an extension of time to complete the recruitment. Employer included dated copies of the advertisements placed in Newsweek as well as the email correspondence with the CO concerning the request for extension of time. The case was forwarded to BALCA on 6 Sep 16 and I received the file on 14 Sep 16.

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.²³ 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.²⁴ An employer seeking to hire employees under the H-2B program bears the burden of proving that it is entitled to a temporary labor certification.²⁵

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.²⁶ Consequently, before a temporary labor certification may issue, employers must conduct certain recruitment steps designed to inform U.S. workers about the job opportunity.²⁷ In order to show that it has complied with the regulations and conducted these affirmative recruitment efforts, an employer must file a recruitment report addressing the regulatory requirements.²⁸ The regulation requires that the recruitment report contain specific information detailing the employer’s recruitment activity and

²¹ *Id.*

²² *Id.*

²³ 20 C.F.R. § 655.61.

²⁴ 20 C.F.R. § 655.61(e).

²⁵ 8 U.S.C. § 1361.

²⁶ 8 U.S.C. § 1101(a)(15)(H)(ii)(b); *Burnham Companies*, 2014-TLN-00029 (May 19, 2014).

²⁷ *See* 20 C.F.R. § 655.40-47.

²⁸ *See* 20 C.F.R. § 655.48.

be submitted “by a date specified by the CO in the Notice of Acceptance.”²⁹ It is the employer’s burden to prove its eligibility for employing foreign workers under the H-2B program, and the recruitment report assists in determining whether the employer has met its burden.³⁰

In this case, the CO denied the Employer’s H-2B Application after determining that the Employer did not comply with the recruitment requirements set forth in the regulations. Specifically, the CO determined that the Employer’s filing of its recruitment report was not in compliance because it was filed on 26 Jul 16, 41 days after issuance of the Notice of Acceptance and 15 days after the deadline the CO noted in the NOA.³¹

Here, the NOA was issued on 15 Jun 16, requiring Employer to conduct recruitment described in §§ 655.42 through 655.46 within 14 calendar days and to submit a recruitment report by 11 Jul 16. On 14 Jul 16, the CO emailed Employer notifying it that it had not received the Recruitment report. It was not until Employer received that email that it requested an extension of time to file based upon a miscommunication with the advertisement agency.

Employer’s argument for its late filing of the recruitment report is based upon a series of emails between the CO’s office and Employer.³² Specifically, on 14 and 15 Jul 16, Employer replied to the CO apologizing and requesting an extension until 29 Jul 16. On 19 Jul 16, the CO’s office replied noting that the 2015 IFR does not contain provisions for extensions of the recruitment period and to avoid further delay, to submit the recruitment report as soon as possible. Alternatively, the CO noted that Employer could withdraw the case. Employer assumed that this email from the CO granted it an extension and filed the report on 26 Jul 16, fifteen days after the filing deadline.

After reviewing the record, I find that Employer has failed to meet its burden establishing that it complied with the recruitment requirements set forth in the regulations. While Employer failed to timely file its recruitment report, it did not request an extension until *after* the CO emailed Employer notifying it that it failed to submit the report on time.

In simplified terms, Employer missed a deadline and asked for an extension. In response, it received what appears to be a boilerplate reply informing it that no extensions are allowed and it should submit the required report as soon as possible. Employer’s argument is essentially one of equity, suggesting that it detrimentally relied on that response in filing out of time. However, it had already missed its deadline before even asking for the extension. The more accurate view is to consider Employer’s position as one maintaining that the CO waived the deadline, *ex post facto*. While the CO’s response was somewhat ambiguous in that it did not directly reply to the request, that ambiguity weighs against a finding that the CO waived the requirement, even

²⁹ 20 C.F.R. § 655.48(a).

³⁰ See *Whittle, Inc.*, 2016-TLN-0019 (Mar. 9, 2016).

³¹ As noted above, the CO also found that the advertisement was not placed on a Sunday, but Employer appears to have satisfied that issue by submitting a dated copy of the ad for Sunday, July 24th. The basis for denial is the late filing of the recruitment report.

³² The email of the CO is a generic one: tlc.chicago@dol.gov and thus, I am unable to ascertain who exactly sent these emails to Employer. I am only aware that it is someone within the Chicago National Processing Center who communicated with the CO assigned to this case.

assuming he has the authority to do so. Accordingly, I find the CO properly denied the Employer's H-2B Application for Temporary Employment Certification.

ORDER

It is hereby **ORDERED** that the Certifying Officer's denial of the Employer's 12 May 16 Application for Temporary Employment Certification is **AFFIRMED**.

For the Board:

PATRICK M. ROSENOW
Administrative Law Judge