

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 05 March 2018

BALCA Case No.: 2018-TLN-00064
ETA Case No.: H-400-17355-307649

In the Matter of:

SHORE LODGE WHITETAIL, LLC,
Employer.

Appearance: Kaili Moss
Human Resources Director
Shore Lodge Whitetail, LLC
McCall, ID
For the Employer

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
REVERSING CERTIFYING OFFICER'S 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 is a compliance-based certification model¹ which 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

¹ See 82 Fed. Reg. 24042, 24043 (Apr. 29, 2015)

services or labor.” See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);² 20 C.F.R. § 655.6(b).³ Employers who seek to hire foreign workers 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) and 655.61(a). During the administrative review only the material contained within the appeal file (“AF”)⁴ 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 February 9, 2018, denial determination are not considered.

STATEMENT OF THE CASE

On January 1, 2018, the ETA received an *H-2B Application for Temporary Employment Certification* from Shore Lodge Whitetail, LLC for 5 “Cooks, Short Order” as a seasonal need for employment from April 1, 2018 to October 31, 2018 (AF 55-68), with attachments in support of the application (AF 69-144). The position was listed by the Employer as O*Net Code 35-2015, “Cook, Short Order” in Section B.2 and B.3 of the filed ETA Form 9142B (AF 55) and is to be performed in McCall, Idaho. (AF 58). No minimum educational, training or experience requirement is specified in Section F.b of the application, though the Employer listed special requirements under Section F.b Item 5 (AF 58) requiring –

“Lift and sustain 20 lbs. Possible drug screening (post-hire). Possible E-Verify (post-hire). Possible background check (post-hire). No education required. No experience.”

On January 10, 2018 the CO issued a “Notice of Acceptance” (“NOA”) indicating the application had “been reviewed and accepted for processing” and directed the Employer to “perform the actions contained in the SWA Instructions section” set forth therein. (AF 48-54). The requirements set forth included the following –

“The employer must conduct recruitment of U.S. workers and prepare and submit a recruitment report in accordance with 20 CFR 655.40-655.48 and the instructions provided below. All

²The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2017, Pub. L. No. 115-30, Division H, Title I, § 113 (2017). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. See *Further Extension of Continuing Appropriations Act, 2018*, Pub. L. No. 115-123, Division B, Title XII, Subdivision 3, § 20101 (2018).

³ 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.

⁴ “AF” refers to the Appeal File and is followed by the page number of the relevant page in the Appeal File.

recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter ...

I. Instructions for Recruiting U.S. Workers: ...

- A. Newspaper Advertisements – Where to Place (20 CFR 655.42).** You must 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 workers likely to apply for the job opportunity.

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. ...

III. Recruitment Report Requirements:

- A. Submission Date and Method (20 CFR 655.48).** In order for the OFLC CO to make a final determination on your H-2B application, you must prepare, sign, date and submit a written Recruitment Report to our office by March 1, 2018 by email to TLC.Chicago@dol.gov”

At 5:54 PM, Thursday, January 11, 2018, the Employer's agent sent an email to “TLC Chicago – ETA SVC” that “Shore Lodge Whitetail LLC (C-SO) received their NOA on 1/10/18. They are requesting approval to run their newspaper advertising in their local newspaper the Star News located in McCall, ID. The Star News does not have a Sunday edition but does have a Thursday edition. Please advise.” (AF 47). TLC Chicago acknowledged receipt of the email and replied at 12:54 PM, Tuesday, January 16, 2018, as follows (AF 39-40) –

“Thank you for your e-mail. The Department has received your request to recommend a source of advertisement for the area of intended employment for application: Shore Lodge Whitetail, LLC H-400-17355-307649. The Department confirms that Star News is an appropriate publication circulated within your area of intended employment. If you have other questions of concerns please direct them to TLC.Chicago@dol.gov. Please be sure to include your (sic) both you case numbers in all correspondence to the CNPC. Thank You.”

At 12:24 PM, Friday, February 2, 2018, the Employer submitted an “Initial Recruitment Report.” (AF 36-38). Included in the report was documentation that the Employer posted the required newspaper advertising in the *Star News* on Thursday, January 18, 2018 and Thursday, January 25, 2018. (AF 38).

On February 9, 2018 the CO issued a “Final Determination” indicating the application had been denied. (AF 23-26). The CO stated the sole denial reason as -

“Deficiency 1: Employer-conducted recruitment.

... In accordance with Departmental regulations at 20 CFR 655.40(b), 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 by § 655.48.

On January 10, 2018, the Chicago NPC issued a Notice of Acceptance to the employer. The employer provided its recruitment report on February 07, 2018. The employer indicates in its recruitment report that its newspaper advertisements were placed on January 18 and January 25, 2018. However, the employer's application was accepted for further processing on January 10, 2018. The employer's Notice of Acceptance letter clearly states that "[a]ll recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter." Therefore, the Thursday January 25, 2018, newspaper advertisement was placed outside of the required 14 calendar timeframe.

The employer failed to demonstrate it placed newspaper advertisements within the required timeframe in compliance with Departmental regulations at 20 CFR 655.40(b). For this reason, the application is denied."

By email on February 13, 2018, the Employer inquired as to why the application was denied. The Employer noted "We asked for permission to advertise in the local newspaper the Star News on two (2) Thursdays and received permission from DOL to use the two (2) Thursdays. The 14 calendar days posting requirement should have been waived. ... We respectfully request that the Certifying Officer issue a Certification ASAP." (AF 22). On February 14, 2018, the Employer filed a request for administrative review arguing "Based on the timeline ... the first opportunity to publish in the local newspaper following permission from the Certifying Officer was January 18th, 2018 with the second available opportunity being January 25th, 2018 resulting in our second advertisement publishing 15 days after our Notice of Acceptance was issued. As relief was granted for exception to Sunday edition and approval to publish in the local newspaper, we would request the same relief be granted for timing of publication as it relates to the sequences of events ..." (AF 2-3).

On February 23, 2018, the CO forwarded the case to BALCA for administrative review without comment on the Employer's February 13, 2018 inquiry or February 14, 2018 request for review.

On February 23, 2018, BALCA issued a Notice of Assignment and Briefing Schedule directing the CO to assemble and transmit the AF to BALCA by Wednesday, February 28, 2018, and granting leave to the Employer and Solicitor to file briefs on the denial 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 2:00 PM, March 5, 2018.

Upon review of the AF when received on February 28, 2018, it is found that the sole issue involving the application of Departmental regulation 20 C.F.R. § 655.40(a) involves the actions of the CO and does not involve a dispute of fact finding or abuse discretion. Accordingly, briefs from the Employer and/or Solicitor are not required and delay of action by BALCA for such briefs is not in the best interests of the INA.

DISCUSSION

Where an employer has submitted an application for temporary labor 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 may also consider the arguments set forth in the request for review and legal briefs submitted to BALCA. 20 CFR §655.61(e). Accordingly, the specific documents which were attached to the request for review cannot be considered; however the same documents are considered as they previously appeared in the AF.

The CO issued a NOA on January 10, 2018 setting forth specific requirements that the Employer was required to complete. One of the requirements was 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 workers likely to apply for the job opportunity.” The CO instructed the Employer that “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.”

The Employer filed a timely request to advertise in the local newspaper *Star News*. The CO responded on Tuesday, January 16, 2018, that “The Department has received your request to recommend a source of advertisement for the area of intended employment for application: Shore Lodge Whitetail, LLC H-400-17355-307649. The Department confirms that *Star News* is an appropriate publication circulated within your area of intended employment.”

Official notice is taken that the *Star News* is “Published every Thursday in McCall, Idaho by Central Idaho Publishing, Inc.”⁵ This is consistent with the representation made by the Employer’s agent to the CO on January 11, 2018 when permission was requested to advertise in the *Star News*. The CO’s January 16, 2018 email confirming “that *Star News* is an appropriate publication circulated within your area of intended employment” indicates that the CO approved use of the *Star News* for the required newspaper advertising required by 20 CFR § 655.42 and that the CO was aware that the *Star News* was a weekly publication, published on every Thursday.

Under 20 C.F.R. § 655.40(a), an employer must place the newspaper advertisements required by § 655.42 within 14 calendar days of the Notice of Acceptance “unless otherwise instructed by the CO.” The evidence of record in this case established that the CO instructed the Employer in the NOA to request approval for placement of the required two newspaper advertisements in the rural area if no Sunday edition was available; the Employer immediately

⁵ www.mccallstarnews.com, “Contact Us” page.

made such a request to use a local newspaper published weekly on Thursdays; the CO approved the request; the Employer advertised in the two consecutive Thursday editions of the *Star News* immediately following the CO's January 16, 2018 approval of use of the rural local newspaper; and that the second newspaper advertisement fell on the 15th day after the NOA. Here, the Employer complied with the instructions of the CO and the CO erred in not accepting the two consecutive non-Sunday newspaper advertisements placed in the *Star News* immediately after the CO specifically approved such advertising as being compliant with the provisions the CO's instruction in the NOA. Accordingly, the denial under the provisions of 20 C.F.R. § 655.40(a) was made in error.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that the denial of the Employer's *Application for Temporary Employment Certification* is **REVERSED** and that this matter is **REMANDED** for further action pursuant to 20 C.F.R. § 655.61(e).

SO ORDERED.

For the Board:

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia