

**U.S. Department of Labor**

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**Issue Date: 21 July 2017**

BALCA Case No.: 2017-TLN-00054

ETA Case No.: H-2B/ETA-9142 – H-400-17032-240214

*In the Matter of:*

**BLAZE BAR HARBOR, LLC,**  
Employer.

Certifying Officer: Leslie Abella Dehan  
Chicago National Processing Center

Appearances: Marcus B. Jaynes, Esq.  
*Attorney for the Employer*

Jeffry L. Nesvet, Esq.  
Heather Filemyr, Esq.  
Office of the Solicitor of Labor  
*Attorneys for the Certifying Officer*

Before: Steven B. Berlin  
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).<sup>1</sup> For the reasons discussed below, the Certifying Officer’s denial of the Employer’s Application is affirmed.

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<sup>1</sup> 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). This case falls within those parameters.

## Facts

On or about February 3, 2017, Employer Blaze Bar Harbor, LLC d/b/a Blaze Restaurant filed an H-2B Application for Temporary Employment Certification (signed January 31, 2017) with the Department's Employment and Training Administration. P 52-65.<sup>2</sup> It seeks temporary certification to hire three full-time ("35+ hrs./wk.) seasonal server/hosts at the prevailing wage (\$12.48 per hour – overtime at \$18.72 per hour), with a start date of May 1, 2017, and an end date of November 5, 2017. P 52-59, 73.

The Certifying Officer sent Blaze Bar Harbor and its representative a Notice of Deficiency, dated March 23, 2017. The representative responded substantively by email on March 28, 2017. P 33-36. The Certifying Officer then issued a Notice of Acceptance, dated April 10, 2017. P 25-31.

The Notice of Acceptance includes a section entitled "Employer Requirements." P 25-31. This section includes a detailed statement of the requirements for recruiting U.S. workers and submitting a report concerning the recruitment. The Certifying Officer identifies the applicable regulations. She states in the first paragraph of the section on "Employer Requirements": "All recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter." P 26 (emphasis in original).

In the section on "Instructions for Recruiting U.S. Workers," the Notice begins: "**Employers must proceed with advertising specified in this letter, even if the [State Workforce Agency] has not provided the employer with a job order number.**" P 26 (emphasis in original). After listing thirteen enumerated items that must be included in newspaper advertisements, the Notice repeats the same caution verbatim, again in boldface type. P 28.

The Notice then gives details on the required submission of a recruitment report, which is due by "**May 1, 2017.**" P 29 (emphasis in original). P 21-23.

When the Certifying Officer had not received a compliance report by May 1, 2017, she wrote to Employer's representative, reminding the representative of the May 1, 2017 due date. The representative did not respond until May 10, 2017, when he emailed the recruitment report (dated May 1, 2017).

In the Recruitment Report, Blaze Bar Harbor's owner Matthew Haskell identifies two print advertisements he had placed for the jobs. P 22. The first was in the *Portland Press Herald* on April 29, 2017. The second was in the *Maine Sunday Telegram* on April 30, 2017.

The Certifying Officer denied the application in a "Final Determination," issued on May 16, 2017. She found that Blaze Bar Harbor had failed to meet each of the two H-2B program requirements that employers must show: (1) that there are no sufficient U.S. workers available who can do the job at the time the H-2B application was filed, and (2) that employment of a

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<sup>2</sup> "P" refers to the certified Administrative Record.

foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

On May 26, 2017, Blaze Bar Harbor timely requested administrative review.<sup>3</sup> Consistent with the regulations, the request identifies the decision in dispute, sets out the grounds for the requested review based on the material before the Certifying Officer, and raises legal arguments.<sup>4</sup> The Certifying Officer assembled and submitted the administrative record and filed a timely opposing brief.<sup>5</sup>

### Discussion

BALCA's review is limited to the record before the Certifying Officer at the time of the Final Determination; only the Certifying Officer may accept documentation after the Final Determination.<sup>6</sup> "The scope of the Board's review is limited to the appeal file prepared by the Certifying Officer, 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 Certifying Officer in support of the application." 20 C.F.R. § 655.61. The employer bears the burden of proof to establish it has met the requirements of the H-2B program. *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (*citing* 8 U.S.C. § 1361).

To grant an employer's request for temporary labor certification for the employment of foreign workers in the H-2B nonimmigrant classification, the Secretary of Labor ("Secretary") must make 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

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<sup>3</sup> The request for review must be filed within 10 days after the Certifying Officer's Final Determination issues. 20 C.F.R. § 655.61(a)(1).

<sup>4</sup> 20 C.F.R. § 655.61(a)(2), (3), (5).

<sup>5</sup> 20 C.F.R. § 665.61(b), (c).

<sup>6</sup> 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-00004/17, slip op. at 4-5 (Feb. 21, 2012).

- (2) The employment of the H-2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.<sup>7</sup>

20 C.F.R. § 655.1(a). Here, the Certifying Officer found that Blaze Bar Harbor failed to make an adequate showing to establish either of the criteria.

*Recruiting requirements.*

Unless otherwise instructed by the CO, the employer must conduct the recruitment described in §§655.42 through 655.46 within 14 calendar days from the date the Notice of Acceptance is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in §655.48.

20 C.F.R. § 655.40(b). For newspaper advertising,

The employer must place an advertisement . . . on 2 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 and appropriate to the occupation and the workers likely to apply for the job opportunity.

20 C.F.R. § 655.42(a). The newspaper ad must contain certain information. 20 C.F.R. § 655.41(b).

*Requirements for a recruitment report.* “The employer must prepare, sign, and date a recruitment report . . . . The recruitment report must be submitted by a date specified by the CO.” 20 C.F.R. § 655.48(a). It must contain certain specified information. *Id.*

*Blaze Bar Harbor failed to meet timely the advertising and recruitment report requirements.* The Certifying Officer’s Notice of Acceptance is dated April 10, 2017. Blaze Bar Harbor was required to advertise in newspapers on at least two separate days and complete this within 14 calendar days of the date on the Notice of Acceptance. Blaze Bar Harbor admits that it did not advertise the job in a newspaper until April 29 and 30, 2017. Both advertisements were untimely.

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<sup>7</sup> The H-2B program may extend to “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 Immigration and Nationality Act, the Department of Homeland Security 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 of Labor 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. 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 of Labor. 8 C.F.R. § 214.2(h)(6)(iv); 20 C.F.R. § 655.1.

The Certifying Officer required that Blaze Bar Harbor submit a recruitment report by May 1, 2017. Blaze Bar Harbor did not submit the report until May 10, 2017. The report was untimely.

*Blaze Bar Harbor's arguments.* Blaze Bar Harbor admits that its submissions were untimely. Its arguments are that the advertising was only a few days late, the delay was caused by miscommunications with counsel, the ads didn't lead to any applications anyway, there is no evidence that the late advertising made any difference to the result, the Department should have processed the application at an earlier date (which might also have produced a different result), and the Department has discretion to issue a certification even if the advertising was late.<sup>8</sup>

I find these arguments without merit. The regulations establish the deadline for newspaper advertising at 14 days. This has the effect of making sure that the market for U.S. workers is tested at the time of application. It is part of the Department's role of determining whether there are sufficient numbers of qualified U.S. workers who could do the job at the time of certification.

Although the Certifying Officer has discretion to modify the time for advertising, she did not do so. To the contrary, in the Notice of Acceptance, she twice stated in boldface type that the deadline was 14 days. The repeated admonition was placed at the beginning and end of her discussion of the posting and content requirements for the ads. The admonitions were designed to be certain that anyone reading the provisions about newspaper advertising would understand that the 14-day deadline applied to that requirement.<sup>9</sup> Moreover, Blaze Bar Harbor never requested an extension of time to do the advertising. To whatever extent any adjustment in the 14-day deadline was in the Certifying Officer's discretion, there is nothing to suggest that she abused that discretion.

Difficulties in communications between client and counsel are not a basis to overturn the Department's determination. As the client chose its attorney, it is responsible for its attorney's actions. *Link v. Wabash RR. Co.*, 370 U.S. 626, 633-34 (1962). Thus, Blaze Bar Harbor is responsible for any failures in its communications with its counsel, whether the failure is attributable to Blaze, its counsel, or both of them.

The fact that the late-advertising did not produce any applicants does not, as Blaze Bar Harbor argues, prove that timely advertising would have had the same result. Blaze Bar Harbor offers nothing to support this argument beyond conjecture.

Similarly, the delays that the Department's limited resources cause are not a reason to excuse applicants under the H-2B program from meeting program requirements. The program requirements are intended to protect U.S. workers while allowing employers to hire temporary nonimmigrant aliens only if they do so consistent with program requirements. That goal should not be compromised because of unavoidable delay in government review of applications.

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<sup>8</sup> Blaze Bar Harbor relies on the regulatory language that requires that the advertising be done within 14 days of the Notice of Acceptance, but expressly allows the Certifying Officer to designate a different amount of time. As the regulation begins: "Unless otherwise instructed by the CO . . ." 20 C.F.R. § 655.42(a).

<sup>9</sup> The admonition appears another time, earlier in the Notice of Acceptance.

Finally, Blaze Bar Harbor offers nothing to explain the late filing of the recruitment report.

Order

For the foregoing reasons, the Certifying Officer's "Final Determination" of May 16, 2017, is AFFIRMED.

For the Board:

STEVEN B. BERLIN  
Administrative Law Judge