



Issue Date: 29 May 2018

**BALCA Case No.:** 2018-TLN-00127  
**ETA Case No.:** H-400-17361-630992

*In the Matter of:*

**LD TEBBEN COMPANY, INC. D/B/A  
LD TEBBEN,**  
*Employer.*

Certifying Officer: William L. Carlson, Ph.D.  
Chicago National Processing Center

Appearances: Kevin Lashus, Esq.  
Fisher Broyles  
Austin, Texas  
*For the Employer*

Before: **COLLEEN A. GERAGHTY**  
Administrative Law Judge

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

This case arises from the Employer’s 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 program must apply for and

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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 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.

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).

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 1, 2018, the Employment and Training Administration (“ETA”) received an application for H-2B temporary labor certification from LD Tebben Company (“Employer”) for employment of 20 “Roofers,” from April 1, 2018 to December 31, 2018. (AF 37).<sup>3</sup>

On January 10, 2018, the CO issued a Notice of Deficiency (“NOD”), identifying two deficiencies with the Employer’s application. (AF 35). First, the CO found the Employer failed to submit a signed and dated agent agreement pursuant to 20 C.F.R. § 655.8. (AF 35). Second, the CO found that the Employer failed to submit a complete and accurate Form 9142 under 20 C.F.R. § 655.15(a), because Section A and Section B were not signed or dated. (AF 35). The Employer responded the same day, providing the signed and dated agent agreement and an amended Form 9142 with the required signatures and dates. (AF 24-31).

On January 16, 2018, the CO issued a Notice of Acceptance (“NOA”), accepting the application for processing. (AF 16). The NOA included instructions for the Employer on recruiting U.S. workers and submitting a recruitment report, and stated that “all recruitment steps . . . must be conducted within 14 calendar days from the date of this letter.” (AF 17) (emphasis added).

On March 20, 2018, the CO emailed the Employer stating that he had not received the Employer’s recruitment report, which was due on March 1, 2018. (AF 15). The CO directed the Employer to submit the recruitment report within one business day. (AF 15).

On March 21, 2018, the Employer submitted its recruitment report to the CO. (AF 14). The Employer indicated in its recruitment report that it placed newspaper advertisements in the Oklahoman on February 14 & 18, 2018. (AF 14).

On April 5, 2018, the CO issued a Final Determination denying certification. (AF 3-13). The CO stated 20 C.F.R. § 655.40(b) requires recruitment to be conducted within 14 calendar dates from the date the NOA was issued. (AF 6). The CO denied the application because the Employer’s newspaper advertisements placed with the Oklahoman on February 14, 2018 and February 18, 2018 were not placed within the required 14 days of the NOA, which was issued on January 16, 2018. (AF 6).

On April 18, 2018, the Employer requested administrative review of the denial before BALCA. (AF 1). The Employer stated that the CO “erroneously determined that LD Tebben

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<sup>3</sup> The appeal file is referenced herein as “AF” followed by the page number.

Company failed to establish that its peakload job opportunity is and will be temporary in nature.” (AF 1). The Employer did not address the CO’s stated reason for denial, namely that recruitment was conducted outside the required timeframe established in 20 C.F.R. § 655.40(b).

On May 14, 2018, I issued a Notice of Docketing,<sup>4</sup> allowing the parties to file briefs within seven business days. Neither the CO nor the Employer filed appellate briefs.

## **DISCUSSION**

To obtain labor certification under the H-2B program, an applicant must conduct certain recruitment steps to ensure that there are not qualified U.S. workers available for the position sought in the employer’s application. 20 C.F.R. § 655.40(a). The employer must “conduct the recruitment . . . within 14 calendar days from the date the Notice of Acceptance is issued.” § 655.40(b). Following recruitment, the employer must submit a recruitment report that, *inter alia*, describes its recruitment activity. See §§ 655.40(f); 655.48(a). It is the employer’s burden to prove its eligibility for certification under the H-2B program and the recruitment report assists in determining whether the employer has met its burden. See *Whittle, Inc.*, 2016-TLN-00019 (Mar. 9, 2016).

In this case, the CO issued the NOA on January 16, 2018. Thus, pursuant to 20 C.F.R. § 655.40(b), the Employer was required to conduct recruitment by January 30, 2018. Employer’s recruitment report, filed on March 21, 2018, indicated that it placed newspaper advertisements with the Oklahoman on February 14, 2018 and February 18, 2018. (AF 14). The placement of these advertisements was outside the required timeframe set forth in Section 655.40(b). Accordingly, I find the Employer has failed to meet its burden of establishing it complied with the recruitment deadlines set forth in 20 C.F.R. § 655.40(b), and I hereby affirm the CO’s denial of the Employer’s application.

## **ORDER**

It is hereby **ORDERED** that the Certifying Officer’s denial of the Employer’s Application for Temporary Employment Certification is **AFFIRMED**.

**SO ORDERED.**

For the Board:

**COLLEEN A. GERAGHTY**  
Administrative Law Judge

Boston, Massachusetts

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<sup>4</sup> The regulations require the CO to file with BALCA a copy of the Appeal File within 7 business days of receipt of the request for administrative review. 20 C.F.R. § 655.61(b). The Employer filed its request for administrative review on April 19, 2018. (AF 1). Based on my office’s email communications with the CO, it appears the CO timely uploaded the appeal file on May 1, 2018. However, due to an issue with docketing at BALCA, the undersigned did not receive the Appeal File until May 14, 2018, and issued the Notice of Docketing the same day.