



**Issue Date: 21 May 2018**

**BALCA Case No.: 2018TLN00128**

ETA Case No.: H-400-17351-203841

*In the Matter of:*

**COOPER STONE LLC.**

*Employer*

**Certifying Officer:** Leslie Abella  
Chicago National Processing Center

Appearances:

Robert Kershaw, *Esq.*  
The Kershaw Law Firm, PC  
Austin, TX  
*For the Employer*

Office of the Solicitor  
U.S. Department of Labor  
Washington, DC  
*For the Certifying Officer*

Before: Peter B. Silvain, Jr.  
**Administrative Law Judge**

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h) and 20 C.F.R. Part 655 Subpart A. This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to a request by Cooper Stone LLC (“Employer”) for administrative review of the Certifying Officer’s (“CO”) denial of temporary labor certification under the H-2B program. For the following reasons, the Board affirms the CO’s denial of certification.

## BACKGROUND

On January 1, 2018, Employer applied for temporary employment certification through the H-2B program to fill 20 positions for “Rock Splitters, Quarry” for the period of April 1, 2018 through December 1, 2018. (AF 26-50).<sup>1</sup>

The CO accepted this application on January 26, 2018, and directed Employer to begin recruitment of U.S. workers. (AF 19-25). Specifically, the CO stated: “All recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter.” (AF 20).

On March 21, 2018,<sup>1</sup> Employer mailed a Summary Recruitment Results Letter to the CO (AF 15-17). Therein, Employer stated that it placed recruitment advertisements in The Williamson County Sun on February 7 and 11, 2018. (AF 15). Employer also posted the job order in two locations at its place of business from January 30 to February 16, 2018. (AF 15-16). Employer attested that it had not been able to hire any workers to fill its available positions. (AF 16).

On April 5, 2018, the CO issued a final determination letter denying Employer’s application for temporary labor certification under the H-2B program. (AF 3-12). The CO articulated that the application was denied because the Employer’s newspaper advertisements did not comply with 20 C.F.R. §§ 655.42 through 655.46 because they were not conducted within 14 calendar days of the Notice of Acceptance. (AF 6). Since the CO issued its Notice of Acceptance on January 26, 2018, the advertisement placed on February 11, 2018 fell outside the 14-calendar-day timeframe required by 20 C.F.R. § 655.40(b). Accordingly, the CO denied the Employer’s application. (AF 3).

On April 19, 2018, Employer submitted a request for administrative review to BALCA appealing the CO’s Final Determination in the above-captioned H-2B matter. (AF 1). On May 2, 2018, the case was assigned to the undersigned and a Notice of Docketing and Order Setting Briefing Schedule was issued. Because H-2B appeals are expedited, and in accordance with 20 C.F.R. § 655.33, the parties were given a brief due date of seven days after the receipt of the administrative file. Thereafter, neither party submitted a brief.

## DISCUSSION

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States].”<sup>2</sup> Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training

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<sup>1</sup> Correspondence between the Chicago National Processing Center and counsel for Employer indicates that Employer allegedly submitted the recruitment report on February 16, 2018, which would be prior to the March 1, 2018 deadline. (AF 13).

<sup>2</sup> 8 U.S.C. § 1101(a)(H)(ii)(b).

Administration (“ETA”).<sup>3</sup> To apply for this certification, an employer must file an *Application for Temporary Employment Certification* (“ETA Form 9142”) with ETA’s Chicago National Processing Center (“CNPC”).<sup>4</sup> After an employer’s application has been accepted for processing, it is reviewed by the CO, who will either request additional information or issue a decision granting or denying the requested certification.<sup>5</sup> If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA.<sup>6</sup>

BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination.<sup>7</sup> The employer bears the burden of proving that it is entitled to temporary labor certification.<sup>8</sup> 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.<sup>9</sup>

After considering all evidence, BALCA must take one of the following actions in deciding the case:

1. Affirm the CO’s determination; or
2. Reverse or modify the CO’s determination; or
3. Remand to the CO for further action.<sup>10</sup>

A CO may only grant an employer’s H-2B application if there are not enough available domestic workers in the United States who are capable of performing the temporary labor at the time the employer files its application for certification.<sup>11</sup> Consequently, before a temporary labor certification may be issued, employers must conduct certain recruitment steps designed to inform U.S. workers about the job opportunity.<sup>12</sup> In order to show that it has complied with the regulations and conducted these affirmative recruitment efforts, an employer must file a recruitment report addressing the regulatory requirements.<sup>13</sup> The regulation requires that the recruitment report contain specific information detailing the employer’s recruitment activity and

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<sup>3</sup> 8 C.F.R. § 214.2(h)(6)(iii).

<sup>4</sup> 20 C.F.R. § 655.20.

<sup>5</sup> 20 C.F.R. § 655.23.

<sup>6</sup> 20 C.F.R. § 655.33(a).

<sup>7</sup> See *Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012) (“[t]he 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.”).

<sup>8</sup> 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).

<sup>9</sup> 20 C.F.R. § 655.1(a).

<sup>10</sup> 20 C.F.R. § 655.61(e)(1)-(3).

<sup>11</sup> 8 U.S.C. § 1101(a)(15)(H)(ii)(b); *Burnham Companies*, 2014-TLN-00029 (May 19, 2014).

<sup>12</sup> See 20 C.F.R. § 655.40-§ 655.47.

<sup>13</sup> See 20 C.F.R. § 655.48.

be submitted “by a date specified by the CO in the Notice of Acceptance.”<sup>14</sup> It is the employer’s burden to prove its eligibility for employing foreign workers under the H-2B program, and the recruitment report assists in determining whether the employer has met its burden.<sup>15</sup>

Here, the CO denied Employer’s H-2B Application after determining that Employer did not comply with the recruitment requirements set forth in the regulations. Specifically, the CO determined that Employer failed to properly advertise the job opportunity by not placing one of its newspaper advertisements within 14 calendar days from the Notice of Acceptance date.

The regulation at 20 C.F.R. § 655.40(b) provides:

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.

The recruitment steps described in §§ 655.42 through 655.46 include: newspaper advertisements; contact with former U.S. employees; contact with employees’ bargaining representative or posting of the job opportunity; and, when required by the CO, additional reasonable recruitment. After the employer’s recruitment activity is complete, the employer must prepare and submit a recruitment report detailing its recruitment activity, as specified in 20 C.F.R. § 655.48.

Here, the Notice of Acceptance was issued on January 26, 2018 and tracked the requirements set forth in the regulations. The Notice of Acceptance required Employer to conduct the recruitment described in §§ 655.42 through 655.46 (with no additional recruiting steps added by the CO) within 14 calendar days from January 26, 2018, and then submit a recruitment report by March 1, 2018. (AF 19-25). Therefore, Employer was required to: place newspaper advertisements in accordance with the regulations; contact former U.S. employees; and provide notice of the job opportunity to the bargaining representative or, if there was no bargaining representative, post the job opportunity in at least two conspicuous locations at the place of anticipated employment for 15 consecutive business days; and then file a recruitment report detailing this activity once completed.

As stated in its recruitment report, Employer contacted its former employees and posted the job opportunity in two conspicuous locations at the place of anticipated employment from “Jan 30 to current.”<sup>16</sup> (AF 15-17). In addition, Employer placed two newspaper advertisements with The Williamson County Sun on February 7, 2018 and February 11, 2018. (AF 15). However, the placement of the second newspaper advertisement fails to comply with the

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<sup>14</sup> 20 C.F.R. § 655.48(a).

<sup>15</sup> See *Whittle, Inc.*, 2016-TLN-00019 (Mar. 9, 2016).

<sup>16</sup> Employer’s recruitment report is dated February 16, 2018. Accordingly, although not addressed by the CO, if the recruitment report was actually submitted on February 16, 2018, the job opportunity posting appears to have only been posted for 14 consecutive business days instead of the required 15 consecutive business days.

regulations as Employer was required to conduct its recruitment activity within 14 days of the Notice of Acceptance (issued January 26, 2018).<sup>17</sup>

For these reasons, I find Employer has failed to meet its burden of establishing that it complied with the recruitment requirements set forth in the regulations. Accordingly, the CO properly denied the Employer's H-2B Application for Temporary Employment Certification.

**ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

Peter B. Silvain, Jr.  
Administrative Law Judge

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<sup>17</sup> See 20 C.F.R. § 655.40(b).