

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 25 April 2017

BALCA Case No.: 2017-TLN-00033
ETA Case No.: H-400-16366-482738

In the Matter of:

M.A.G. IRRIGATION, INC.
Employer

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: Michele Ann Contreras, Esquire
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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 case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h) and 20 C.F.R. Part 655 Subpart A. This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to M.A.G. Irrigation, Inc.’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 January 1, 2017, Employer applied for temporary employment certification through the H-2B program to fill one position for a “Landscaping and Groundskeeper Worker” for the period of April 1, 2017 through December 1, 2017. (AF 64-80).¹

On January 12, 2017, the CO issued a Notice of Deficiency citing deficiencies regarding 20 C.F.R. §§ 655.10(a), 655.15(a), 655.16, and 655.18.² (AF 54-60). Specifically, the CO notified Employer that its H-2B application was deficient pursuant to Section 655.10(a) because the basic wage indicated in the application was not equal to the highest of the prevailing wage and applicable minimum wages. The CO also determined that Employer failed to submit the job order to the SWA serving the area of intended employment at the same time it submitted its application to the CNPC as required by 20 C.F.R. § 655.16. The CO also noted that the Massachusetts SWA confirmed Employer did not place a job order for the requested position. Further, the job order did not contain all of the required language as required by 20 C.F.R. § 655.18. (AF 57-59). Finally, the CO requested the Employer provide a complete and accurate ETA Form 9142B, Appendix B, which reflects the Interim Final Rule published on April 29, 2015 as required by 20 C.F.R. § 655.15(a). (AF 59-60).

On January 12, 2017, Employer responded to the CO’s Notice of Deficiency and submitted an updated ETA Form 9142, Appendix B and amended job order. Employer also amended Section G of the ETA Form 9142 indicating it will pay the highest of the applicable wages. (AF 46-53).

On January 26, 2017, the CO issued a Second Notice of Deficiency citing deficiencies regarding the inconsistent wage rates contained in the submitted job order as well as an incorrect overtime wage rate that was not one and a half times the basic rate. The CO instructed Employer to amend the ETA Form 9142 such that it contains consistent wage rates as well as a correct overtime wage rate. (AF 39).

On January 30, 2017, Employer responded to the CO’s Second Notice of Deficiency and provided an amended job order indicating a consistent wage rate and overtime wage rate. (AF 33-38). On February 7, 2017, the CO issued a Notice of Acceptance informing Employer that its temporary labor certification had been accepted for processing. (AF 26-32). On February 28, 2017, Employer submitted its recruitment report. (AF 23-25).

On March 2, 2017 and March 7, 2017, the CO notified Employer that upon a review of the recruitment, Employer listed newspaper advertisements that do not comply with 20 C.F.R. §§ 655.42-655.46. Specifically, the CO stated the advertisements placed on February 22, 2017 and February 26, 2017 fall outside of the required fourteen day timeframe stated in the Notice of Acceptance. The CO instructed Employer to notify the Department whether or not it had placed

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

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.

an additional Sunday newspaper advertisement within the fourteen calendar days from the Notice of Acceptance. (AF 21-22).

On March 8, 2017, Employer responded to the CO's inquiry and attested that it only placed newspaper advertisements on February 22, 2017 and February 26, 2017. Employer also stated it did not place an additional Sunday newspaper advertisement which within 14 calendar days from the date of the Notice of Acceptance, because "Employer was out of town during the 14 calendar days, and unable to get the Sunday ad placed during that time." Thus, Employer requested "that the ads placed be accepted as proof that the employer made a bona fide test of the labor market." (AF 19-20).

On March 20, 2017, the CO made its final determination regarding Employer's H-2B application. (AF 9-18). The CO denied Employer's application due to its failure to establish that (1) there are not sufficient U.S. workers available 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) the employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed. (AF 9).

Specifically, the CO found that both of Employer's print advertisements dated February 22, 2017 and February 26, 2017 were not completed within 14 days from the date that the Notice of Acceptance was issued. The CO also found Employer's response that it was out of town during the 14 calendar days and unable to get the ads placed during that time was insufficient to overcome the deficiency. Thus, the CO determined Employer failed to meet the regulatory requirements at 20 C.F.R. § 655.40(b) and denied Employer's application. (AF 12).

On March 29, 2017, 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. (AF 1-8). On March 30, 2017, BALCA docketed the appeal and issued a Notice of Case Assignment. Pursuant to the Notice of Case Assignment, 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 April 10, 2017. Because H-2B appeals are expedited, and in accordance with 20 C.R.F. § 655.33, the parties were given a brief due date of April 19, 2017. Thereafter, the parties timely submitted briefs.

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).

After considering all 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.

20 C.F.R. § 655.61(e)(1)-(3).

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 a temporary labor certification may be issued, 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. 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. *See* 20 C.F.R. § 655.48. The regulation requires that the recruitment report contain specific information detailing the employer’s recruitment activity and be submitted “by a date specified by the CO in the Notice of Acceptance.” 20 C.F.R. § 655.48(a). 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. *See Whittle, Inc.*, 2016-TLN-00019 (Mar. 9, 2016).

Here, the CO denied Employer's H-2B Application after determining that Employer did not comply with the recruitment requirements set forth in the regulations. Specifically, the CO determined that Employer failed to properly advertise the job opportunity by not placing its newspaper advertisements within 14 calendar days from the Notice of Acceptance date.

The regulation at 20 C.F.R. § 655.40(b) provides: "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). The recruitment steps described in §§ 655.42 through 655.46 include: newspaper advertisements; contact with former U.S. employees; contact with employees' bargaining representative or posting of the job opportunity; and, when required by the CO, additional reasonable recruitment. After the employer's recruitment activity is complete, the employer must prepare and submit a recruitment report detailing its recruitment activity, as specified in 20 C.F.R. § 655.48.

Here, the Notice of Acceptance was issued on February 7, 2017, and tracked the requirements set forth in the regulations. The Notice of Acceptance required Employer to conduct the recruitment described in §§ 655.42 through 655.46 (with no additional recruiting steps added by the CO) **within 14 calendar days** from February 7, 2017, and then submit a recruitment report by March 3, 2017. (AF 26-32) (emphasis added). Therefore, Employer was required to: place newspaper advertisements in accordance with the regulations; contact former U.S. employees; and provide notice of the job opportunity to the bargaining representative or, if there was no bargaining representative, post the job opportunity in at least two conspicuous locations at the place of anticipated employment for 15 consecutive business days; and then file a recruitment report detailing this activity once completed.

As stated in its recruitment report, Employer contacted its former employees and posted the job opportunity in two conspicuous locations at the place of anticipated employment for 15 consecutive business days. In addition, Employer placed two newspaper advertisements with the Taunton Daily Gazette on February 22, 2017 and February 26, 2017. (AF 24). However, the placement of the two newspaper advertisements fail to comply with the regulations, because Employer was required to conduct its recruitment activity within 14 days of the Notice of Acceptance (issued February 7, 2017), and it did not place the print advertisements within the 14 calendar day timeframe. *See* 20 C.F.R. § 655.40(b). Further, in an email exchange with the CO, Employer admitted it "did not place an additional Sunday newspaper advertisement which was placed with 14 calendar days from NOA date" due to being out of town during that timeframe. (AF 19).

Although Employer contends "the discrepancy in the dates was very minor, and did not affect the ultimate goal of recruiting U.S. workers," Employer's failure to timely advertise the job opportunity warrants a denial of labor certification in order to protect domestic workers. (AF 2); *Ridgebury Management LLC*, 2014-TLN-00020 (April 7, 2014). *See also BPS Industries*,

Inc., 2010-TLN-00014; 2010-TLN-00015 (Nov. 24, 2009) (“recruitment requirements are ‘designed to reflect what the Department has determined, based on program experience, are most appropriate to test the labor market’”); *Freemont Forest Systems, Inc.*, 2010-TLN-00038 (March 11, 2012) (“by omitting one of the advertising components, the Employer did not conduct a proper test of the labor market to determine if labor certification was required”). 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. *See* 20 C.F.R. § 655.1(a).

For these reasons, I find Employer has failed to meet its burden of establishing that it complied with the recruitment requirements set forth in the regulations. Accordingly, the CO properly denied the Employer’s H-2B Application for Temporary Employment Certification.

ORDER

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

ORDERED this 25th day of April, 2017 at Covington, Louisiana.

CLEMENT J. KENNINGTON
Administrative Law Judge