

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 20 April 2018**

**BALCA Case No.:** 2018-TLN-00111  
**ETA Case No.:** H-400-17357-285627

*In the Matter of:*

**GOLD MEDAL POOLS LLC,**  
*Employer.*

Appearance: Robert Kershaw, Esquire  
The Kershaw Law Firm, PC  
Austin, Texas  
*For the Employer*

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

Before: Scott R. Morris  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

This case arises from Gold Medal Pools’ (“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);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers who seek to hire foreign workers under this

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<sup>1</sup> 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).

<sup>2</sup> 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

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).

## BACKGROUND

On October 25, 2017, the Department of Labor’s Employment and Training Administration (“ETA”) received from Employer an application for temporary labor certification for twenty-five “Construction Laborers”. AF 28-56.<sup>3</sup> The CO accepted this application on January 12, 2018, and directed the Employer to begin recruitment of U.S. workers. AF 21-27. 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 22.

On February 12, 2018, Employer mailed a Summary Recruitment Results Letter to the CO. AF 19-20. Therein, Employer stated that it placed recruitment advertisements in the Dallas Morning News on January 28 & 29, 2018, and the Texas Workforce Commission from January 12 to February 12, 2018. AF 19. Employer also posted the job order in its place of business from January 29 to February 2, 2018. AF 20. Employer attested that it had not been able to hire any workers to fill its available positions. AF 20.

On February 15, 2018, the CO emailed Employer, noting that Employer’s listed newspaper advertisements did not comply with 20 C.F.R. §§ 655.42 through 655.46. AF 18. Employer had placed its newspaper advertisements on January 28 & 29, 2018, which was outside of the required 14-calendar-day timeframe. Thus, the CO instructed Employer to indicate whether it placed additional newspaper advertisements within the 14 calendar days from the Notice of Acceptance date, January 12, 2018.

On March 15, 2018, the CO issued a final determination letter denying Employer’s application for temporary labor certification under the H-2B program.<sup>4</sup> AF 8-17. The CO reiterated that 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 11. Since the CO issued its Notice of Acceptance on January 12, 2018, both publication dates of January 28 & 29, 2018 fell outside the 14-calendar-day timeframe required by 20 C.F.R. § 655.40(b). Accordingly, the CO denied Employer’s application.

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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.

<sup>3</sup> References to the appeal file will be abbreviated with an “AF” followed by the page number.

<sup>4</sup> Based on the record, it appears that Employer did not respond to the CO’s February 15, 2018 email.

On March 29, 2018, Employer appealed the CO's denial.<sup>5</sup> This Tribunal issued a Notice of Assignment and Expedited Briefing Schedule on April 3, 2018. The CO has not filed a brief.

## STANDARD OF REVIEW

The scope and standard of review in the H-2B program are limited. When an employer requests a review by the Board under 20 C.F.R. § 655.61(a), the request for review may contain only legal arguments and evidence which were actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The Board "must review the CO's determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. § 655.61(e). The Board must affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action. *Id.* While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing the CO's determinations. *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017).

## DISCUSSION

Upon review of the Appeal File, the undersigned finds that the CO's denial of certification is supported by the evidence of record.

An employer bears the burden of demonstrating eligibility for the H2B program, and a CO may not grant a temporary labor certification unless the employer seeking the certification has complied with all the requirements of the labor certification process for H-2B workers. 20 C.F.R. § 655.50(b). These requirements include conducting "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).

Here, Employer conducted its required newspaper advertisements (*see* 20 C.F.R. § 655.42) outside of the 14-calendar-day timeframe that 20 C.F.R. § 655.40(b) requires. The CO issued the Notice of Acceptance on January 12, 2018; thus, Employer should have conducted the entirety of its required recruitment under 20 C.F.R. §§ 655.42 through 655.46 by January 26, 2018. Employer's publication of newspaper advertisement on January 28 & 29, 2018 fell outside this 14-calendar-day timeframe.

Accordingly, the Tribunal finds that the CO did not err in denying the Employer's application. The CO's denial is hereby AFFIRMED.

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<sup>5</sup> Employer failed to include any legal arguments in its appeal. As noted in this Tribunal's Notice of Assignment, the regulations instruct an employer to include any legal argument and evidence in its initial appeal of the CO's H-2B determination. *See* 20 C.F.R. § 655.61(a)(2), (3), (5).

**SO ORDERED.**

For the Board:

SCOTT R. MORRIS  
Administrative Law Judge

Cherry Hill, New Jersey