



Issue Date: 21 June 2017

BALCA Case No.: 2017-TLN-00052
ETA Case No.: H-400-16352-783784

In the Matter of:

LL ALVAREZ, LLC,
Employer.

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: Paul R. Melletz, *Esq.* Leticia Sierra, *Esq.*
Gerstein Grayson Cohen & Melletz, LLP Office of the Solicitor
Mount Laurel, New Jersey U.S. Department of Labor
For the Employer Washington, D.C.
For the Certifying Officer

Before: Peter B. Silvain, Jr.
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to LL Alvarez, LLC’s (“the Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor

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 of need after October 1, 2015, in accordance with all application filing requirements under the IFR. *Id.* at 24110. The Employer filed an *Application for Temporary Employment Certification* after April 29, 2015, with a start date of need after October 1, 2015. Therefore, the IFR applies to this case. All citations to 20 C.F.R. Part 655 refer to the IFR.

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).

certification from the U.S. Department of Labor (“Department”).³ A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.⁴

STATEMENT OF THE CASE

The Employer, located in Audubon, New Jersey, performs landscaping and groundskeeping. (AF 213-230.)⁵ On January 26, 2017, the Employer filed with the CO the following documents: (1) ETA Form 9142B, *Application for Temporary Employment Certification* (“Application”) and (2) ETA Form 9141, *Application for Prevailing Wage Determination*. (AF 100-119). The Employer requested certification for three landscaping and groundskeeping workers⁶ from April 12, 2017, to November 30, 2017, based on a seasonal need. (AF 213).

On March 16, 2017, the CO issued a Notice of Deficiency (“NOD”), which outlined six deficiencies in the Employer’s Application. (AF 206-212). The Employer responded to the NOD on March 17, 2017. (AF 116-202). On March 21, 2017, the CO issued a Minor Deficiency Email. (AF 115). The Employer responded to the Minor Deficiency Email on March 22, 2017. (AF 105-114). On March 23, 2017, the CO issued a second Minor Deficiency Email. (AF 103-104). The Employer responded to the second Minor Deficiency Email on March 24, 2017. (AF 101-102).

On March 24, 2017, the CO issued a Notice of Acceptance (“NOA”) informing the Employer that DOL had accepted its application for temporary labor certification for processing. (AF 94-100). 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 94). It stated: “[a]ll recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter.” (*Id.*) (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 95-96). 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 95) (emphasis in original).

Between March 29 and April 13, 2017, the Employer sought and received additional guidance from the CO regarding its recruitment obligations. (AF 46-89). The Employer requested variances from certain advertising requirements due to cost. (*Id.*). Specifically, the CO denied requests from the Employer for leave to place a Friday ad rather than a Sunday ad due to cost and publish the Sunday ad in an area that did not serve the area of intended employment

³ 8 C.F.R. § 214.2(h)(6)(iii).

⁴ 20 C.F.R. § 655.61(a).

⁵ In this Decision and Order, “AF” refers to the Appeal File.

⁶ SOC (O*Net/OES) occupation title “Landscaping and Groundskeeping Workers” and occupation code 37-3011. AF 213.

(AF 46-47). The Employer also sought leave to reduce the size of the ad, which the CO found permissible so long as the ad contained the required information pursuant to regulation. (AF 51-52). On April 17, 2017, the Employer submitted its recruitment report. (AF 38-45).

On May 10, 2017, the CO issued a Final Determination denying the Employer's Application ("Denial"). (AF 23-37). The CO found that the Employer's recruitment did not comply with Departmental regulations at 20 C.F.R. §§655.41, 655.40(b), and 655.45. (AF 27-28). Specifically, the CO concluded that the Employer failed to: (1) place a Sunday newspaper advertisement; (2) conduct recruitment within 14 days from the date the NOA was issued; and (3) contact a bargaining representative or post notice of the job opportunity at the place of anticipated employment. (AF 27-29). By not completing the necessary recruitment (placing a Sunday newspaper ad and contacting a bargaining representative or posting notice of the job opportunity at the place of anticipated employment) within 14 days from the date the NOA was issued, the CO found that the Employer did not comply with the regulations. (AF 23-27).

On May 24, 2017, the Employer requested administrative review of the CO's Denial before BALCA, as permitted by 20 C.F.R. § 655.61.⁷ (AF 1-10). The Employer noted that it advertised in a local newspaper on Friday, April 14, 2017, due to financial inability to post a Sunday ad. (AF 2-3). Specifically, the Employer argued that placing a Sunday ad was not "cost effective . . . to incur such an unreasonable expense." (AF 3). Further, the Employer provided that it had contacted a local newspaper with Sunday ad space "well within the time parameters allotted by 20 CFR 655.40(b)," but did not receive the "financially unjustifiable" quote for the ad until April 6, 2017. As such, the Employer requested permission to run two consecutive Friday ads. (*Id.*). Finally, the Employer argued that it complied with 20 C.F.R. §655.45, as its recruitment report expressly stated "employment was available to them throughout the season" and it supplied a copy of the job posting and Friday newspaper ad with the New Jersey Department of Labor and Workforce Development that identified the job listing, wages, and type of work to be performed. (*Id.*).

On May 26, 2017, I issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer ("Solicitor") to file briefs within seven business days of receiving the Appeal File.⁸ BALCA received the Appeal File from the CO on June 2, 2017.

The Associate Solicitor for Employment and Training Legal Services ("Solicitor") filed a brief on June 13, 2017. The Solicitor argued that the Employer failed to meet the terms of certification as it did not fully comply with the recruitment requirements, including the Sunday

⁷ Pursuant to 20 C.F.R. § 655.61(a), within ten (10) business days of the CO's adverse determination, an employer may request that BALCA review the CO's denial. Within seven (7) business days of receipt of an employer's appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO's decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO's brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery

⁸ 20 C.F.R. § 655.61(c).

advertisement requirement, the requirement to inform the Employer's employees or their union representative of the job opportunity, and the requirement to complete all recruitment steps within the 14-day period. (*Certifying Officer's Brief at 3-4*). The Solicitor further argued that substituting the required recruitment steps, regardless of reason, did not excuse noncompliance. (*Id.*). Moreover, the Solicitor noted that a CO may not certify an application based on an employer's substantial compliance or substituted actions. (*Id.* at 4). Additionally, the Solicitor averred that the required recruitment steps reflected the Department's considered judgment about what timeframes and methods of notice to U.S. workers best support other program requirements and the goals of the statute. (*Id.* at 4-5). Given this, the Solicitor concluded that the Employer's failure to comply with the requirements impeded both the unavailability and adverse effect determination that the statute requires. (*Id.* at 5).

DISCUSSION AND APPLICABLE LAW⁹

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.¹⁰ 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.¹¹

The Employer bears the burden of proving that it is entitled to temporary labor certification.¹² The CO may only grant an employer's H-2B application 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.¹³ Consequently, before a temporary labor certification is issued, an employer must conduct recruitment steps designed to inform U.S. workers about the job opportunity.¹⁴ The requisite recruitment steps must be conducted within 14 days from the date of the NOA.¹⁵ Section 655.42(a) requires employers to place two newspaper advertisements on separate dates, one of which must be a Sunday.

In the present case, the Employer was required to place two newspaper ads on separate dates, one of which must have been a Sunday, on or before April 7, 2017.¹⁶ Instead, the Employer placed its single Friday ad on April 14, 2017, seven days after the regulatory mandated

⁹ For the purposes of deciding this appeal, I have limited my consideration to the CO's first and second grounds for denial—that the Employer did not place a Sunday newspaper ad within the 14-day timeframe in violation of 20 C.F.R. §§655.42(a) and 655.40(b).

¹⁰ 20 C.F.R. § 655.61.

¹¹ 20 C.F.R. § 655.61(e).

¹² 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).

¹³ 20 C.F.R. §655.1(a).

¹⁴ See 20 C.F.R. §§655.40-655.47

¹⁵ 20 C.F.R. §655.40(b).

¹⁶ April 7, 2017, constituted the end of the 14-day period beginning on March 24, 2017, the date NOA was issued.

fourteen day period ended. Further, by placing its single ad on a Friday it also failed to fulfill the required placement of a suitable ad in the appropriate newspaper on a Sunday. Substantial compliance with the advertising requirements is insufficient to meet the employer's burden in establishing compliance with the regulations.¹⁷ The instant case is no exception. While the undersigned can appreciate the Employer's financial difficulties in securing the requisite Sunday ad, that does not excuse noncompliance with the applicable regulations. 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.¹⁸

Based on the evidence of record, I find that the Employer has failed to comply with the recruitment requirements under 20 C.F.R. §§655.42(a) and 655.40(b). Therefore, I find that the CO properly concluded that the Employer has failed to show that there are insufficient qualified U.S. workers available to perform the temporary services or labor for which the Employer desires to hire foreign workers and that employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.¹⁹

ORDER

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

For the Board:

PETER B. SILVAIN, JR.
Administrative Law Judge

¹⁷ *Whittle, Inc.*, 2016-TLN-00019 (Mar. 9, 2016) (rejecting an 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.").

¹⁸ *M.A.G. Irrigation*, 2017-TLN-00033 (Apr. 25, 2017) at 6.

¹⁹ 20 C.F.R. §655.1(a).