

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 18 October 2017**

**BALCA Case No.: 2017-TLN-00069**  
**ETA Case No.: H-400-17142-707551**

*In the Matter of:*

**DDM HAULERS, LLC,**  
*Employer.*

Certifying Officer: Chicago National Processing Center

Appearances: Sheila A. Gray  
LaborMadeEasy  
Kingston, OK  
*For the Employer*

Nora Carroll, Esquire  
Micole Allekotte, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

Before: **CARRIE BLAND**  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

On September 20, 2017, the Board of Alien Labor Certification Appeals (“BALCA”) received a request for administrative review of the Certifying Officer’s Final Determination in the above-captioned H-2B temporary labor certification matter.<sup>1</sup>

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<sup>1</sup> On April 29, 2015, the Department of Labor (“DOL”) 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. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

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.<sup>2</sup> Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”). 8 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer 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. 20 C.F.R. § 655.61(a).

## STATEMENT OF THE CASE

On July 31, 2017, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from DDM Haulers, LLC (“Employer”). AF 113 – 136.<sup>3</sup> Employer requested certification for 17 “full-time, temporary construction laborers” from October 1, 2017 until July 1, 2018. AF 125. Employer indicated that the nature of its temporary need was a peakload need, and explained that:

By mid-November most construction deliveries have been made. Therefore, from November 21, 2016 to August 20, 2017 we need to supplement our permanent workers. October 1, 2017 to July 1, 2018 is our peakload period for construction laborers. These full time, temporary worker[s] will not become a part of our regular operations. From August 1 – September 30th the need for field construction slows and our permanent worker[s] are well able to handle the workload.

AF 125.

On July 21, 2017, the CO issued a Notice of Deficiency (“NOD”) notifying Employer that its application did not comply with the requirements of the H-2B program. AF 106 – 112.

First, the CO identified a “failure to establish the job opportunity as temporary in nature” and requested further information and documentation to demonstrate Employer’s temporary peakload need. Specifically, the CO requested that Employer provide:

1. An explanation as to why the requested dates of need have significantly changed from the employer’s prior application;
2. An explanation as to why the submitted documentation does not support the dates of need being requested for certification;
3. Summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation of Construction Laborer, the

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<sup>2</sup> See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(ii)(B); 20 C.F.R. § 655.6(b). The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Continuing Appropriations Act, 2018, Pub. L. No. 115-56, Division D, § 101(a)(8) (2017).

<sup>3</sup> References to the 139-page appeal file will be abbreviated with an “AF” followed by the page number.

total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system;

4. A summary of all projects that have contributed to the employer's need for temporary workers at its worksite location(s) during its requested dates of need. The list should include the anticipated start and end dates of each project and worksite addresses;
5. Contracts for all the identified projects in the employer's summary that indicate the worksite/project. The contracts must also include a description of the work to be performed and include signatures of all appropriate parties; and
6. Other evidence and documentation that similarly serves to justify the standard of need and dates of need being requested for certification.

AF 109 – 110.

Second, the CO identified a "failure to establish temporary need for the number of workers requested," and requested further explanation and documentation to establish employer's need for a total of 17 workers. The CO requested that the Employer provide:

1. An explanation as to why the requested number of workers has changed from the employer's prior application;
2. An explanation as to why the submitted documentation does not support the number of workers being requested for certification;
3. Summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation of Construction Laborer, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
4. Other evidence and documentation that similarly serves to justify the increase in the number of workers from the employer's prior application, H-400-17142-707551, if any.

AF 110 – 111.

Third, the CO identified an issue with "disclosure of foreign worker recruitment" in that the employer's application did not include an agreement between itself or its agent and an agent or recruiter engaging in the recruitment of H-2B workers. The CO requested the following:

1. The employer and its agent must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2[B] workers under this Application for Temporary Employment Certification, including the identity and location of all persons and entities hired by or working for the recruiter or agent. All agreements must contain the required language

prohibiting seeking or receiving payments from prospective employees as indicated at 20 C.F.R. § 655.20(p); or

2. The employer must notify the Department that they will not utilize any agent or recruiter for the recruitment of H-2[B] workers under this Application for Temporary Employment Certification.

AF 111 – 112.

On August 1, 2017, Employer responded to the NOD, including in its response an amended statement of temporary need; summarized monthly payroll documents for the years 2015 to 2016; multiple contractor agreements; a request to amend the number of workers from 17 to 18; and a statement that the employer will not utilize an agent or recruiter. AF 95 – 105. With regard to its amended statement of temporary need, Employer explained:

Employer's dates of need have changed to coincide with its contractors' needs. Contracts attached hereto, clearly show Employer's peakload need to be October 2, 2017 through July 1, 2018. These contracts further stipulate Employer have available 18 laborers during this time period. Copies of these contracts are attached as Exhibit 1. Employer has also attached copies of its monthly payroll reports for calendar years (CYs) 2015 and 2016 as you requested. These payroll reports are attached as Exhibit 2. These documents were not submitted with the Application as DDM had not received the signed contracts from its contractors at the time of filing. Employer believes that the submitted contracts fully support its peakload need, its requested dates of need, as well as its requested number of workers.

With regard to its request to amend the number of workers to 18, Employer explained:

The requested number of workers have changed because the companies which have contracted with the employer to provide construction services have stipulated in their contracts that Employer have available 18 construction laborers during the time period of October 2, 2017 to July 1, 2018. Copies of these contracts are attached as Exhibit 1. Employer has also attached copies of its monthly payroll reports for calendar years (CYs) 2015 and 2016 as you requested. These payroll reports are attached as Exhibit 2. These documents were not submitted with the Application as DDM had not received the signed contracts from its contractors at the time of filing. The payroll report submitted at the time of filing was not the intended payroll report.

AF 111 – 112.

After reviewing the documentation that Employer submitted in response to the NOD, the CO concluded that Employer met the requirements in the deficiency and issued a Notice of Acceptance ("NOA"). AF 85 – 92. The CO authorized Employer to conduct recruitment according to agency regulations. AF 86 – 92.

On August 28, 2017, at 1:14 PM the CO received Employer's Recruitment Report via email. AF 82 – 84. The Report is copied in part below:

DDM Haulers LLC  
RECRUITMENT REPORT

Case Reference Number: H-400-17142-707551

Dear Certifying Officer:

The Texas Workforce Commission (TWC) placed the position on the State website. I placed 2 advertisements in the Big Spring Herald (attached) one on Sunday, October 2 and one on Tuesday September 27th as required by the Notice of Acceptance. Additionally, I posted the job order in a conspicuous place at the office and offered the position to all current workers. I received no inquiries.

AF 84. The same day, at 1:20 PM, the CO received a "corrected" Revised Recruitment Report from Employer via email. 79 – 81. The Revised Report read, in part, as follows:

**REVISED**  
DDM Haulers LLC  
RECRUITMENT REPORT

Case Reference Number: H-400-17142-707551

Dear Certifying Officer:

The Texas Workforce Commission (TWC) placed the position on the State website. I placed 2 advertisements in the Big Spring Herald (attached) one on Sunday, October 2 and one on Tuesday \_\_\_\_\_ as required by the Notice of Acceptance. Additionally, I posted the job order in a conspicuous place at the office and offered the position to all current workers. I received no inquiries.

AF 81.

On August 29, 2017, the CO issued a Minor Deficiency email to Employer. AF 77 – 78. In its email, the CO explained that the recruitment report did not address the following issues:

1. Contact former U.S. employees employed in the occupation and at the place of employment during the previous year, including those workers laid off within 120 days before the date of need (except those U.S. workers dismissed for cause or who abandoned the worksite), to inform them of the job opportunity and ask if they are interested in returning; and
2. The revised recruitment report included newspaper publication dates that had a line drawn through them as to remove them from the document; however, the employer must include its publication dates. The employer's report also indicated that the advertisements were attached; however, there were no advertisements submitted.

AF 77.

The CO instructed that Employer must submit an amended recruitment report which accounts for each of the required recruitment steps and information, and requested the advertisements that the Employer referenced as attached in its report. The CO required Employer to respond by e-mail or fax no later than 2:00 PM on August 31, 2017. AF 77.

The CO did not receive a response from Employer by the stated deadline of August 31, 2017. Because Employer's application did not address the above-noted issues, and because Employer did not issue a timely response to the CO's Minor Deficiency email, the CO determined that the Employer failed to provide a recruitment report in compliance with Department regulations at 20 C.F.R. § 655.43 and 20 C.F.R. § 655.40(b). Consequently, the CO issued a Denial of Employer's application on September 14, 2017. AF 68.

In its Denial, the CO indicated that Employer failed to show that "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-2[B] classification at the place where the foreign worker is to perform the work," and that "[t]he employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed." AF 64. In its enclosures for denial, the CO identified two deficiencies with Employer's application. First, the CO indicated an issue with "Contact with former U.S. Employees." Specifically, the CO stated that:

In the recruitment report, received on August 28, 2017, the employer failed to confirm that former U.S. employees employed in the occupation and at the place of employment during the previous year were contacted to inform them of the job opportunity and to ask if they are interested in returning. On August 29, 2017, the Chicago NPC sent an email to the employer notifying the employer that this information was missing and requesting that the employer submit an updated recruitment report indicating how its contacted former employees. To date, the Chicago NPC has not received the employer's amended recruitment report.

AF 67.

Second, the CO identified an issue with "Employer-conducted recruitment." Specifically, the CO stated that:

The Notice of Acceptance letter issued to the employer on August 2, 2017, states that "[a]ll recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter." On August 28, 2017, the employer provided a recruitment report stating that the required print advertisements were placed with the Big Spring Herald newspaper publication on Sunday, October 2, 2017 and Tuesday, September 27. Then the same day, August 28, 2017, the employer submitted a revised recruitment report with a line drawn through the dates as to redact them from the document; however, the employer did not provide amended dates as evidence of the publication dates. Both reports

also indicated that the advertisements were attached; however, there were no advertisements submitted or attached to either recruitment report.

AF 68.

On September 14, 2017, the same day of the CO's Denial, but after the Denial was issued, the CO received three Revised Recruitment Reports from Employer via email. AF 54 – 63. The reports were identical, and two were dated August 28, 2017, while the third had 28 crossed out and 29 written in. AF 56, 59, 63. All three reports read as follows:

The Texas Workforce Commission (TWC) placed the position on the State website. I placed 2 advertisements in the Odessa American on Sunday, August 6th and on Monday, August 7th as required by the Notice of Acceptance. There are no former workers to contact. Additionally, I posted the job order in a conspicuous place at the office and offered the position to all current workers. I received no inquiries.

AF 56, 59, 63.

In one of these emails, Employer asked if the Revised Recruitments Report “change[s] the Denial?” AF 54. The CO did not respond to these emails from Employer, however, the CO chose to include these emails within the appeal file. For that reason, under 20 C.F.R. § 655.61(e), I will consider them as part of my review of this case.

On September 20, 2017, Employer requested administrative review of the denial. AF 1. In its request, Employer stated that:

Employer has meet (sic) and complied with every Federal regulation covering the H-2B visa program except for the delay in filing the corrected Recruitment Report. That Recruitment Report has, at this time, been submitted to the Chicago National Processing Center (CNPC).

...

Immediately upon receipt of the Denial from CNPC, agent realized what had happened, obtained the revised, signed Recruitment Report and submitted it to the CNPC in hopes that this series of errors could be corrected.

AF 1 – 2.

On October 10, 2017, counsel for the CO filed a brief with this Office. In its brief, the CO submits that, based on the information submitted by the Employer in the AF, the Employer's business did not establish that it placed newspaper advertisements in accordance with 20 C.F.R. §§ 655.41, 655.42. Brief at 3. The CO points to the Employer's failure to attach advertisements to either the Recruitment Report or the Revised Recruitment Report, and Employer's failure to respond to the CO's Minor Deficiency Email by the Deadline of August 31. *Id.* at 3. The CO also refers to the Revised Recruitment Report sent after the denial, noting that the statement

changed the name of the paper and job placement dates, but still did not attach advertisements as required. *Id.* at 4. The CO argues that even the Employer’s appeal, filed on September 20, 2017, does not clearly state the name of the paper and dates of publication. *Id.* at 4. For these reasons, the CO requests that its decision should be affirmed.

## **DISCUSSION AND APPLICABLE LAW**

BALCA’s standard of review in H-2B cases is limited. BALCA reviews H-2B decisions under an arbitrary and capricious standard. *See Brooks Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). 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 the Final Determination. 20 C.F.R. § 655.61. 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. 20 C.F.R. § 655.61(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).

The CO denied Employer’s application because Employer failed to indicate whether it contacted former employees concerning the job posting, and because it failed to provide copies of newspaper advertisements for the job posting. AF 67 – 68. The CO argues that its denial of certification must be upheld unless shown by Employer to be arbitrary and capricious. Brief at 3. Meanwhile, Employer in its appeal notice argues that it “ran its advertisements as required and filed its recruitment report—albeit an incorrect recruiting report—in a timely manner.” AF at 2.

### ***Contacting Former Employees***

Pursuant to the regulation at 20 C.F.R. § 655.43, an employer is required to “contact its former U.S. workers, including those who have been laid off within 120 calendar days before the date of need, employed by the employer in the occupation at the place of employment during the previous year,” and “disclose the terms of the job order, and solicit their return to the job.” In its Recruitment Report before the CO, Employer failed to indicate whether it attempted to make contact with any former employees. After the CO’s Denial, Employer sent an additional Revised Recruitment Report on September 14, 2017, which included the sentence “There are no former workers to contact.” AF 59. On appeal, the CO did not address this deficiency in its brief.

Although this September 14<sup>th</sup> Recruitment Report was sent after the deadline set by the CO, the CO included the September 14<sup>th</sup> Recruitment Report within the appeal file. AF 54 – 63.

Under 20 C.F.R. § 655.61(e), BALCA “must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted.” The September 14<sup>th</sup> Recruitment Report is part of the Appeal File, so it is properly in the record and is considered in rendering this decision.

Upon review of the record, I find that Employer met the requirement of contacting former employees. 20 C.F.R. § 655.43 requires employers to contact former U.S. employees, under the assumption that these former employees actually exist. In this case, Employer indicated in its September 14<sup>th</sup> Recruitment Report that there were no former U.S. employees for it to contact concerning this job posting. AF 59. This is sufficient to establish that Employer did not have to comply with the requirement in 20 C.F.R. § 655, and therefore discharged its duty under that provision. Having no argument from the CO to the contrary, I find that Employer has met the requirements of 20 C.F.R. § 655.43, and reverse the CO’s denial with respect to contacting former employees.

### *Newspaper Advertisements*

The CO also denied Employer’s application under the newspaper advertisement requirement. According to the regulation at 20 C.F.R. § 655.42(a), an employer seeking to hire temporary foreign workers is required to place advertisements for the job posting on two separate days in a newspaper of general circulation that serves the area of intended employment. These advertisements can be on two consecutive days, but a least one advertisement must be in a Sunday newspaper. *Id.* In addition, the employer is required to maintain copies of its newspaper advertisements for these job postings, with the date of publications and a full copy of the advertisement, or tear sheets of the pages of publication, or other proof of publication furnished by the newspaper showing the advertisement and date of publication. 20 C.F.R. § 655.42(d). These advertisements, in turn, must meet the requirements of 20 C.F.R. § 655.41. This includes requiring the employer’s name and contact information, the geographic area of intended employment, a description of the job opportunity, the wage, and directions for where to apply. 20 C.F.R. § 655.41(b)(1)-(14).

In the present case, the CO determined that Employer failed to comply with the regulatory obligations of H-2B employers because Employer did not provide copies of newspaper advertisements with its recruitment report. By failing to provide copies of advertisements, the CO argues, Employer failed to provide tangible evidence that its advertisements met the requirement of the H-2B program, and therefore failed to carry its burden of meeting the requirements of the H-2B program. The CO cites *Putnam and Brokers*, 2017-TLN-00008 (Dec. 21, 2016), to show that an employer carried the burden of proof to show that it has met the obligations of the H-2B program. Brief at 3 – 4.

Employer aims to satisfy the advertisement requirement by providing descriptions of the advertisements in its Revised Report. In its September 14<sup>th</sup> Revised Report, Employer stated that it posted two advertisements in the *Odessa American*. One of these was on Sunday, August 6<sup>th</sup>, and the other was on Monday, August 7<sup>th</sup>. AF 59. Employer also stated that it placed the job on the SWA website, and placed an additional advertisement in a conspicuous place at the office and offered the position to all current workers. *Id.* Employer argues that its description of the

advertisements fully satisfied the newspaper advertisement requirement. AF at 2. I find that the evidence presented by the Employer fails to support its assertion, and that the CO did not abuse its discretion in denying Employer's application.

While the Revised Recruitment Reports provided by the Employer offers the names of the newspapers and dates of publications, this information is not a substitute for providing copies of the actual newspaper advertisements. As the CO points out in its brief, 20 C.F.R. § 655.42(d) requires the Employer to maintain copies of newspaper advertisements in which it advertised the job posting, and these advertisements must comply with 20 C.F.R. § 655.41. While Employer provided descriptions of its advertisements, descriptions alone are insufficient. By failing to provide copies of the newspaper advertisements, the CO is unable to confirm whether Employer in-fact posted these advertisements, and whether the advertisements conformed to the requirements of 20 C.F.R. § 655.41. Without meeting the rules for newspaper advertisements in 20 C.F.R. § 655.42, Employer has failed to carry its burden that it complied with the requirements of the H-2B program. This is a requirement that BALCA has strictly enforced. *See, e.g., Whittle v. DBA Antlers Lodge*, 2016-TLN-00019 (March 9, 2016), at 5 (Affirming CO's denial of H-2B application because newspaper advertisements attached to employer's application "failed to include all the information required by 20 C.F.R. § 655.41(b)(3)").

Based on the fact presented, I find that the CO's decision to issue a denial of Employer's application was not arbitrary and capricious nor an abuse of discretion. The record establishes that Employer failed to meet the newspaper advertisement requirement. Accordingly, the CO's denial of certification is **AFFIRMED**.

**SO ORDERED.**

For the Board:

**CARRIE BLAND**  
Administrative Law Judge

Washington, D.C.