

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 01 December 2017

BALCA Case No.: 2018-TLN-00012
ETA Case No.: H-400-17235-410883

In the Matter of:

DALLAS STEWART RACING STABLE, INC.,
d/b/a DALLAS STEWART,
Employer,

Certifying Officer: Leslie Abello
Chicago National Processing Center

Appearances: Craig McDougal, Esquire
William Velie Attorneys at Law
Norman, Oklahoma
For the Employer

Jeffrey L. Nesvet, Associate Solicitor
C. Cleveland Fairchild, Attorney
U.S. Department of Labor
Office of the Solicitor
Employment & Training Legal Services
Washington, District of Columbia
For the Certifying Officer

Before: Larry S. Merck
Administrative Law Judge

DECISION AND ORDER DIRECTING GRANT OF CERTIFICATION

This case arises from Dallas Stewart Racing Stable, Inc.'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 non-agricultural 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 seeking to utilize this program must apply for and receive labor certification from the U.S. Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). 8 C.F.R. § 214.2(h)(6)(iii). A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies the application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA”). 20 C.F.R. § 655.61(a).

BACKGROUND

Employer’s business involves training racing horses to compete during thoroughbred racing seasons. (AF 67-68).³ On August 31, 2017, Employer filed its Form 9142 seeking six full-time, seasonal Thoroughbred Racehorse Grooms⁴ for the period of November 15, 2017 to April 15, 2018. (AF 49-58). On September 7, 2017, the Chicago National Processing Center (“CNPC”) accepted the application for processing.⁵ (AF 31).

The Notice of Acceptance outlined several recruitment steps for Employer to perform, as well as recruitment report requirements. (AF 32-37). The instructions required Employer’s submission of its recruitment report by October 16, 2017. (AF 35). On October 18, 2017, the CPNC notified Employer that its recruitment report had not been received, and provided Employer until October 19, 2017 to respond. (AF 26). On October 19, 2017, Employer submitted its recruitment report, a copy of its Notice of Position Available, and a Horse List.⁶

On October 23, 2017, the CNPC notified Employer via a Minor Deficiency Email that there were issues with its recruitment report:

¹ See 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).

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 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 Citations to the Appeal File are abbreviated as “AF” followed by the page number.

⁴ The standard occupational classification title was listed as “Nonfarm Animal Caretakers,” SOC code 39-2021. (AF 49).

⁵ Prior to the application being accepted for processing, the CNPC issued a Notice of Deficiency to Employer for its failure to submit an acceptable job order. (AF 43-48). Employer submitted an amended job order on September 6, 2017. (AF 38-42). Based on the CNPC’s acceptance of the application on September 7, 2017 and the documentation in the appeal file, it appears that the amended job order was sufficient, and the issue was resolved.

⁶ Employer’s response requested an increase from six workers to seven workers due to an increase in the number of horses at Employer’s stable. (AF 26). Each worker is able to care for one to five horses, depending on skill. *Id.* The Horse List includes a list of thirty-three horses. (AF 30). A copy of the Form 9142 located at AF 15-21 reflects that the request is for seven workers, suggesting that the CNPC updated the Form 9142 based on Employer’s request.

The employer does not indicate contact with former U.S. workers and by what means they were contacted. Also the recruitment report submitted is signed but not dated.

Please submit a revised recruitment report which indicates that contact with former U.S. workers was made (and by what means) and one which is dated.

To avoid further delay, you must respond . . . no later than . . . October 25, 2017.

(AF 22-23). On October 25, 2017, Employer submitted its amended recruitment report. (AF 22-24).

The CNPC issued a Final Determination on October 30, 2017, denying the application. (AF 11). The Certifying Officer (“CO”) noted the deficiency as “Contact with Former U.S. Employees” and cited 20 C.F.R. § 655.43 and § 655.48(a)(3) as authorities. (AF 14). The CO wrote:

The employer submitted a recruitment report which did not include confirmation of its contact with former employees. The Department sent a communication to the employer directing the employer to submit an amended recruitment report which indicates that contact was made with former U.S. workers and by what means, and on what date. However, the employer’s amended recruitment report did not contain the requested information. Thus, the employer has not met their recruitment obligation under the regulations. Therefore the application is denied.

Id.

On November 3, 2017, Employer filed a *Brief in Support of Appeal*. (AF 1). Employer’s brief stated, in pertinent part:

1. On Thursday, October 19, 2017 our office submitted recruitment documents for petitioner [Employer], which stated that there were no former employees to contact.
2. On Wednesday, October 25, 2017 Department of Labor requested a revised recruitment report.
3. On Wednesday, October 25, 2017 we submitted a revised recruitment report updating the outcome of contact with one applicant. The previous recruitment summary was still accurate as to former employees as there were no former employees to contact[.]
4. On Monday, October 30, 2017 Department of Labor denied [the application] on the basis that a revised recruitment report did not contain information on contact with previous employees.

. . . .

In conclusion, [Employer] respectfully requests that the denial be overturned.

Id. Employer also attached copies of its recruitment report, Notice of Position Available, and a letter dated September 22, 2017. (AF 6-9). In the address line, the letter states that it was sent to the CNPC via email. (AF 6-7).

The CO filed its appellate brief on November 27, 2017.⁷ The CO argues that Employer failed to carry its burden to establish that it met the requirements of the H-2B program. CO Br. at 3-4. Further, the CO argues that its decision was not arbitrary or capricious, and it was fully supported by the evidence in the appeal file. *Id.* The CO further argues:

[Employer] failed to submit a recruitment report that complied with 20 C.F.R. 655.43 and 655.48(a)(3). [Employer] submitted a letter with its appeal purportedly dated “September 22, 2017” containing the statement “there are no former employees eligible for position to contact[,]” and noting that [Employer] “received three (3) applicants.” However, [Employer’s] recruitment information otherwise shows that applicants first contacted the Employer on October 19, 2017. Obviously, [Employer] could not have known on September 22 that three applicants would apply for the position on October 19. Furthermore, the CO’s email from October 23 unambiguously stated that the recruitment report submitted on October 19 did not adequately address contact with former employees, yet [Employer’s] response submitted on October 25 provided no additional evidence in response to this deficiency.

Id.

STANDARD OF REVIEW

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 & Ed, Inc.*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Indus. Prof’l Servs.*, 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

⁷ Employer did not file an appellate brief in response to the *Notice of Docketing and Order Establishing Briefing Schedule*. However, based on the title of the document submitted to request review by the Board of Alien Labor Certification Appeals (“BALCA”), “Brief in Support of Appeal,” I consider that document to be Employer’s appellate brief.

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).

DISCUSSION

The CO determined that Employer failed to comply with the regulatory obligations of H-2B employers because Employer did not submit a recruitment report that complied with 20 C.F.R. §§ 655.43 and 655.48(a)(3). The regulation at 20 C.F.R. § 655.43 requires an employer 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, disclose the terms of the job order, and solicit their return to the job.” An employer’s recruitment report must contain “confirmation that former U.S. employees were contacted, if applicable, and by what means.” 20 C.F.R. § 655.48(a)(3).

Employer argues that it submitted a revised recruitment report on October 25, 2017, which reflected an updated outcome of contact with one of the applicants, but “the previous recruitment summary was still accurate as to former employees as there were no former employees to contact.” Emp. Br. at 1. The CO argues that the revised recruitment report “did not provide any additional evidence” in response to the CO’s request for a recruitment report “indicat[ing] that contact with former U.S. workers was made (and by what means).” CO Br. at 4.

It is clear that an employer is required to include “confirmation that former U.S. employees were contacted,” *if applicable*. The issue here is whether the CO’s decision was arbitrary and capricious, or contrary to law, where the regulation at 20 C.F.R. § 655.48(a)(3) does not apply to Employer because it did not have any former U.S. employees to contact. Based on the plain language of the regulation at 20 C.F.R. § 655.48(a)(3), an employer’s obligation to provide information regarding contact with former U.S. employees only exists if it is applicable; otherwise, there appears to be no affirmative obligation for an employer to provide such information. *See DDM Haulers, LLC*, 2017-TLN-00069 (Oct. 18, 2017) (Section 655.43 requires employers to contact former U.S. employees under the assumption those employees actually exist).⁸ An employer’s silence on its recruitment report with regard to its contact with former U.S. employees, based on the plain meaning of the phrase “if applicable,” means the regulation does not apply.⁹

⁸ I note that the facts in *DDM Haulers* differ from those in this case, but the interpretation of the regulation is applicable here.

⁹ The plain language of an Office of Foreign Labor Certification (“OFLC”), Frequently Asked Question (“FAQ”), similar to the regulation at 20 C.F.R. § 655.48(a)(3), also does not require an employer to include a statement or reference to contact with former U.S. employees, unless it is applicable. The OFLC FAQ states:

12. What information must I include in my recruitment report under the 2015 H-2B Interim Final Rule?

....

The recruitment report must contain the following information:

In this case, the CO requested an amended recruitment report that was dated and indicated that contact with former U.S. employees was made; Employer responded with an amended recruitment report that included a date, but did not make any reference to former U.S. employees. This response by Employer demonstrates that the CO's request was received, Employer acknowledged and made the requested changes, and it remained silent on its contact with U.S. employees because it did not have any former U.S. employees to contact.

Requiring Employer in this case to make an affirmative statement in its recruitment report that it contacted former U.S. employees, even though the Employer did not have any former U.S. employees to contact, is contrary to the plain language requirements of the regulation at 20 C.F.R. § 655.48(a)(3).¹⁰ For these reasons, I reverse the CO's denial of certification.¹¹

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's denial of the Employer's *Application for Temporary Employment Certification* is **REVERSED** and that this matter is **REMANDED** for certification.

For the Board:

LARRY S. MERCK
Administrative Law Judge

....

If applicable, a statement that the employer: Contacted former U.S. workers and by what means.

OFLC, Frequently Asked Questions, H-2B Temporary Non-agricultural Program, Round 7, *available at* https://www.foreignlaborcert.doleta.gov/pdf/H-2B_2015_IFR_FAQs_Round7.pdf.

¹⁰ I acknowledge that Employer should have explained in its recruitment report that it did not have any former U.S. employees. Making such a statement communicates to the CO that an employer has fully met its obligation under 20 C.F.R. § 655.48(a)(3). However, as I have explained in this opinion, the Employer was not required to do so, and the failure to state that Employer did not have any former U.S. employees to contact is not a sufficient ground for denying the application.

¹¹ I do not address the CO's arguments regarding the September 22, 2017 letter submitted by Employer on appeal because nothing about the letter has any bearing on the outcome of this case.