



Issue Date: 09 April 2018

BALCA Case No.: 2018-TLN-00103
ETA Case No.: H-400-17360-307177

In the Matter of:

G. Shrubber Landscape & Irrigation LLC,
Employer.

Appearance: Glen Trole
4486 S Zarahemla Dr.
Salt Lake City, UT 84124
For the Employer

Before: LYSTRA A. HARRIS
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA” or “Board”) pursuant to the request of G. Shrubber Landscape & Irrigation, LLC (“Employer”) for administrative review of the Non-Acceptance Denial issued by the Certifying Officer (“CO”) in the above captioned H-2B temporary labor certification matter.¹

The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one time, seasonal, peakload, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).³ A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor

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 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). 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 8 C.F.R. 655.214.2(h)(6)(iii).

certification. If the CO denies certification, an employer may seek administrative review before BALCA.⁴

I. Statement of the Case

Employer is located in Salt Lake City, Utah and employs workers to provide landscaping and maintenance services.⁵ On December 28, 2017, the Department of Labor's Employment and Training Administration ("ETA") received Employer's application for temporary labor certification.⁶ Employer sought approval to hire 40 foreign nationals as "landscaping and grounds keeping workers" from March 19, 2018 to December 15, 2018, based on seasonal need.⁷

On January 2, 2018, the CO issued a Notice of Deficiency ("NOD"), stating that the CO determined Employer's "job order must offer to U.S. workers no less than the same benefits, wages, and working conditions that [Employer] is offering, intends to offer, or will provide to H-2B workers."⁸ Employer responded to the NOD on January 4, 2018⁹; on January 11, 2018, the CO issued a Notice of Acceptance concerning its January 2, 2018 NOD.¹⁰

On February 16, 2018,¹¹ the CO informed Employer that it found "the following issue which prevents the Chicago NPC from further processing:

In review of [Employer's] recruitment report, received February 6, 2018, we find [that the] report did not contain confirmation that the notice of the job opportunity was posted for 15 consecutive business days.

[Employer] is reminded that if there is no bargaining representative, then [Employer] must post the availability of the job opportunity to all employees in the job classification and area in which the work will be performed by the H-2B workers.

If [Employer] posted the availability of the job, then [Employer] must submit a revised recruitment report that includes confirmation that the notice of the job opportunity was posted for 15 consecutive business days."

The CO gave Employer until February 20, 2018 to respond with the appropriate information.¹²

On February 28, 2018, the CO emailed Employer, stating that it had not received a response to its February 16, 2018 letter.¹³ On that same day, Employer uploaded a revised recruitment report, as the CO requested.¹⁴

⁴ 20 C.F.R. 655.61(a).

⁵ Appeal File ("AF") 56.

⁶ AF 56-74.

⁷ AF 56.

⁸ AF 52.

⁹ AF 49-50.

¹⁰ AF 41-47.

¹¹ AF 30.

¹² AF 36.

¹³ AF 30.

¹⁴ AF 28, 32-35.

On the afternoon of February 28, 2018, the CO responded to Employer.¹⁵ The CO acknowledged receipt of Employer's revised recruitment report. However, the CO wrote that "[t]he recruitment report does not confirm that a bargaining representative was contacted and by what means, and if there is no bargaining representative, that [Employer] posted the availability of the job opportunity in two conspicuous locations at the place of anticipated employment for 15 consecutive business days."¹⁶ The CO explained that this is a separate requirement than "placing the newspaper ads or placing an SWA job order."¹⁷

On March 2, 2018, Employer responded, stating that it does not use a bargaining representative, and that it has a "help wanted sign at [Employer's] shop and there is an electronic ad with LinkedIn that ties to the ad at workforce services. Please advise."¹⁸ On March 2, 2018, the CO responded, as follows:

The LinkedIn posting and Help Wanted sign described by [Employer] does [sic] not meet the 15 day posting requirement described above. [Employer] must identify a location at which a posting can remain posted for 15 consecutive business days. An internet search shows that [Employer's] location at 762 West 1390 SO, Salt Lake City, UT 84104 appears to be occupied by [Employer] and could be used for the 15 business day posting. In your reply to this email, please confirm if you can post at this location. After we receive this confirmation, we will provide further steps concerning the content of what should be posted.¹⁹

The CO requested Employer to respond no later than March 6, 2018.²⁰

On March 19, 2018, the CO issued its final determination, which denied Employer's request for temporary labor certification.²¹ Specifically, the CO denied Employer's request, because it either did not provide notice to its bargaining representative or it failed "to post the job opportunity in at least 2 conspicuous locations for at least 15 consecutive business days at the place(s) of anticipated employment or using a means that provides reasonable notification to all employees in the occupation and area of intended employment (*e.g.*, electronic intranet customarily used to post notices about job opportunities)."²² The CO noted that it had informed Employer of this deficiency, and:

responded in an email to [Employer] on **February 3, 2018** suggesting a location it could post the opportunity to satisfy the 15 day posting requirement and asked [Employer] to respond if this would be possible. The response to this email was due on March 6, 2018. As of today's date [Employer] has failed to respond to this email. Therefore, this application is being denied.²³

Also on March 19, 2018, Employer wrote to the CO, stating that it has "had the job posted at [its] shop since early January Hoping someone stopping by may ask for a position."²⁴

¹⁵ AF 28–29.

¹⁶ AF 28.

¹⁷ *Id.*

¹⁸ AF 27.

¹⁹ AF 24.

²⁰ *Id.*

²¹ AF 12–15.

²² AF 15 (citing 20 C.F.R. § 655.45(a), (b)).

²³ AF 16 (emphasis added).

²⁴ AF 10.

On March 21, 2018, Employer responded to the final determination letter.²⁵ Employer noted that the final determination letter stated that the CO had sent an email to Employer on February 3, 2018; however, Employer averred that it never received any email from the CO on February 3, 2018.²⁶ Employer wrote that it has “the workforce services job posted at [its] shop and will continue to keep it posted at [its] shop.”²⁷

II. Applicable Law

BALCA’s standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and Employer’s request for administrative review, which may only contain legal arguments and evidence that Employer actually submitted to the CO before the date the CO issued a final determination.²⁸ An employer bears the burden of proving by a preponderance of the evidence that it is entitled to temporary labor certification.²⁹ A bare assertion without supporting evidence is insufficient to carry the employer’s burden.³⁰ A CO’s denial of certification must be upheld unless shown by Employer to be arbitrary and capricious or otherwise not in accordance with the law.³¹ After considering the evidence of record *de novo*, 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.³²

III. Discussion

A review of the Appeal File demonstrates that Employer provided improper notice of the job opportunity; the CO’s reasoning was, therefore, not arbitrary and capricious and merits affirmance. Twenty C.F.R. § 655.45(b)³³ requires Employer to “post the availability of the job opportunity **in at least 2 conspicuous** locations at the place(s) of anticipated employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the H-2B workers.” (Emphasis added). The regulation is clear that “the notice must meet the requirements under § 655.41.”

Section 655.41 requires such notice to contain detailed information about the job opportunity, including, but not limited to, the employer’s name and contact information, the geographic area of intended employment, and a description of the job opportunity, including minimum education and experience requirements. The Department explained in the preamble of the Interim Final Rule, that the intention of § 655.45(b) is “to provide that all of the employer’s U.S. workers are afforded the same

²⁵ AF 1–2.

²⁶ AF 2; *see also* AF 9.

²⁷ *Id.*

²⁸ 20 C.F.R. § 655.61.

²⁹ 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 (Sep. 10, 2014); and *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (Jul. 28, 2009).

³⁰ *AB Controls & Technology, Inc.*, 2013-TLN-00022 (Jan. 17, 2013).

³¹ *See Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016); *Tarilas Corp.*, 2015-TLN-00016, slip op. at 5 (Mar. 5, 2015).

³² 20 C.F.R. § 655.61(e); *The Original Roofing Company, LLC*, 2017-TLN-00027, slip op. at 5 (Apr. 11, 2017).

³³ Section 655.45(a), concerning the Employer’s burden to contact its employees’ bargaining representatives, is inapplicable here because Employer’s employees are not part of any collective bargaining agreements. AF 26–27.

access to the job opportunities for which the employer intends to hire H-2B workers.”³⁴ The Department characterized the rule as “flexibl[e],” and even offered “alternative methods” to fulfill the requirements of § 656.45, as follows:

This permits the employer to devise an alternative method for disseminating this information to the employer’s employees, for example, **by posting the notice in the same manner and location as for other notices, such as safety and health occupational notices, that the employer is required by law to post.** This provision further provides that electronic posting, such as displaying the notice prominently on any internal or external Web site that is maintained by the employer and customarily used for notices to employees about terms and conditions of employment, is sufficient to meet this posting requirement as long as the posting otherwise meets the requirements of this section.³⁵

On February 16, 2018, the CO informed Employer that its recruitment report “did not contain confirmation that the notice of the job opportunity was posted for 15 consecutive business days.”³⁶ Employer responded on March 1, 2018, stating that it has a “help wanted sign at [its] shop and there is an electronic ad with LinkedIn that ties to the ad at workforce services.”³⁷ Additionally, on March 21, 2018, Employer wrote that it has “the workforce services job posted at [its] shop and will continue to keep it posted at [its] shop.”³⁸ Employer provided the LinkedIn advertisement.³⁹

Here, the undersigned finds that the “help wanted” sign does not comport with the regulatory requirement to post information concerning the job openings “in at least 2 conspicuous locations.”⁴⁰ Notably, the Appeal File contains no indication that the “help wanted” sign contained any of the detailed information Employer is required to provide under § 655.41.⁴¹ Thus, the CO correctly determined that Employer’s application fails to fulfill the requirements of § 655.45(b).

In its request for review of the CO’s final determination, Employer has argued that it has “the job posted at [its] shop.”⁴² The applicable regulations prohibit BALCA from considering such evidence because Employer presented it after the CO made its final determination.⁴³ Assuming, *arguendo*, BALCA were allowed to consider such evidence, Employer’s bare assertion that it has “the workforce services job posted at [its] shop,”⁴⁴ is also insufficiently detailed to meet the highly specific requirements of § 655.41. Thus, even if BALCA could consider Employer’s statements on appeal, such statements would be insufficient to demonstrate the CO’s final determination was arbitrary and capricious,⁴⁵ warranting reversal.

³⁴ See 80 Fed. Reg. at 24,077.

³⁵ *Id.* at 24,078 (emphasis added).

³⁶ AF 30, 36.

³⁷ AF 27.

³⁸ AF 1–2.

³⁹ AF 25.

⁴⁰ § 655.45(b); § 655.41.

⁴¹ The Office reserves judgment on whether Employer’s LinkedIn posting satisfies the requirements of § 655.41.

⁴² AF 10, 1–2.

⁴³ § 655.61(a)(5) (“[T]he request for review . . . may contain only legal argument and such evidence as was actually submitted to the CO **before the date the CO’s determination was issued.**”).

⁴⁴ AF 1–2.

⁴⁵ In its request for review, Employer rightly noted a typographical error in the CO’s final determination letter. See AF 2, 9. Notably, the CO wrote that it “responded in an email . . . **on February 3, 2018**

IV. Order

The CO's March 19, 2018 final determination denying Employer's application requested H-2B temporary labor certification for 40 landscaping and grounds keeping workers is hereby **AFFIRMED**.

SO ORDERED.

For the Board:

LYSTRA A. HARRIS
Administrative Law Judge

suggesting a location it could post the opportunity to satisfy the 15 day posting requirement and asked [Employer] to respond if this would be possible.” AF 16 (emphasis added). Although Employer is correct that the AF contains no such February 3, 2018 letter, the existence of the CO's typo does not make its final determination arbitrary and capricious. The February 3, 2018 letter may not exist, but the AF shows that the CO sent an email to Employer on March 2, 2018 with the same or substantially the same information. *See* AF 24 (where the CO wrote that Employer “must identify a location at which a posting can remain posted for 15 consecutive business days. An internet search shows that the employer's location at 762 West 1390 SO, Salt Lake City, UT 84104 appears to be occupied by the employer and could be used for the 15 business day posting. In your reply to this email, please confirm if you can post at this location.”). Regardless of the actual email date, the CO still communicated with Employer prior to the final determination about the potential deficiency in its application and even provided Employer with a potential remedy. Employer, therefore, received the same or substantially the same information in the actual March 2, 2018 email as the CO incorrectly stated it received in the purported February 3, 2018 email. Employer's argument that it never received the February 3, 2018, therefore, does not render the CO's decision arbitrary and capricious. *See, e.g., Los Angeles Unified School Dist., 2012-PER-03153, slip op. at 3, 6 (Jan. 23, 2017) (rejecting Employer's argument that the CO's decision was arbitrary and capricious “due to carelessness.”)*.