

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-00034
ETA Case No.: H-400-16366-901563

In the Matter of:

BOOTHILL PROPERTIES, INC.,
Employer

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For the Certifying Officer

Before: **TIMOTHY J. McGRATH**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from Employer's request for review before the Board of Alien Labor Certification Appeals ("BALCA") of the denial by a Certifying Officer ("CO") for the Employment and Training Administration ("ETA") of its application for H-2B temporary labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), 1184(a)(c); 8 C.F.R. § 214.2(h); 20

C.F.R. Part 655, Subpart A.¹ For the reasons set forth below, the CO's denial of temporary labor certification in this matter is affirmed.

STATEMENT OF THE CASE

On January 1, 2017, the ETA received an application for H-2B temporary labor certification from Boothill Properties, Inc. ("Employer") for employment of six "Room Attendants" from April 1, 2017 to December 31, 2017. AF 59-67.² The Employer's application identified one worksite in Havre, Montana and stated that its need was "peakload." AF 59, 62.

On January 23, 2017, the CO issued a Notice of Deficiency ("NOD"), notifying Employer that its application failed to meet the criteria for acceptance based on three specific deficiencies. AF 51-58. First, Employer failed to establish the job opportunity is temporary in nature. AF 54-55. Second, Employer failed to submit an acceptable job order. AF 55-57. Lastly, Employer did not submit a complete and accurate ETA Form 9142. AF 57. The CO requested additional documentation to cure these deficiencies. AF 54-57.

On February 6, 2017, Employer responded to the NOD with the requested information. AF 35-50. Employer's response included its monthly payroll information for calendar years 2015 and 2016, profit and loss statements from January 2016 to December 2016, a copy of its job order, and an amended ETA Form 9142. AF 39-50.

On February 17, 2017, the CO issued a Notice of Acceptance ("NOA") of Employer's application. AF 28-34. In the NOA, the CO instructed Employer to "[c]onduct recruitment of U.S. workers and prepare and submit a recruitment report in accordance with 20 CFR 655.40-655.48 All recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter." AF 29 (emphasis in original). The CO directed Employer, among other things, to "place a newspaper advertisement on two separate days, which may be consecutive, one of which must be a Sunday, in a newspaper of general circulation

¹ On April 29, 2015, the Department of Labor ("DOL") and the Department of Homeland Security jointly published an Interim Final Rule ("2015 IFR") amending the standards and procedures that govern the H-2B temporary labor certification program. *See* 80 Fed. Reg. 24042 (Apr. 29, 2015). This case will be heard under the procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR.

² The appeal file is referenced herein as "AF" followed by the page number.

serving the area of intended employment and appropriate to the occupation and the workers likely to apply for the job opportunity.” AF 29.

On March 10, 2017, Employer provided the CO with its recruitment report indicating it placed its advertisements on Monday, February 27, 2017 in the *Havre Daily News*, and on Sunday, March 5, 2017 in the *Great Falls Tribune*. AF 23-24. On March 14, 2017, the CO sent Employer a minor deficiency email requesting Employer notify DOL whether an additional Sunday newspaper advertisement was placed within 14 calendar days from the NOA date. AF 20-22. The CO noted the Sunday, March 5, 2017 newspaper advertisement identified in the recruitment report ran outside of the required timeframe. AF 20-22. That same day, Employer responded to the CO’s email indicating it did not place an additional Sunday newspaper advertisement within 14 calendar days from the NOA date. AF 20.

On March 20, 2017, the CO denied Employer’s application for temporary labor certification. AF 9-19. The CO denied certification pursuant to 20 C.F.R. § 655.40(b) because Employer failed to conduct its recruitment within 14 calendar days from the date the NOA was issued. AF 13. Employer’s advertisement in the *Great Falls Tribune* was placed on Sunday, March 5, 2017 – two days after the mandatory period lapsed. AF 13.

On April 3, 2017, Employer requested administrative review of the denial before BALCA. AF 1-3. In its review request, Employer stated its second advertisement was placed only two days outside the 14-day period. AF 2. Employer argued the “discrepancy in dates was very minor, and did not affect the ultimate goal of recruiting U.S. workers.” AF 2. Employer indicated its advertisement was not placed within the required timeframe because it was out of town when the NOA was issued. AF 2.

On April 12, 2017, I issued Notice of Docketing allowing the parties to file briefs within seven business days. The parties filed their appellate briefs in this matter on April 19, 2017 (“Er. Br.” and “CO Br.” respectively). In Employer’s appellate brief, it requested the CO waive the 14-day requirement and reiterated much of its argument presented in its appeal to BALCA. Er. Br. at 2.³ The CO argued the denial of Employer’s application based on its failure to advertise within the 14-day period was not arbitrary or capricious. CO Br. at 3. The CO indicated this type of recruitment error merits denial of certification as the regulatory requirements are strictly enforced in order to protect U.S. workers. *Id.* at 2-3.

³ I have hand-numbered the pages in Employer’s brief as it was not paginated.

DISCUSSION

The 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. § 655.61(a), (e). The issue before me is whether the CO properly denied certification in light of Employer's failure to conduct its recruitment within the obligatory timeframe.

Before temporary labor certification is granted, employers must follow specific recruitment steps in order "to ensure that there are not qualified U.S. workers who will be available for the positions listed" in the employer's application. *See* 20 C.F.R. §§ 655.40 – 655.47. A CO may only grant certification to an employer if it can demonstrate there are not available U.S. workers who are capable of performing temporary labor positions at the time the employer files its application. 8 U.S.C. § 1101(a)(15)(H)(ii)(b); *Burnham Companies*, 2014-TLN-00029, PDF at 5 (May 19, 2014).

An employer is required to provide the CO with a recruitment report confirming its compliance with the regulatory recruitment requirements. *See* 20 C.F.R. § 655.48. Pursuant to section 655.48(a), the recruitment report must detail the employer's recruitment activity. The regulations further provide: "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 CO denied Employer's H-2B application because it did not place its Sunday advertisement within 14 days from the date of the NOA. The CO issued its NOA letter on February 17, 2017 and directed Employer to place its newspaper advertisements within 14 calendar days from the date of the letter. AF 29. Thus, Employer had from February 18, 2017 until March 3, 2017 to conduct its recruitment. Although Employer placed two separate newspaper advertisements as instructed by the CO, the *Great Falls Tribune* Sunday advertisement was placed outside of the required 14-day period on March 5, 2017. AF 23-24.

Employer admits it failed to conduct its recruitment within the required timeframe. *Er. Br.* at 1-2. In its appellate brief, Employer argues the 14-day period requirement should be waived because its recruitment activity *began* within 14 calendar days of the date of the NOA

letter, although its recruitment was not completed within that timeframe. *Id.* at 2. In support, Employer cites to a 2015 ETA H-2B interim final rule Frequently Asked Question (“FAQ”).⁴ *See id.* I find Employer’s argument unconvincing. ETA’s FAQs are persuasive, but not binding authority. Further, the FAQ does not support Employer’s position as it solely addresses circumstances where recruitment directed by the CO will take longer than 14 days to complete. Employer does not aver its recruitment could not be conducted within 14 calendar days of the NOA date, but requests to be excused from the timeframe requirement as it was out of town when it received the NOA. *See Er. Br.* at 2.

The applicable regulation and the CO’s instructions mandated Employer to conduct, not merely begin, its recruitment within 14 calendar days from the NOA date. *See* § 655.40(b); AF 29. As pointed out by the CO, BALCA adopts a strict application of the recruitment requirements set forth in the regulations. *See Montauk Manor Condominiums*, 2016-TLN-00066 (Sept. 22, 2016) (finding employer failed to timely file its recruitment report pursuant to 20 C.F.R. § 655.48); *H & R Drains & Waterproofing LLC*, 2016-TLN-00061 (Sept. 8, 2016) (affirming denial of certification where employer failed to conduct recruitment within timeframe mandated by 20 C.F.R. § 655.40(b)). Accordingly, I affirm the CO’s denial of certification

⁴ The ETA has issued the following response to a FAQ about deadlines for employer-conducted recruitment:

11. Must all employer-conducted recruitment be completed within 14 calendar days from the date on which the Notice of Acceptance (NOA) was issued?

The 2015 H-2B Interim Final Rule (IFR) requires the employer to engage in the employer-conducted recruitment activities directed in the NOA (e.g., newspaper advertisements, contact with former U.S. workers, and contact with the bargaining representative or posting a notice) within the 14-calendar days from the date the NOA is issued. 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.

For example, where there is no applicable bargaining representative, the regulation requires the employer to post the availability of the job opportunity for at least 15 consecutive business days at the place(s) of intended employment. This posting must be started, but does not need to be completed, within the 14-day period after the NOA is issued. Similarly, if the CO directs the employer to conduct additional recruitment activity that requires more than 14 calendar days to complete, that activity must be started, but need not be completed, within the 14-day period after the NOA is issued.

ETA, H-2B FAQs – Round XI at 4, https://www.foreignlaborcert.doleta.gov/pdf/H-2B_2015_IFR_FAQs_Round11.pdf.

based on Employer's failure to conduct its recruitment within 14 days of the date of the CO's NOA letter.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Board:

TIMOTHY J. McGRATH
Administrative Law Judge