

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 25 April 2018

BALCA Case No.: 2018-TLN-00102
ETA Case No.: H-400-17360-847670

In the Matter of:

DAYTONA HOSPITALITY MANAGEMENT, LLC.,
Employer.

Appearances: Karen Schindler
Aztec Foreign Labor
Atascadero, CA
For the Employer

Nora Carroll, Attorney
Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, DC
For the Certifying Officer

Before: **JERRY R. DeMAIO**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from the Employer's request for review before the Board of Alien Labor Certification Appeals ("BALCA") of the denial by a Certifying Officer ("CO") for the Employment and Training Administration ("ETA") of its application for an H-2B temporary labor certification. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), 1184(a)(c); 8 C.F.R. § 214.2(h);

20 C.F.R. Part 655, Subpart A.¹ For the reasons set forth below, the CO's denial of temporary labor certification in this matter is affirmed.

STATEMENT OF THE CASE

On January 2, 2018, Daytona Hospitality Management ("Employer") filed an application for H-2B temporary labor certification with the ETA. (AF 46-93)². The application sought to certify the employment of forty-eight maids and housekeeping cleaners for employment in the United States from April 1, 2018 through September 15, 2018. (AF 46).

On February 13, 2018, the CO issued a notice of acceptance, stating that the application had been accepted for processing. The letter outlined instructions for the recruitment of U.S. applicants. (AF 30-36.) Of note, the CO directed 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. All recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter. The employer's recruitment report may not be submitted until the employer-conducted recruitment is complete, including the notice of the job opportunity, which must be posted for 15 consecutive business days, if applicable (see section further below).

(AF 31). And that, under 20 C.F.R. § 655.42:

The employer must place a newspaper advertisement on two separate days, which may be consecutive, one of which must be a Sunday, in a newspaper of general circulation serving the area of intended employment and appropriate to the occupation and the workers likely to apply for the job opportunity.

(AF 31). The CO directed that a recruitment report be submitted to the Department by March 9, 2018. (AF 34-35).

In a letter dated March 1, 2018, the Employer submitted a "Recruiting Efforts Summary", summarizing the steps taken in the recruiting of U.S. candidates. The letter stated, among other

¹ On April 29, 2015, the Department of Labor ("DOL") and the Department of Homeland Security jointly published an Interim Final Rule ("2015 IFR") amending the standards and procedures for the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). This case will be heard under the procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR.

² Citations to the appeal file are abbreviated "AF" followed by the page number.

things, that newspaper advertisements had been placed in the Fort Meyers News Press on Sunday, February 25, 2018, and on Wednesday, February 28, 2018. (AF 29).

On March 13, 2018, the CO issued a final determination, denying the application. (AF 18-21). As grounds for denial, the CO noted that under 20 C.F.R. § 655.40(b), the Employer had been required to conduct the recruitment steps in §§ 655.42 through 655.46 within 14 calendar days from the date the NOA was issued. The Employer's recruitment report, however, indicated that one of the newspaper advertisements had been placed in the Fort Myers News Press on February 28, 2018, which was more than 14 calendar days after the date of the NOA. Because the Employer had failed to demonstrate that it placed newspaper advertisements within the required timeframe under 20 C.F.R. § 655.40(b), the application was denied.

On March 15, 2018, the Employer requested administrative review of the denial with BALCA in a letter that also outlined some of the Employer's concerns with the process. (AF 1-6). On March 26, 2018, a Notice of Docketing was issued allowing the parties to file briefs within seven business days. Neither party has filed a brief.

DISCUSSION

The Employer's request for Board review concedes that the February 28th newspaper advertisement was published on the 15th day of recruitment—outside of the 14-calendar day window established by 20 C.F.R. § 655.40(b). (AF 4). However, the Employer argues that “the requirement to post the notification of the job order for 15 consecutive business days is impossible to complete within a 14-day calendar window”, and is unduly confusing to employers. So there is no question that the Employer was in technical violation of the regulatory time requirement.

As to whether the 14-day and 15-day requirements are incompatible, the Employer cites a Department of Labor Frequently Asked Questions (FAQ) Web page that answers their own question:

The employer must begin all employer-conducted recruitment activities within 14 calendar days from the date of the NOA. The employer will be able to both begin and complete many of these activities within the 14-day period. Where an activity takes longer to complete, *the employer must start the recruitment activity within the 14-day period* and continue the activity until it is completed before submitting the recruitment report to the Chicago NPC.

For example, where there is no applicable bargaining representative, the regulation requires the employer to post the availability of the job opportunity for at least 15 consecutive business days at the place(s) of intended employment. *This posting must be started, but does not need to be completed, within the 14-day period after the NOA is issued.*

(AF 4-5, emphasis added).

The February 28th newspaper advertisement was neither started nor completed within the 14-day period required by the regulation, and the CO therefore correctly denied the application under 20 C.F.R. § 655.40(b).

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Board:

JERRY R. DeMAIO
Administrative Law Judge