BALCA Case No.: 2017-TLN-00046

ETA Case No.: H-400-167009-937019

In the Matter of:

A NEW IMAGE LANDSCAPE, INC.,

Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary non-agricultural employment provisions of the Immigration and Nationality Act (“INA,” or “the Act”), 8 U.S.C. § 1101(a)(15)(H)(ii), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A. The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States “if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(15)(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). For the reasons set forth below, the Certifying Officer’s (“CO”) denial of temporary labor certification is affirmed.

STATEMENT OF THE CASE


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. See 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) (“2015 IFR”). The 2015 IFR applies if an employer filed its temporary labor certification application after April 29, 2015 and requested a start date after October 1, 2015. In the present case, Employer filed its temporary labor certification application after April 29, 2015, requesting a start date of need after October 1, 2015. Thus, the 2015 IFR applies.

2 For purposes of this opinion, “AF” stands for “Appeal File.”
On February 17, 2017, the CO issued a Notice of Acceptance (“NOA”) informing Employer that DOL had accepted its application for temporary labor certification for processing. (AF 32-38.) The NOA explained that the Employer “must conduct recruitment of U.S. workers and prepare and submit a recruitment report in accordance with 20 CFR 655.40-655.48 and the instructions provided below.” (AF 33.) It stated: “[a]ll recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter.” (AF 33 (emphasis in original).) The NOA set forth “Instructions for Recruiting U.S. Workers,” which included the following requirement: to place a newspaper advertisement on two separate days, one of which must be a Sunday, in a newspaper of general circulation. (AF 33.) The NOA emphasized, “Employers must proceed with advertising in the time specified in this letter, even if the SWA has not provided the employer with a job order number.” (AF 35 (emphasis in original).)

On March 13, 2017, the CO issued a Minor Deficiency Email stating that Employer’s newspaper advertisements did not comply with §§655.42 through 655.46. (AF 28.) Specifically, the CO noted that Employer placed its newspaper advertisements in The Chronicle Telegram on Sunday, March 5, 2017 and Monday, March 6, 2017 even though the February 17, 2017 NOA directed Employer to conduct all recruitment steps within fourteen calendar days from the date of the NOA. (Id.) The Director asked Employer to “notify the Department whether or not it placed additional newspaper advertisements within 14 calendar days from NOA date.” (Id.)

Employer responded to the Minor Deficiency Email on March 17, 2017. (AF 24.) Employer wrote that “[t]he newspaper ads were placed for March 5 and March 6. The employer was unable to place the ads the previous weekend. We request that you accept the ads as a timely bona fide attempt to recruit US workers.” (Id.)

On March 29, 2017, the CO issued a Final Determination denying Employer’s application for temporary labor certification (“Denial”). (AF 11-15.) The CO found that Employer’s listed newspaper advertisements did not comply with Departmental regulations at 20 CFR 655.40(b). (AF 14.) The CO reiterated that Employer placed its advertisements on March 5 and March 6, 2017, more than fourteen calendar days after the February 17, 2017 NOA. (Id.) The CO noted that Employer confirmed that it was not able to timely place its ads. (AF 15.) The CO found that by not publishing both advertisements in the newspaper within fourteen days from the NOA, Employer did not comply with the regulations. (Id.)

On April 4, 2017, Employer submitted a request for review before the Board of Alien Labor Certification Appeals (“BALCA”). (AF 1-9.) Employer noted that the fourteenth calendar day from the February 17 NOA would have been March 3, 2017, thus, Employer placed the job ads only two and three days outside of the fourteen calendar day period. (AF 2.) Furthermore, Employer argued that it placed the job order with the State Workforce Agency and the job order ran for the entire fourteen-day period. (Id.) Employer cited to the 2015 H-2B Interim Final Rule FAQ’s, which provide:

The employer must begin all employer-conducted recruitment activities within 14 calendar days from the date of the NOA. The employer will be able to both begin and complete many of these activities within the 14-day period. Where an
activity takes longer to complete, the employer must start the recruitment activity within the 14-day period and continue the activity until it is completed before submitting the recruitment report to the Chicago NPC.

Employer argued that it began its recruitment within the fourteen calendar-day period although it did not complete it within the fourteen-day period; Employer did complete its recruitment prior to submitting its recruitment report. Thus, Employer contended that the statement in the FAQ applies in this case and the fourteen-day requirement should be extended or waived. (AF 3.)

Employer argued that the fourteen calendar-day requirement should be waived because: 1) it placed the ads within the fifteen business-day period for posting the Notice of the Job Opportunity\(^3\) and 2) the State Workforce Agency job order remained active during the entire period. (Id.) Employer argued that the discrepancy was very minor and did not affect the ultimate goal of recruiting U.S. workers. (Id.)

The Associate Solicitor for Employment and Training Legal Services (“Solicitor”) filed a brief on April 27, 2017. The Solicitor argued that Employer failed to establish compliance with the regulations because Employer failed to place its advertisements within the fourteen-day window as the regulations require. The Solicitor noted that the CO has no authority to waive the fourteen-day deadline once a violation has occurred.\(^4\) See Solicitor’s Brief at 3. The Solicitor also argued that compliance with some of the recruitment requirements does not cure non-compliance with another, independent requirement. Id. at 4. Finally, the Solicitor argued that the 2015 Interim Final Rule FAQ does not apply because Employer did not begin its ad placement within the fourteen-day period. Id.

**SCOPE OF REVIEW**

BALCA has a limited standard of review in H-2B cases. Specifically, BALCA may only consider the appeal file, the parties’ legal briefs, and the employer’s request for review, which may only contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.61(a)(5). After considering the evidence, BALCA must take one of the following actions in deciding the case:

(1) Affirm the CO’s denial of temporary labor certification, or
(2) Direct the CO to grant temporary labor certification, or
(3) Remand to the CO for further action.

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\(^3\) Under section 655.45(b), an employer must post the availability of its job opportunity in at least two conspicuous locations at the place of anticipated employment for at least fifteen consecutive business days.

\(^4\) The Solicitor cited to H&R Drains & Waterproofing, 2016-TLN-00061 (Sept. 8, 2016) and Montauk Manor Condominiums, 2016-TLN-00066 (Sept. 22, 2016).
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. 8 U.S.C. § 1101(a)(15)(H)(ii)(b); Burnham Companies, 2014-TLN-00029 (May 19, 2014). Consequently, before DOL issues a temporary labor certification, employers must conduct certain recruitment steps designed to inform U.S. workers about the job opportunity. See 20 C.F.R. § 655.40-§ 655.47. The employer must conduct these recruitment steps within fourteen calendar days from the date of the Notice of Acceptance. 20 C.F.R. §655.40(b). Section 655.42(a) directs employers to place an advertisement on two separate dates, one of which must be a Sunday.

In the present case, Employer was required to place its job advertisements by March 3, 2017, within fourteen days of the NOA. Employer failed to place its job advertisements within the fourteen-day window by placing the ads on March 5 and March 6. In response, Employer argued that DOL should waive the fourteen-day requirement because Employer’s mistake was minor and the job order ran for fourteen days.

BALCA has found that even a minor delay in placing job advertisements constitutes non-compliance with the requirements. M.A.G. Irrigation, Inc., 2017-TLN-00033 (Apr. 25, 2017)(denying certification where the employer placed its job advertisements one day and five days after the fourteen day deadline). BALCA held that “although a strict enforcement of the regulations can sometimes lead to harsh results, it also ensures the wages and working conditions of U.S. workers will not be adversely affected by similarly employed H-2B workers.” Id. at 6. Furthermore, BALCA has held that substantial compliance with the advertisement requirements is insufficient to meet the employer’s burden in establishing compliance with the regulations. Whittle, Inc., 2016-TLN-00019 (Mar. 9, 2016) (rejecting employer’s argument that it substantially complied with the H-2B advertising requirements, finding that “BALCA has strictly enforced the H-2B newspaper advertisement requirements in order to protect domestic workers.”)

Consequently, the record shows that Employer has failed to comply with the advertisement requirements under 20 C.F.R. §655.42(a) by failing to place its job advertisements within the fourteen day period.
ORDER

In light of the foregoing, it is hereby ORDERED that the Certifying Officer’s Final Determination denying Employer’s ETA Form 9142, H-2B Application for Temporary Employment Certification is AFFIRMED.

For the Board:

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey