



Issue Date: 14 May 2018

BALCA Case No.: **2018-TLN-00118**
ETA Case No.: H-400-18012-024882

In the Matter of:

PEREZ PINE STRAW INC.,
Employer

Certifying Officer: Leslie Abella
Chicago National Processing Center

Before: **TIMOTHY J. McGRATH**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from Perez Pine Straw Inc.’s (“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);¹ 20 C.F.R. § 655.6(b).²

Employers who seek to hire foreign workers under this 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 (“ETA”) reviews applications for temporary labor certification. Following the

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 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.

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 January 12, 2018, ETA received an application for H-2B temporary labor certification from Employer for eight "Landscaping and Groundskeeper Laborer[s]" from April 2, 2018 to November 30, 2018. (AF 66-91).³ Employer's application identified multiple worksites in Florida and indicated that its need was "seasonal." (AF 66, 69).

On March 7, 2018, the CO issued a Notice of Deficiency ("NOD"), notifying Employer that its application failed to meet the criteria for acceptance based on three specific deficiencies. (AF 59-65). First, Employer failed to submit an acceptable job order in accordance with 20 C.F.R. §§ 655.16 and 655.18. (AF 62-64). Second, Employer's application did not indicate that it will pay workers the highest of the applicable wage rates in violation of 20 C.F.R. § 655.10(a). (AF 64-65). Lastly, Employer failed to submit a complete and accurate application in conformance with 20 C.F.R. § 655.15(a).

On March 16, 2018, Employer responded to the NOD with supporting information and documentation to cure the deficiencies identified by the CO. (AF 51-56). The CO then issued a Notice of Acceptance ("NOA") of Employer's application on March 26, 2018. (AF 44-50). In the NOA, the CO instructed Employer to "[c]onduct recruitment of U.S. workers and prepare and submit a recruitment report in accordance with 20 CFR 655.40-655.48 . . . All recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter." (AF 44) (emphasis in original).

The CO directed Employer, among other things, to "place a newspaper advertisement on two separate days, which may be consecutive, one of which must be a Sunday, in a newspaper of general circulation serving the area of intended employment and appropriate to the occupation and the workers likely to apply for the job opportunity." (AF 45). The CO also advised Employer of the following:

If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the employer may contact the Department by sending an email to tlc.chicago@dol.gov, describing the advertising options available in the area of intended employment, suggesting alternative publications that serve the local area, and requesting assistance with identifying an alternative publication. Upon receipt of the employer's request, the Certifying Officer (CO) may direct the employer to advertise in a regularly published daily edition of a local newspaper with the widest circulation in the area of intended employment.

Id. On April 13, 2018, Employer emailed the CO stating that its newspaper advertisement would be placed on Wednesday, April 18, 2018 because there were no newspapers of general

³ References to the appeal file will be abbreviated with an "AF" followed by the page number.

circulation in the area of intended employment with a Sunday edition. *See* (AF 42). Employer also indicated the advertisement would be placed in the newspaper's online edition for seven days. *Id.*

On April 16, 2018, the CO wrote to Employer via email: "[T]he Department does not accept online advertisements as meeting the requirements at 20 CFR 655.42. Furthermore, the [E]mployer is required to conduct the recruitment described in §§ 655.42 through 655.46 within 14 calendar days from the date the Notice of Acceptance is issued." (AF 38).

On April 17, 2018, Employer provided the CO with its recruitment report indicating its required advertisements were scheduled to run in the local newspaper, *Clermont News Leader*. (AF 31). Employer stated its advertisement was set to appear in the newspaper on Wednesday, April 18, 2018 because the local newspaper does not have a Sunday edition and only runs ads on Wednesdays. *Id.* Employer indicated its advertisement would also appear in the online edition of the local newspaper for seven consecutive days from April 18, 2018 to April 25, 2018. *Id.*

On April 18, 2018, the CO denied Employer's application for temporary labor certification pursuant to 20 C.F.R. § 655.40(b) because Employer failed to place its newspaper advertisements within fourteen calendar days from the date the NOA was issued. (AF 14-18). Employer's advertisements would be placed in the local newspaper, *Clermont News Leader*, in print and online, between April 18, 2018 and April 25, 2018—well after the mandatory period. *See* (AF 17-18).

On April 24, 2018, Employer requested administrative review of the denial before BALCA. (AF 1-2). In its request, Employer explained why it was unable to advertise within the required fourteen day period:

[I] had a problem in finding a newspaper company in my area to place an ad in the Sunday paper. And . . . there are no newspaper companies in my area of job opportunity to run ads on Sundays, as stated, in the Notice of Acceptance that I must do. Therefore, secondly, when I went ahead and paid for the ad to run in their Wednesday paper and online for 7 days, unfortunately, I didn't meet the cut-off deadline of Fridays by 5pm to run in following Wednesday papers . . . And thirdly; Because I don't have enough workers to complete my contracts, I am having to work more hours in the pine straw fields and wasn't able to make it to the local newspaper company until Monday, April 9th, 2018 . . . and was unaware of the deadlines and my ad couldn't run in the Wednesday, April 11th paper.

(AF 1).

On May 4, 2018, I issued a Notice of Docketing allowing the parties to file briefs. Neither Employer nor the CO filed appellate briefs by the deadline.

DISCUSSION

The scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.61(a), (e). The issue before me is whether the CO properly denied certification in light of Employer's failure to conduct its recruitment within the obligatory timeframe.

Before temporary labor certification is granted, employers must follow specific recruitment steps in order "to ensure that there are not qualified U.S. workers who will be available for the positions listed" in the employer's application. *See* 20 C.F.R. §§ 655.40 – 655.47. A CO may only grant certification to an employer if it can demonstrate there are not available U.S. workers who are capable of performing temporary labor positions at the time the employer files its application. 8 U.S.C. § 1101(a)(15)(H)(ii)(b); *Burnham Companies*, 2014-TLN-00029, PDF at 5 (May 19, 2014).

An employer is required to provide the CO with a recruitment report confirming its compliance with the regulatory recruitment requirements. *See* 20 C.F.R. § 655.48. Pursuant to section 655.48(a), the recruitment report must detail the employer's recruitment activity. The regulations further provide: "Unless otherwise instructed by the CO, the employer must conduct the recruitment described in §§655.42 through 655.46 within 14 calendar days from the date the Notice of Acceptance is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in §655.48." 20 C.F.R. § 655.40(b).

In this case, the CO denied Employer's application because it did not place its newspaper advertisements within fourteen days from the date of NOA. (AF 17-18). The CO issued its NOA letter on March 26, 2018 and directed Employer to place its newspaper advertisements within fourteen calendar days from the date of the letter. (AF 44). Therefore, Employer had from March 27, 2018 until April 9, 2018 to conduct its recruitment. *See id.*

Employer did not place its newspaper advertisement in the *Clermont News Leader* until April 18, 2018, which was scheduled to run in the online version through April 25, 2018.⁴ (AF 31-34). In fact, when Employer submitted its recruitment report to the CO on April 17, 2018, its newspaper advertisements had not yet run. *See* (AF 30-31). It is absurd that Employer submitted a recruitment report prior to obtaining the results of its recruitment. Pursuant to § 655.40(b), Employer was required to complete its recruitment before submitting its recruitment report to the CO.

In its request for administrative review, Employer concedes it failed to conduct its newspaper recruitment within the regulatory required timeframe. (AF 1-2). Employer's

⁴ Pursuant to 20 C.F.R. § 655.42, an employer must place its advertisements on two separate days in a "newspaper of general circulation serving the area of intended employment and appropriate to the occupation and the workers likely to apply for the job opportunity." Although not pertinent to this decision as the CO did not cite to § 655.42 in the Final Determination denying certification, I note Employer's online advertisements do not meet the requirements required by the regulations.

proffered reasons as to why it was unable to conduct recruitment within the mandatory time period are not persuasive. The Board has adopted a strict application of the recruitment requirements set forth in the regulations. See *Montauk Manor Condominiums*, 2016-TLN-00066 (Sept. 22, 2016) (finding employer failed to timely file its recruitment report pursuant to 20 C.F.R. § 655.48); *H & R Drains & Waterproofing LLC*, 2016-TLN-00061 (Sept. 8, 2016) (affirming denial of certification where employer failed to conduct recruitment within timeframe mandated by 20 C.F.R. § 655.40(b)).

Accordingly, I affirm the CO's denial of certification because Employer failed to conduct its recruitment within fourteen days of the date of the CO's NOA letter and improperly submitted its recruitment report before even commencing its mandatory newspaper advertising.

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts