

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 19 March 2018

BALCA Case No.: 2018-TLN-00075
ETA Case No.: H-400-17351-168293

In the Matter of:

HICKMAN’S LANDSCAPE MAINTENANCE, LLC,
Employer.

Appearance: Kevin R. Lashus, Esq.
The Kershaw Law Firm, PC
Austin, TX
For the Employer

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

Before: Alan L. Bergstrom
Administrative Law Judge

DECISION AND ORDER - AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s (“CO”) denial in the above-captioned H-2B temporary labor certification matter. 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 Department of Homeland Security, “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” See 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).¹ Employers who seek to hire foreign workers

¹ 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*

under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”) using an ETA Form 9142B, *Application for Temporary Employment Certification* (“Form 9142”). 8 CFR § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a CO of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 C.F.R. § 655.50. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.53(b); 20 C.F.R. § 655.61(a). During the administrative review only the material contained within the appeal file (“AF”)² upon which the denial determination was made may be considered as evidence, while the Employer’s legal argument in its request for review and that legal argument in filed briefs may be considered as argument in the case, 20 C.F.R. § 655.61(e). Accordingly, the documents attached to Employer’s filings after the December 18, 2017, denial determination are not considered.

STATEMENT OF THE CASE

On January 1, 2018,³ the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Hickman’s Landscaping Maintenance, LLC, doing business as Charleston Grounds Management, for 8 “Landscape Laborers” as a peakload need for employment from April 1, 2018 to November 30, 2018 (AF 17-25), with attachments in support of the application (AF 26-60). The position was listed by the Employer as O*Net Code 37-3011, “Landscaping and Groundskeeping Workers” in Section B.2 and B.3 of the filed ETA Form 9142B (AF 17) and is to be performed at John’s Island, Charleston County, South Carolina. (AF 20). No minimum educational or training requirement is specified in Section F.b of the application, though the Employer indicates 2 months of experience in landscaping and groundskeeping is required. No special additional requirements were indicated.

The Employer retained The Kershaw Law Firm, PC for legal counsel in this matter. (AF 19).

On February 1, 2018, the CO issued a “Notice of Deficiency” (“NOD”) indicating the following deficiencies (AF 13-16):

“Deficiency: Job order assurances and contents.

... In accordance with 20 Code of Federal Regulations (CFR) 655.18(a)(1), the employer’s job order must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer’s H-2B workers. This does not relieve the employer from providing to H-2B workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers.

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.

² “AF” refers to the Appeal File and is followed by the page number of the relevant page in the Appeal File.

³ Applications filed after April 29, 2015 with an employment start date of need after October 1, 2015 are processed under the Interim Final Rule revising federal regulations related to the H-2B program published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015). 20 CFR §655.4(e). This application was filed by e-mail at 3:21:40 AM CST, Monday, January 1, 2018. (AF 53).

In Section F.a, Item 3, of the ETA Form 9142, the employer indicated the daily worker hours are 7:00am to 5:00pm. This is inconsistent with the daily work hours indicated in the job order, 8:00am to 5:00pm.

Modification Required:

The employer may amend Section F.a, Item 3, of the ETA Form 9142 to list a daily work schedule that is consistent with the job order.

OR

The employer must submit amended job order language that contains a daily work schedule that is consistent with the employer's ETA Form 9142.

The employer's NOD response must include corrected language which remedies this deficiency so that the Chicago NPC can provide this information to the SWA. Or, the employer may also submit an already-amended job order that contains all of the required language indicate above.

We require your written permission to make the amendments to the application on your behalf.”

The NOD as issued included the information to the Employer required by 20 C.F.R. § 655.31, including that in § 655.31(b)(4) stating “that if the employer does not comply with the requirements of this section by either submitting a modified application within 10 business days or requesting administrative review before an ALJ under § 655.61, the CO will deny the *Application for Temporary Labor Certification* ... the denial of the *Application for Temporary Labor Certification* is final, and cannot be appealed ...[and] will not [be] further considered.” (AF 14-15).

On February 20, 2018, the CO issued a “Final Determination” denying the Employer's *Application for Temporary Employment Certification* for the 8 Landscape Laborers requested by the Employer in accordance with Departmental regulations at 20 CFR §655.31(b)(4). The CO denied the application “in accordance with 20 CFR 655.31(b)(4) because the employer has neither submitted a modified application within 10 business days from the date of the NOD was issued nor requested Administrative Review before an Administrative Law Judge under 20 CFR 655.61.” (AF 5).

On February 28, 2018, the Employer filed a “Notice of Appeal” to BALCA with the Office of Foreign Labor Certification. The Employer's counsel submits that the CO “erroneously determined the Hickman's Landscaping Maintenance, LLC failed to establish that it provided timely job assurances and contents as identified in the Notice of Deficiency issued in this case ... but that error, is not critical or substantive.” In the alternative the Employer's counsel “requests remand because we failed to timely respond to the Notice by mistake. Our firm's computer system was significantly impacted by a successful malware attack beginning on January 31, 2018 that was not fixed until February 5, 2018. My mistake to timely respond to the NOD should not be the basis of the denial because the client has the need, and they can easily amend the 9142 as appropriate – we could not have anticipated the impact of the attack on our systems.”

On March 5, 2018, BALCA issued a Notice of Assignment and Briefing Schedule directing the CO to assemble and transmit the AF to BALCA and granting leave to the Employer and Solicitor to file briefs on the issues involved in this case by mail or facsimile transmission to the office of this BALCA Judge, or e-mail to the National Office, no later than 4:00 PM, Thursday, March 15, 2018. The Employer timely filed a “Motion to Remand” in which counsel states “we failed to timely respond to the Notice of Deficiency by mistake. Our firm’s computer system was significantly impacted by a successful malware attack beginning on January 31, 2018 that was not fixed until February 5, 2018. Our firm’s mistake to timely respond to the NOD should not be the basis of the denial because the client has the need, and they can easily amend the 9142 as appropriate – we could not have anticipated the impact of the attack on our systems.” Employer “requests that [BALCA] remand the case to allow it to provide express authority to the CO to amend the 9142 filed in this case to identify hours of operation consistent with the job order submitted in this case.” The Solicitor filed a timely “Opposition to Request for Remand” and submits that “there is no basis to remand this matter to provide the Employer a second opportunity to comply with the regulations ... [and] should be denied.”

DISCUSSION

An employer seeking certification to employ H-2B nonimmigrant workers bears the burden to establish eligibility for issuance of a requested temporary labor certification. Where an employer has submitted an *Application for Temporary Employment Certification* of H-2B workers and that application fails to meet all the obligations required by 20 CFR Part 655 or other requirements of the H-2B program, the CO issues an Notice of Deficiency (NOD) to the employer setting forth the deficiency in the application and permitting the employer to submit supplemental information and documentation for consideration before issuance of a final determination on the application. 20 CFR §655.31(b). BALCA may only consider the documentation considered by the CO in its final denial determination as contained in the AF and arguments set forth in the request for review and legal briefs submitted to BALCA. 20 CFR §655.61(e).

Pursuant to Federal regulations at 20 C.F.R. § 655.31(b) the Employer was advised of the specific deficiency that existed between the *Application for Temporary Employment Certification* and the job order placed with the State Workforce Agency serving the area of intended employment, as well as the steps required by the Employer to correct the deficiency. The Employer was advised that the necessary corrective steps must be taken within 10 business days of the date the NOD was issued. (AF 13-16). The NOD was issued on Thursday, February 1, 2018. The 10 business-day period expired on Thursday, February 15, 2018. Thus in order to correct the deficiency, the Employer needed to notify the CO it was authorized to amend the ETA Form 9142, Section F.a, Item 3, daily work hours from “7:00am to 5:00pm” to read “8:00am to 5:00pm” or submit to the CO an amended job order listing the work hours as “7:00am to 5:00pm”, no later than close of business hours on Thursday, February 15, 2018.

The Employer’s counsel states the corrective steps set forth in the NOD were not taken because of a computer malware attack that disabled the law firm’s computer system from Wednesday, January 31, 2018 to Monday, February 5, 2018. This period encompassed the first 2 business days of the 10 business-day response period. The Employer set forth no explanation for

not taking the required corrective actions within the remaining 8 business days. There is no evidence that the Employer took the required action to correct the deficiency at any time prior to the February 20, 2018 denial determination.

The Employer's counsel argues that the failure to timely comply with the NOD was a product of "our law firm's mistake to timely respond to the NOD should not be the basis of the denial because the client has the need." But as the Supreme Court has observed, "clients must be held accountable for the acts and omissions of their attorneys." *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396 (1993). The Employer "voluntarily chose this attorney as [its] representation in the action, and [it] cannot now avoid the consequence of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation..." *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962); *see also Kaname Japanese Rest.*, 2004-INA-00298 (Aug. 24, 2005) (pre-PERM).

Here, the Employer fails to articulate any arbitrary or capricious actions by the CO that would constitute an abuse of discretion by the CO. After deliberation on the AF and argument of the Parties, this Administrative Law Judge finds that the evidence of record indicates that the CO complied with the regulatory provisions of 20 C.F.R. Part 655 and properly denied the Employer's January 1, 2018, *Application for Temporary Employment Certification* for 8 Landscape Laborers for the period from April 1, 2018 to November 30, 2018, on John's Island, Charleston County, South Carolina, pursuant to 20 C.F.R. §655.31(b)(4).

ORDER

It is hereby ORDERED that the Certifying Officer's **DENIAL** of the Employer's January 1, 2018, *Application for Temporary Employment Certification* is **AFFIRMED**.

SO ORDERED.

For the Board:

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia