



**Issue Date: 19 June 2018**

BALCA Case Nos.: 2018-TLN-00134  
ETA Case Nos.: H-400-18012-325696

*In the Matter of:*

**MARSPEC, INC.**  
**DBA MARINE SPECIALTIES,**  
*Employer.*

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

This case is before the Board of Alien Labor Certification Appeals (BALCA) pursuant to Marspec, Inc. DBA Marine Specialties' (Employer) request for review of the Certifying Officer's (CO) Non-Acceptance Denial in the above captioned H-2B temporary labor certification matter.<sup>1</sup> 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.<sup>2</sup> 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).<sup>3</sup> A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.<sup>4</sup>

**FACTUAL BACKGROUND**

Employer is located in Provincetown, Massachusetts, where it employs workers in outer Cape Cod to perform duties within retail stores.<sup>5</sup> On 1 Jan 18, Employer applied for H-2B temporary labor certification, seeking approval to hire 30 foreign nationals as Stock Clerks from 1 Apr 18 to 1 Dec 18, based on a peakload need.<sup>6</sup>

On 6 Mar 18, the CO issued a Notice of Deficiency (NOD).<sup>7</sup> Specifically, the CO determined that employer failed to establish temporary need for the number of workers requested, specifically, that the prior year application requested and was approved for 11 stock clerks, and

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<sup>1</sup> 20 C.F.R. Part 655.

<sup>2</sup> 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).

<sup>3</sup> 8 C.F.R. § 214.2(h)(6)(iii).

<sup>4</sup> 20 C.F.R. § 655.61(a).

<sup>5</sup> Appeal File (AF) 103.

<sup>6</sup> *Id.*

<sup>7</sup> AF 94-98.

the current year request was for 30.<sup>8</sup> Employer had not explained the increase in number of workers requested.

On 16 Mar 18, Employer filed an email response to the CO's NOD attaching the requested documentation, and adding that it was misinformed about how to count other types of temporary labor workers – Employer was once again requesting 11 H2-B workers to start the season, and would augment those numbers with 19 J1 workers starting in May 2018.<sup>9</sup> It also gave written permission for the CO to amend ETA Form 9142 to reflect 11 workers instead of 30.<sup>10</sup>

A 28 Mar 18 Email from Employer to the CO notes that Employer discovered it was no longer on the Deficient list, and was then in processing, though it had not yet received a Notice of Acceptance.

On 6 Apr 18 the CO issued a Notice of Acceptance to Employer, citing the correct ETA Case Number, but errantly stating that “employer’s application seeking temporary labor certification for six Swimming Pool Technician Helpers” had been reviewed and was accepted for processing. This document includes Employer Requirements to complete recruitment steps (newspaper advertisements, contacting former U.S. Employees, Contacting the Bargaining Representative/Posting the Job Opportunity/Contacting Community Based Organizations, considering U.S. Applicants, Recruitment Reports) which “must be conducted within 14 calendar days from the date of this letter.” Additionally, the letter states that “Employers must proceed with advertising in the time specified in this letter, even if the SWA has not provided the employer with a job order number.”

On 3 May 18, the CO emailed Employer, informing it that it had received the H-2B application in question, and that a Notice of Acceptance had been issued to Employer on 6 Apr 18 by email. The CO noted that the Recruitment Report was due by 30 Apr 18, but no response had been received. The CO gave Employer one business day to provide the Recruitment Report.

Also on 3 May 18, Employer replied to the CO's email, requesting the Notice of Acceptance be corrected to reflect the 11 stock clerks, instead of the 6 swimming pool technician helpers, informing that it had never filed for swimming pool technician helpers. It also informed the CO that it was unable to submit a completed recruitment report for this position as it does not have a state issued job bank number due to the error on the Notice of Acceptance.

On 4 May 18, Employer again emailed the CO, attaching a recruitment report and noting that it did not have a state issued case number as they had not yet received a corrected Notice of Acceptance though they had requested one multiple times. The Recruitment Report from Employer states in pertinent part: “Bargaining representative: Not applicable. Job Posting at Business: Posted at work location for 15 days from 03/15/2018 to 04/01/2018.”<sup>11</sup>

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<sup>8</sup> AF 97.

<sup>9</sup> AF 85-89.

<sup>10</sup> AF 85.

<sup>11</sup> AF 47.

Also on 4 May 18,<sup>12</sup> the CO issued a corrected Notice of Acceptance to Employer. However, the corrected Notice of Acceptance, updating the position from swimming pool technician helpers to stock clerks was still dated 6 Apr 18.

On 15 May 18, The CO issued a Final Determination denying Employer's application, finding that Employer failed to follow the Job Posting Requirements. Specifically, the CO determined that Employer failed to meet the posting requirements of 20 C.F.R. § 655.40(b). It continues that:<sup>13</sup>

in the Notice of Acceptance sent on 4 May 18, it states that 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.

The employer submitted a recruitment report on 8 May 18 which stated that the internal posting notice was posted on "15 Mar 18 and will continued to be posted until 1 Apr 18."

The NOA letter is specific in that the employer must conduct recruitment of U.S. workers and prepare and submit a recruitment report in accordance with 20 C.F.R. §§ 655.40 – 655.48 and the instructions provided in the letter. All recruitment steps requiring action from the employer were to be conducted within 14 calendar days from the date of the NOA letter.

On 16 May 18, Employer requested administrative review, stating that:<sup>14</sup>

We followed the proper timeline for submission and recruitment based on the April 6, 2018 issue date [of the Notice of Acceptance]. We placed our newspaper ads, our job posting at our location, and all the required steps based on the April 6 timeline. We feel we were denied because we didn't follow the timeline connected to a May 4, 2018 issue date, which was NOT the NOA issue date, but the date USDOL sent us our corrected NOA, which still reflected a NOA issue date of April 6<sup>th</sup>. . We did not need to follow the May 4<sup>th</sup> timeline as that wasn't the date of NOA issue.

We feel this was denied in error, as we followed the required steps. We feel our denial is due to a mistake made at the USDOL Chicago Office, and demand a review based on USDOL internal errors. We followed procedure on this end, and feel we are being denied unfairly.

On 29 May 18, I issued a Notice of Docketing and Expedited Briefing Schedule, permitting Employer and counsel for the CO ("Solicitor") to file briefs within seven business days of receiving the appeal file.<sup>15</sup> Briefs for both Employer and Solicitor were due by close of business on 12 Jun 18. Neither Employer nor the Solicitor filed briefs.

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<sup>12</sup> AF 48-54.

<sup>13</sup> AF 36-37.

<sup>14</sup> AF 1-2.

<sup>15</sup> 20 C.F.R. § 655.61(c).

## DISCUSSION AND 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.<sup>16</sup> A CO's denial of certification must be upheld unless shown by the employer to be arbitrary or capricious or otherwise not in accordance with law.<sup>17</sup> After considering the evidence of record, 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.<sup>18</sup>

Employer bears the burden of proving that it is entitled to temporary labor certification.<sup>19</sup> The CO may only grant Employer's Application to admit H-2B workers for temporary nonagricultural employment if employer has demonstrated that: (1) insufficiently qualified U.S. Workers are available to perform the temporary services or labor for which employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.<sup>20</sup>

The Notice of Acceptance will:<sup>21</sup>

(1) ***Direct the employer to engage*** in recruitment of U.S. workers as provided in §§ 655.40 through 655.46, including any additional recruitment ordered by the CO under § 655.46;

(2) State that such employer-conducted recruitment is in addition to the job order being circulated by the SWA(s) and that the employer must conduct recruitment ***within 14 calendar days from the date the Notice of Acceptance is issued***, consistent with § 655.40[.]

The CO's denial was sufficient under the circumstances. The Post-Acceptance Requirements<sup>22</sup> include mandating the employer to conduct the recruitment described in §§ 655.42 through 655.46 within 14 calendar days ***from the date the Notice of Acceptance is issued***.<sup>23</sup> "If there is no bargaining representative. . . [t]he notice must. . . be posted for at least 15 consecutive business days."<sup>24</sup> Temporary labor certification may not be granted to an employer who fails to comply with these requirements.<sup>25</sup> Moreover, the CO complied with the regulatory requirement at 20 C.F.R. § 655.33(b)(2) to inform Employer that recruitment must be conducted within this

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<sup>16</sup> 20 C.F.R. § 655.61.

<sup>17</sup> See *Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (10 May 16).

<sup>18</sup> 20 C.F.R. § 655.61(e).

<sup>19</sup> 8 U.S.C. § 1361; see also *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (10 Jan 11).

<sup>20</sup> 20 C.F.R. § 655.1(a).

<sup>21</sup> 20 C.F.R. § 655.33(b)[emphasis added].

<sup>22</sup> 20 C.F.R. §§ 655.40 - 655.49.

<sup>23</sup> 20 C.F.R. § 655.40(b)[emphasis added].

<sup>24</sup> 20 C.F.R. § 655.45(b).

<sup>25</sup> 20 C.F.R. § 655.51(a).

narrow timeframe.<sup>26</sup> Notwithstanding this notice, it is uncontroverted that the Recruitment Report submitted by Employer stated that the required recruitment had taken place before the issuance of the Notice of Acceptance.<sup>27</sup>

Since the Notice of Acceptance “directs the employer to engage in recruitment,” it triggers the recruitment period. Recruitment that takes place before the date the Notice of Acceptance is issued does not satisfy this requirement.<sup>28</sup> Employer conducted one of the mandatory recruitment steps BEFORE the Notice of Acceptance was issued: the employer submitted a recruitment report on 8 May 18 which stated that the internal posting took place from 15 Mar 18 through 1 Apr 18.<sup>29</sup> Whether the CO was holding Employer to the date stated on the corrected NOA (6 Apr 18) or the issue date of the corrected NOA (4 May 18) is not relevant to this issue, since the internal posting notice, as reflected on the Recruitment Report submitted by employer, predated both of these dates.<sup>30</sup>

### **ORDER AND DECISION**

In light of the foregoing, the Certifying Officer’s decision denying certification is **AFFIRMED**.

**SO ORDERED.**

For the Board:

**PATRICK M. ROSENOW**  
Administrative Law Judge

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<sup>26</sup> AF 82-83.

<sup>27</sup> AF 48-49.

<sup>28</sup> Here, none of the required posting took place after the Notice of Acceptance was issued. If any of the required posting took place after the Notice of Acceptance was issued, my analysis would likely be different.

<sup>29</sup> AF 47.

<sup>30</sup> As such, Employer’s argument that it had been unfairly denied based on the discrepancy between the stated date of and the issue date of the Notice of Acceptance is without merit.