



Issue Date: 02 April 2018

BALCA Case No.: 2018-TLN-00088
ETA Case No.: H-400-18002-170560

In the Matter of:

DUANE L. ELLIOTT,

Employer.

Appearance: Duane L. Elliott
Employer
New Market, Maryland
For the Employer

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

Before: Joseph E. Kane
Administrative Law Judge

DECISION AND ORDER AFFIRMING
DENIAL OF CERTIFICATION

This case arises from Duane L. Elliott’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

² 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*

program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

On January 2, 2018, the ETA received an application for H-2B temporary labor certification from the Employer for employment of eight seafood Packers and Packagers from April 1, 2018 to November 30, 2018. (AF 17, 19). The Employer’s application identified one worksite in East New Market, Maryland and stated that its need as “seasonal.” (AF 19).

On February 12, 2018, the CO issued the Notice of Acceptance (“NOA”). 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.” The Employer provided, however, its recruitment report to the CO the same day the CO issued the NOA. In the recruitment report, the Employer indicated that it published newspaper advertisements in the Star Democrat on Sunday, January 14, 2018 and Monday, January 15, 2018. (AF 17). The Employer also posted the opportunity at two locations at the place of employment between January 2, 2018 and February 12, 2018. (AF 17).

On March 2, 2018, the CO denied Employer’s application for temporary labor certification. (AF 14). The CO denied certification pursuant to 20 C.F.R. § 655.40(b) because the Employer failed to conduct its recruitment within 14 calendar days from the date the NOA was issued. (AF 14). The Employer conducted all recruitment prior to receiving the NOA. (AF 14).

On March 14, 2018, the Employer requested administrative review of the denial before BALCA. (AF 1-13). In its review request, the Employer stated that it had no choice but to conduct recruitment early, because the CO failed to timely respond to its application and failed to provide the NOA within 7 days as required by the regulations. (AF 1-3).

On March 15, 2018, I issued Notice of Docketing allowing the parties to file briefs within seven business days of receiving the Appeal File.³ BALCA received the Appeal File from the CO on March 15, 2018. The parties did not file briefs. The matter is now ripe for decision.

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.

³ See 20 C.F.R. § 655.61(c).

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 contain only 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." 20 C.F.R. § 655.40(b).

The CO denied Employer's H-2B application because the Employer submitted its recruitment report on the same day as NOA was issued and conducted its recruitment prior to the issuance of the NOA, not within the required 14 days. The Employer ran the advertisements for publication before the application was accepted for processing. The Employer also posted advertisement at the job site prior to the NOA and job postings must also be posted for at least 15 consecutive business days. 20 C.F.R. § 655.45. The Employer did not allow sufficient time to elapse before finalizing the recruitment report. The CO issued its NOA letter on February 12, 2018, and directed Employer to place its newspaper advertisements within 14 calendar days from the date of the letter. Thus, Employer had between February 12, 2018 and February 26, 2018 to conduct its recruitment. The Employer failed to wait for the CO's instructions.

Employer admits it failed to conduct its recruitment within the required timeframe and that it did not wait until receiving the NOA to start recruitment. (AP 1-13). The Employer argues that the Employer should not be required to wait until the CO issues a NOA when the CO fails to issue the NOA within the required 7 day timeframe provided in the regulations. The Employer relies on the regulations requiring the CO to issue a NOA within 7 business days of receiving the application. 20 C.F.R. § 655.33. The Employer asserts that if the CO had complied then its notice of requirement would have been timely.

The applicable regulations and the CO's instructions mandated Employer to conduct its recruitment within 14 calendar days from the NOA date. *See* § 655.40(b). The instructions did not allow the Employer to rely on prior recruitment efforts. The preamble to the regulations, specifically provide that, "unlike under the 2008 rule, this interim final rule requires that the employer conduct recruitment of U.S. workers **after** its Application for Temporary Employment Certification is accepted for process by the CO." 80 Fed. Reg. 24042, 24075 (Apr. 29, 2015) (emphasis added). Furthermore, 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

For the Board:

JOSEPH E. KANE
Administrative Law Judge