



Issue Date: 26 March 2018

BALCA Case No.: 2018-TLN-00084
ETA Case No.: H-400-18001-280868

In the Matter of:

A.E. PHILLIPS & SON, INC.,
Employer.

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: James P. Knudson, *Pro Se*
Fishing Creek, Maryland
For the Employer

Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to A.E. Phillips & Sons, Inc.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Denial 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 on a one-time, seasonal, peak-load or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor

¹ 20 C.F.R. § 655, Subpart A (codified April 1, 2016). On April 29, 2015, the Department of Labor (the “Department”) 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. 80 Fed. Reg. 24042 (Apr. 29, 2015). The IFR rules apply to this case.

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 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 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.⁴

STATEMENT OF THE CASE

The Employer is a crab picking and processing company located in Fishing Creek, Maryland. (AF 48).⁵ On January 1, 2018, the Employer filed an ETA Form 9142, *Application for Temporary Employment Certification* (“Application”), requesting certification for thirty (30) seafood processors/crab pickers to process crabs from April 1, 2018, until November 30, 2018. (AF 47-68).

On January 3, 2018, the CO issued a Notice of Deficiency (“NOD”), which indicated that the Employer included the incorrect SOC code and occupational title on its Application. (AF 43-46). The Employer submitted an amended ETA Form 9142 with the proper SOC code and occupational title on January 4, 2018. (AF 36-42).⁶

On January 8, 2018, the CO issued a Notice of Acceptance (“NOA”) informing the Employer that its application for temporary labor certification had been accepted for processing. (AF 29-35). 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 29). 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 29-30). 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 30) (emphasis in original).

On February 7, 2018, the Employer submitted its recruitment report. (AF 20-28). The report indicated that the Employer ran advertisements in a local newspaper on Tuesday, January 30, 2018 and Sunday, February 4, 2018. (AF 22).

On February 26, 2018, the CO made its final determination regarding the Employer’s Application. (AF 9-19). The CO found that the Employer’s recruitment did not comply with regulations at 20 C.F.R. § 655.40(b) because its advertisements were not run within the required 14-day timeframe from the date the NOA was issued. (AF 12).

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 “Food Cooking Machine Operators and Tenders” and occupation code 51-3093. (AF 37).

On March 7, 2018, the Employer requested administrative review of the CO's Denial before BALCA, as permitted by 20 C.F.R. § 655.61.⁷ (AF 1-8). The Employer acknowledged that the advertisements ran outside of the 14-day time frame but stated that there was a misunderstanding regarding the nature of the NOA when it was received, which caused them to run the advertisements on later dates. (AF 2-3). The Employer also noted that the CO found no fault with the content of the ads, but denied the application solely on the timing they were run. (AF 4).

On March 9, 2018, 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 On March 16, 2018, BALCA received the Appeal File from the CO. Neither party has filed a brief.

DISCUSSION AND APPLICABLE LAW

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.]⁹ 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.¹⁰

The Employer bears the burden of proving that it is entitled to temporary labor certification.¹¹ The CO may only grant the Employer's Application to admit H-2B workers for temporary non-agricultural 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.¹² Consequently, before a temporary labor certification is issued, an employer must conduct recruitment steps designed to inform U.S. workers about the job opportunity.¹³ The requisite recruitment steps

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).

⁹ 20 C.F.R. § 655.61.

¹⁰ 20 C.F.R. § 655.61(e).

¹¹ 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).

¹² 20 C.F.R. § 655.1(a).

¹³ *See* 20 C.F.R. §§ 655.40-655.47.

must be conducted within 14 days from the date of the NOA.¹⁴ 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 on or before January 22, 2018.¹⁵ The Employer did not run its advertisements within the required time period when it ran them on January 30, 2018 and February 4, 2018. The fact that the ads contained the proper content is not enough to meet the Employer's obligations under the regulations because substantial compliance with the advertisement requirements is insufficient to meet the employer's burden in establishing compliance with the regulations.¹⁶ The instant case is no exception. The Employer's failure to read the NOA when it was received does not excuse non-compliance with the time limits in the applicable regulations. Even a minor delay in placing job advertisements constitutes non-compliance with the requirements.¹⁷ Although 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 in the record, I find that the Employer has failed to comply with the recruitment requirements under 20 C.F.R. § 655.40(b) that it must conduct its recruitment within fourteen days after its receipt of the NOA. Therefore, I find that the CO properly denied the Employer's application.

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:

Larry A. Temin
Administrative Law Judge

¹⁴ 20 C.F.R. § 655.40(b).

¹⁵ January 22, 2018 constitutes the end of the 14-day period, which began on January 8, 2018, the date the NOA was issued.

¹⁶ *Whittle, Inc.*, 2016-TLN-00019 (Mar. 9, 2016) (rejecting 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").

¹⁷ *M.A.G. Irrigation, Inc.*, 2017-TLN-00033 (Apr. 25, 2017) (denying certification where the employer placed its job advertisements one day and five days after the fourteen day deadline).

¹⁸ *Id.* slip op. at 6.