



Issue Date: 21 June 2019

BALCA Case No.: 2019-TLN-00071
ETA Case No.: H-400-18362-559117

In the Matter of:

**HOMEFRONT S AND D, LLC,
DBA ANDY’S SPRINKLER AND DRAINAGE,**

Employer

Certifying Officer: Chicago National Processing Center

Appearances: Wendel V. Hall, Esq.,
Washington, D.C.
For the Employer

Robert B. Hines, Attorney
Matthew Bernt, Associate Solicitor
Office of the Solicitor
Division of Employment and Training Legal Services
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Natalie A. Appetta
Administrative Law Judge

DECISION AND ORDER DIRECTING GRANT OF CERTIFICATION

This case arises from Homefront S and D, LLC, DBA Andy’s Sprinkler and Drainage’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny its 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 (DHS). *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

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through

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 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).

BACKGROUND

On January 7, 2019, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 44 landscape laborers for the period of April 1, 2019 to November 30, 2019. (AF 18-45).³ Employer indicated that the nature of its temporary need was “peakload.” (AF 18).

The CO issued a Notice of Acceptance on February 1, 2019, notifying the Employer that its application for temporary employment certification for 44 landscaping and groundskeeping workers under the H-2B temporary non-agricultural labor certification program had been reviewed and accepted for processing. (AF 10-17). The CO stated that Employer’s “application is timely and contains the required conditions of employment necessary to ensure that the wages and working conditions of U.S. workers similarly employed will not be adversely affected.” (AF 10).

In regard to further actions required by the Employer the Notice of Acceptance stated,

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 recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter. 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, if applicable (see section further below).

(AF 11).

subsequent appropriations legislation, including the current continuing resolution. Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-120, Division B (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 have 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.

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

The CO also directed the Employer to conduct the recruitment steps noted in the regulations at 20 C.F.R. §§ 655.41-45 including the newspaper advertisement requirements at Section 655.42.

In this regard the CO stated the following regarding newspaper advertisements, consistent with the regulation found at 20 C.F.R. § 655.42. The CO stated:

The employer 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 the 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.

(AF 11).

The CO noted specific information that must be included in the advertisement pursuant to 20 C.F.R. §655.41. The CO also emphasized 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. (AF 12-13).

The CO directed the Employer to submit its recruitment report by the deadline of March 1, 2019. The CO noted specific information that must be included in the recruitment report. (AF 15-16). The CO's Notice of Acceptance also noted 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, if applicable. (AF 11). The CO also informed the Employer of its duty to update the recruitment report throughout the entire recruitment period which continues until 21 days before the start date of need. (AF 16).

On February 22, 2019, Employer submitted its recruitment report. (AF 8). Employer provided the information requested by the CO including the required information regarding the placement of the job order, posting of availability of the job opportunity in two conspicuous locations at its company for fifteen consecutive business days, and notice that Employer had placed its first and second advertisements in the Star Local Media/Carrollton Newspaper on Sunday February 10th and Sunday, February 17th, 2019. Employer further noted that the days are not consecutive as the Star Local Media/Carrollton Newspaper does not circulate on any other

day of the week but on Sunday. (AF 8). Employer also noted that no applicants had responded to its recruitment efforts either from the print ad, the job posting or from the Texas SWA. *Id.*

On February 25, 2019, the CO issued a Final Determination Denial to the Employer. The CO stated that the office was unable to issue a certification because the employer listed newspaper advertisements did not comply with the regulation at 20 C.F.R. 655.40(b). (AF 4-7). Specifically, the CO stated:

In its recruitment report, the employer indicates that it published its newspaper advertisement in the Star Local Media/Carrollton Newspaper on Sunday February 10, 2019 and Sunday, February 17, 2019. However, the regulations clearly state the employer must conduct the recruitment described in section 655.42 through 655.46 within 14 calendar days from the date that the NOA is issued. By not having its second advertisement published within 14 days from the issuance of the NOA, the employer did not comply with the regulations. Therefore, the application is denied.

(AF 7).

In an email dated February 27, 2019, sent two days after the final denial was issued, and two days before the recruitment report was due (which was March 1, 2019), Employer requested that the CO reconsider its denial. Employer pointed out that it had received the Notice of Acceptance in this case on Friday, February 1, 2019 at 1:51 p.m., which was too late to post its ad in the February 3, 2019 Sunday edition of the local Sunday-only newspaper, the Star Local Media/Carrollton Newspaper. Accordingly, the Employer posted its advertisement on the first two possible opportunities which were Sunday February 10th and Sunday, February 17, 2019. These were the first two days the advertisement could be posted as the newspaper does not circulate on any other day of the week but Sunday. (AF 2). On the following day, February 28, 2019, Employer again emailed the Chicago Certifying office and requested that the denial be reviewed because it would be unfair to deny the application when it would have been “impossible for Homefront to meet the deadline because of the newspaper’s once a week circulation.” (AF 1). There is no indication in the record that the CO considered this request.

On March 5, 2019, Wendell V. Hall, Esq., on behalf of the Employer, filed a request for administrative review of the CO’s denial. Employer points out that the sole basis for denial is the allegation by the Department of Labor that the employer failed to conduct recruitment within 14 calendar days from the date the Notice of Acceptance was issued, as required by 20 C.F.R. §655.40(b). Employer notes that since the Notice of Acceptance was issued on Friday, February 1, at 1:51 p.m. it was too late to place an advertisement in the Sunday, February 3, 2019 edition. Therefore, the advertisement was placed in the first two subsequent editions of the newspaper which were Sunday, February 10th and Sunday, February 17th, 2019.

Employer argues that the issuance of the Notice of Acceptance on a Friday afternoon made it impossible for the Employer to meet the fourteen day requirement for placing its newspaper advertisements. Placement of the ad at the first two opportunities, on Sunday February 10th and 17th reflects that Employer had completed the advertising within 16 days rather

than 14. Employer argues that since the Employer's application was deemed acceptable in all other substantive respects, the CO could not have intended that the Employer's application be denied by creating an "impossibility" of compliance because the CO issued the Notice of Acceptance on a Friday afternoon, thus making it impossible to place two ads in the Sunday only newspaper within 14 days. Accordingly, Employer contends that "[w]hat the CO must have been intending was that the employer advertise as soon as possible (because the law does not require impossibilities)."

Alternatively, the Employer contends that the issue date of the Notice of Acceptance which was issued on Friday afternoon, February 1, at 1:10 p.m., should be deemed issued on the first full business day which would be Monday February 4, 2019. Assuming an issuance date of February 4, 2019, Employer's ads on February 10 and 17, 2019, would have been in compliance with the fourteen day deadline.

In a letter dated March 7, 2019, which was received on March 8, 2019, Employer stated it was "supplementing" its request for review. Employer asserts that the Department's response to a "Frequently Asked Question," (FAQ) posted on the Department's website, supports that the Employer complied with the regulation. Employer notes that FAQ 11 of Round 11 (Dec. 2015) states:

The employer must begin all employer-conducted recruitment activities within 14 calendar days from the date of the NOA. The employer will be able to both begin and complete many of these activities within the 14 day period. Where an activity takes longer to complete, the employer must start the recruitment activity within the 14 day period and continue the activity until it is completed before submitting the recruitment report to the Chicago NPC.

Employer argues that it has complied with this stated interpretation because it began its recruitment as soon as it received the Notice of Acceptance and the advertisements were placed as soon as possible, consistent with the procedure contemplated by the regulation and the FAQ. Employer further cites two H-2B decisions where Employer alleges Administrative Law Judges have recognized this approach, *citing Wiegardt Bros.*, 2019-TLN-00016 (Dec. 7, 2018) and *Miller's Quality Processors of Arkansas, Inc.*, 2019-TLC-00001 (Oct. 24, 2018).

By Order issued on March 15, 2019, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before March 25, 2019.

Attorney Robert P. Hines of the Office of the U.S. Department of Labor Associate Solicitor for Employment and Training Legal Services ("Solicitor") filed a brief in this matter on March 25, 2019, on behalf of the Certifying Officer. The Solicitor argues that the CO's denial of the Employer's application for temporary labor certification should be affirmed because the CO correctly determined that the Employer failed to carry its burden of demonstrating it complied with the 14 day deadline for employer-conducted recruitment provided in 20 C.F.R. §655.40(b).

The Solicitor argues that the agency's strict enforcement of recruitment requirements extends to the requirement to complete all recruitment steps within a 14 day period following the

Notice of Acceptance, “except in very limited circumstances.” The Solicitor acknowledges that the Department of Labor provides an exception from the strict recruitment deadline for certain activities that are impossible to complete within the 14 day window as stated in the agency’s response to an FAQ (Frequently Asked Question) posted online by ETA (Employment and Training Administration) in which the Department provides information pertaining to the H-2B program. The Solicitor notes that ETA’s provided response to the FAQ states that most recruitment activities should be completed within the 14 day window. The Solicitor argues that the exception only applies to activities that are impossible to complete with 14 days, such as the 15 day job posting required when there is no applicable bargaining representative or when the Court or the CO orders a longer recruitment period. The Solicitor argues that this exception should not be applied to the placement of two newspaper advertisements which “can easily be met my placing the ads in a daily paper.”

Employer submitted a timely brief in regard to this matter on March 25, 2019. Employer primarily reiterated the positions stated in its March 5, 2019 letter requesting administrative review and its March 7, 2019 letter supplementing its request for review which have previously been summarized. Employer also argues that the CO’s determination was arbitrary and capricious because it did not follow its own interpretive FAQ in this case, in failing to acknowledge that an exception to the 14 day recruitment deadline exists where it is impossible to comply with the 14 day deadline. Employer asserts that the Solicitor’s brief misstates the record in alleging that other means were available to the Employer to place its two required advertisements, other than its local Sunday only newspaper, as there is no information in the record to support this allegation. Employer also argues that the Employer’s application met all other substantive requirements for acceptance and the CO’s denial on this basis is arbitrary and capricious because there is no rationale which could support an adverse effect on U.S. workers in this case due to Employer’s running its second recruitment ad on February 17th rather than February 15th.

SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO’s determination; or
- (2) Reverse or modify the CO’s determination; or
- (3) Remand to the CO for further action.

(20 C.F.R. § 655.61(e)).

ISSUE

Whether the Employer has met its burden of complying with the fourteen day deadline for recruitment at 20 C.F.R. § 655.40(b)?

DISCUSSION

Employer bears the burden of proof concerning its entitlement to temporary labor certification under the H-2B program. 8 U.S.C. §1361; *Cajun Contractors*, 2011-TLN-00004 (Jan. 10, 2011); *BMGR Harvesting*, 2017-TLN-00015 (Jan. 23, 2017). As part of this burden, Employer must demonstrate compliance with the regulatory recruitment requirements found at 20 C.F.R §§ 655.40- 655.48 which are in place to “ensure that there are not qualified U.S. workers who will be available for the positions listed in the Application for Temporary Employment Certification [and that] U.S. applicants [are] rejected only for lawful job-related reasons. 20 C.F.R. § 655.40(a).

In the Final Determination Denial the CO denied the Employer’s application due to a deficiency in “Employer conducted recruitment pursuant to 20 C.F.R. §655.40(b).” Specifically, the CO determined that the Employer had failed to conduct its recruitment within 14 calendar days from the date the February 1, 2019 Notice of Acceptance was issued. The CO’s determination is based on the fact that Employer’s two recruitment ads ran on February 10, 2019 and February 17, 2019. As the February 17, 2019 ad ran two days after the 14 day deadline (February 15, 2019), the CO found the Employer's advertisement recruitment failed to comply with the regulation at 20 C.F.R. §655.40(b).

The applicable regulation at 20 C.F.R. § 655.40(b) states:

Unless otherwise instructed by the CO, the employer must conduct the recruitment described in §§ 6655.42 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.

In general, BALCA has strictly enforced the recruitment requirements pertaining to the content of recruitment advertisements and job orders, finding generally, that these requirements are in place to protect U.S. workers and to assure that there are not sufficient workers, willing and able to perform the temporary jobs that are the subject of the H-2B temporary labor certification application. See *Clippers Lawn Maintenance Inc.*, 2014-TLN-00028 (May 19, 2014) (affirming denial where the newspaper advertisements did not identify the name of the employer); *Burnham Companies*, 2014 TLN-00029 (May 19, 2014) (affirming denial where the advertisements did not state start and end dates of employment and did not fully state the offered wage range); *Ridgebury Management LLC*, 2014-TLN-00020 (Apr. 7, 2014) (affirming denial and finding that SWA job order must list anticipated end date of employment).

Some cases have also affirmed the CO's denial where Employer failed to comply with the 14 day recruitment deadline. In general, these cases also involved deficiencies in the recruitment report or where Employer had no justification for its failure to comply with the fourteen day deadline. See e.g. *Boothill Properties, Inc.* 2017-TLN-00034 (Apr. 25, 2017); (affirming denial where Employer requested to be excused from required timeframe because it was out of town when the Notice of Acceptance was issued); *Montauk Manor Condominiums*, 2016-TLN-00066 (Sept.22, 2016) (Affirming denial where recruitment did not occur within 14 day period and recruitment report was not filed timely).

In the current case the Employer complied with all other substantive regulatory requirements pertaining to its application for temporary labor certification. The only basis for the CO's denial of the Employer's application was its failure to comply with the 14 day deadline to complete its recruitment obligations with respect to the posting of its two print advertisements, which were placed in the February 10th and February 17th Sunday editions of its local newspaper. Employer had completed all other regulatory recruitment requirements in a timely fashion and had filed its recruitment report on February 22, 2019, a full week prior to the March 1, 2019 deadline for filing this report imposed by the CO in the February 1, 2019 Notice of Acceptance. Employer explained to the CO in its recruitment report that the print advertisements were placed on Sunday, February 10th and Sunday February 17, 2019, which are not consecutive days because the local newspaper, the Star Local Media/Carrollton Newspaper, is only published on Sundays. (AF 8).

As the Notice of Acceptance in this case was not issued until February 1, 2019, a Friday, Employer reasonably asserts that its print ad could not have been placed in the February 3, 2019 Sunday issue of the paper. Employer would have had less than one business day to place an ad for the February 3rd, Sunday newspaper. Therefore, it would have been impossible for the Employer to comply with the 14 day requirement for posting an ad in its local newspaper which is published only on Sundays. Employer argues that it would be unfair to deny its application on this basis as it did everything within its power to comply with the 14 day deadline by placing its ads in the first two editions possible.

Employer argues that a reasonable interpretation of the 14 day requirement at 20 C.F.R. §655.40 can be found in the ETA's (Employment and Training Administration) posted response to a Frequently Asked Question (FAQ) regarding the interpretation of the 14 day deadline. The Solicitor also acknowledges the response to the FAQ and that the Department of Labor provides an exception from the strict recruitment deadline for certain activities that are impossible to complete within the 14 day window, as stated in the agency's response to the FAQ posted online wherein the Department provides information pertaining to the H-2B program. This FAQ is available at the following link:

https://www.foreignlaborcert.doleta.gov/pdf/H-2B_2015_IFR_FAQs_Round11.pdf

The FAQ question and response are stated as follows:

11. Must all employer-conducted recruitment be completed within 14 calendar days from the date on which the Notice of Acceptance (NOA) was issued?

The 2015 H-2B Interim Final Rule (IFR) requires the employer to engage in the employer conducted recruitment activities directed in the NOA (e.g., newspaper advertisements, contact with former U.S. workers, and contact with the bargaining representative or posting a notice) within the 14-calendar days from the date the NOA is issued. The employer must begin all employer-conducted recruitment activities within 14 calendar days from the date of the NOA. The employer will be able to both begin and complete many of these activities within the 14-day period. Where an activity takes longer to complete, the employer must start the recruitment activity within the 14-day period and continue the activity until it is completed before submitting the recruitment report to the Chicago NPC.

For example, where there is no applicable bargaining representative, the regulation requires the employer to post the availability of the job opportunity for at least 15 consecutive business days at the place(s) of intended employment. This posting must be started, but does not need to be completed, within the 14-day period after the NOA is issued. Similarly, if the CO directs the employer to conduct additional recruitment activity that requires more than 14 calendar days to complete, that activity must be started, but need not be completed, within the 14-day period after the NOA is issued.

Important Reminders: The posting of the Notice of Posting, if one is needed, and all other employer-conducted recruitment must be completed before the employer may submit its recruitment report. In addition, the employer must continue to accept referrals to the job opportunity until 21 days before the employer's date of need.

Revised December 8, 2015

Employer argues that the position taken by the agency as stated in the FAQ is reasonable and should be applied to this case. The Solicitor, in his brief filed on behalf of the CO, also argues that the position stated in the agency's response to the posted FAQ should be followed. The undersigned acknowledges the FAQ is readily available online and appears to reflect the agency's posted policy statement, regarding the fourteen day recruitment deadline. However, such a policy statement, albeit readily available, is not entitled to the force and effect of a promulgated regulation as it has not withstood the scrutiny of a promulgated regulation, nor the requisite notice and comment procedures. Although I am not bound to follow or apply ETA's posted response to the FAQ, it should be noted that in other recent H-2B temporary labor certification appeals, counsel for the CO (U.S. Department of Labor Associate Solicitor for Employment and Training Legal Services ("Solicitor")) has similarly argued that such FAQ responses represent the agency's interpretation of its own regulation and therefore should be given deference as such. *See Wiegardt Brothers Inc.*, 2019-TLN-00016. *See also Brook Ledge, Inc.*, 2016-TLN-00033, at *5 ("BALCA should defer to OFLC's rational and reasonable interpretation of an ambiguous regulatory term.").

It is necessary to determine the most reasonable, and intended interpretation of the regulation at 20 C.F.R. § 655.40(b) and apply it to the facts of this case to determine whether the

Employer adequately complied with the required regulatory recruitment. Further the parties agree that the agency's response to the above noted FAQ is reasonable. The regulation at 20 C.F.R. 20 C.F.R. § 655.40(b), states:

Unless otherwise instructed by the CO, the employer must conduct the recruitment described in §§ 6655.42 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.

Although this regulation could arguably reflect a strict 14 day deadline, a reading of the recruitment regulations in their entirety supports that Employer's regulatory recruitment obligation necessarily would take more than 14 days. Specifically Employer's recruitment obligation found at 20 C.F.R. § 655.45 requires the Employer to "post the availability of the job opportunity in at least two conspicuous locations at the place(s) of anticipated employment or in some other manner that provides reasonable notification to all employees." This regulation further states that the above notice must meet the requirements under §655.41 and "be posted for at least 15 consecutive business day." Thus a strict interpretation of the 14 day recruitment deadline would be inconsistent with the regulation at 20 C.F.R. § 655.45.

The undersigned finds that the most reasonable interpretation of the 14 day deadline, which is consistent with the agency's response to the FAQ, would require the Employer's regulatory recruitment to be initiated as soon as possible after the Notice of Acceptance is issued and completed within the 14 day period if possible. If completion of a recruitment requirement is not possible within the 14 day period (as in the case of the posting of the notice in the place of employment for 15 days) then it should be completed as soon as possible.

Thus, based on this interpretation of the fourteen day deadline which the undersigned finds to be most reasonable, where circumstances are such that there is no possible way compliance can occur within the fourteen day period, the regulation would require that recruitment be initiated within the fourteen day period and completed as soon as possible. Although the agency's response to the FAQ as noted above is not binding, it would appear to be consistent with this interpretation.

Also, as noted in the regulation at 20 C.F.R. § 655.40(b), all employer conducted recruitment must in all cases be completed before the employer submits the recruitment report as required in §655.48. As noted above, in this case, all of the Employer conducted recruitment was completed prior to its filing of its recruitment report which it filed on February 22, 2019, a full week before the deadline imposed by the CO of March 1, 2019.

In the instant case there is no possible way the Employer could have complied with the fourteen day requirement due to the fact that the Notice of Acceptance was issued on a Friday and it would reasonably have been too late to place the advertisement in the Sunday edition on February 3, 2019, which would have been less than one business day from the date the Notice of Acceptance was issued. Employer posted its advertisement in its local newspaper the Star Local Media/Carrollton Newspaper, which is only published on Sundays, on the first two opportunities,

Sunday February 10 and Sunday February 17, 2019. Thus the Sunday February 17, 2019 advertisement would have run two days after the fourteen day deadline.

In its recruitment report, the Employer made the CO aware of the fact that the local newspaper, the Star Local Media/Carrollton Newspaper, was a Sunday only newspaper and therefore Employer's ads ran on Sunday, February 10, 2019 and Sunday, February 17, 2019, which were not consecutive days. The CO would also have been aware of the issue date of the Notice of Acceptance on Friday, February 1, 2019. Therefore, the necessary facts were before the CO as to why the Employer was required to go slightly over the fourteen day deadline in placing its two ads in the first two available Sunday editions of the paper.

Thus, in light of the circumstances presented in this case, and acknowledging that it would have been impossible for Employer to place both of its ads in the local newspaper within the fourteen day deadline, the undersigned finds that it would be fundamentally unfair to deny certification where Employer performed its required advertising as soon as possible after receiving the Notice of Acceptance from the CO.

As noted above I find the most reasonable interpretation of the fourteen day recruitment deadline would require the Employer's regulatory recruitment to be initiated as soon as possible after the Notice of Acceptance is issued, and completed within the 14 day period if possible. If completion of a recruitment requirement is not possible within the 14 day period (as in the case of the posting of the notice in the place of employment for 15 days) then it should be completed as soon as possible. I find the Employer complied with the regulatory recruitment requirements, as there was nothing reasonably within the Employer's control which would have allowed Employer to complete its advertising recruitment within the fourteen day period. *See SDG Post Oak, LP*, 2011-Per-01576 (Aug. 17, 2015) (BALCA reversing CO where Employer had placed a compliant advertisement but newspaper erred in the printing of the ad caption, finding it would be fundamentally unfair to deny certification based on a circumstance that could not reasonably be found to be under the Employer's ability to prevent or cure); *see also Miller's Quality Processors of Arkansas, Inc.*, 2019-TLN-00001 (Oct. 24, 2018) (Reversing the CO finding it would be fundamentally unfair to deny certification where there was nothing Employer could have done differently to comply with the regulatory fourteen day deadline for posting its two newspaper advertisements) and *Wiegardt Brothers, Inc.*, 2019-TLN-00016 (Dec. 7, 2018) (Reversing CO and finding a slight variation in the fourteen day recruitment deadline was warranted where Employer had done everything within its control to comply with the fourteen day deadline).

The undersigned finds that a slight variation in the fourteen day recruitment deadline is warranted under the facts presented in this case, noting that the CO cited no other deficiencies in the Employer's recruitment report or noncompliance with the recruitment regulations. In particular, the undersigned notes that the CO did not question the Employer's choice of utilizing its local newspaper, the Star Local Media/Carrollton Newspaper, a Sunday only newspaper, for its print recruitment advertisement, and that the Employer submitted its recruitment report in a timely fashion by the March 1, 2019 deadline specified by the CO. Further, all employer recruitment had been completed by the date the recruitment report was submitted, as specified in the regulation at 20 C.F.R. § 655.40(b) and as instructed by the CO.

ORDER

In light of the foregoing, IT IS ORDERED that the denial of labor certification in this matter is REVERSED and this matter is REMANDED for certification.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

NATALIE A. APPETTA
Administrative Law Judge