



Issue Date: 15 August 2019

BALCA CASE NO.: 2019-TLN-00144

ETA CASE NO.: H-400-17279-882910

In the Matter of:

L & K TREE & SHRUB, INC.,
Employer.

**DECISION AND ORDER AFFIRMING
CERTIFYING OFFICER'S DETERMINATION**

This is a request for administrative review, under 20 C.F.R. section 655.71, subsection (b), of the Certifying Officer's ("CO") determination imposing CO-ordered assisted recruitment on the Employer for a period of one year (AF p. 2).¹ In such a case, the procedures in 20 C.F.R. section 655.61 apply. 20 C.F.R. section 655.71, subsection (b). This proceeding is before the Board of Alien Labor Certification Appeals ("BALCA"), and by designation of the Chief ALJ, I am BALCA for purposes of administrative review. 20 C.F.R. section 655.61, subsection (d); 20 C.F.R. section 655.61, subsection (a).

I. STANDARD OF REVIEW

BALCA much more frequently hears appeals from a CO's decision to grant or deny labor certification in the first instance than from a CO's decision to impose assisted recruitment on an Employer. Nevertheless, in both cases, the same procedural rules, set forth in 20 C.F.R. section 655.61, apply. BALCA's scope of review is limited to the legal arguments and evidence submitted to the CO before issuance of the final determination. 20 C.F.R. § 655.61(a)(5). I must review the CO's determination based solely only on the Appeal File, the request for review, and any legal briefs submitted.² 20 C.F.R. § 655.61(e). I must either affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action. *Id.*

Neither the Act nor the applicable regulations specify a standard of review. When the CO's determination turns on a long-established, policy-based interpreta-

¹ In this Decision and Order, "AF" refers to the Appeal File.

² In this case, the CO submitted a brief. I invited Employer to file a brief if it wished, but it filed no brief.

tion of a regulation, I likely owe considerable deference to the CO. *See Zeta World-force, Inc.*, 2018-TLN-00015, slip op. at 4 (Dec. 15, 2017). But absent a long-standing, policy-based interpretation of a regulation, it would appear I am to review the CO's denial de novo. *Sands Drywall, Inc.*, 2018-TLN-00007, slip op. at 3. (Nov. 28, 2017). Here, under 20 C.F.R. section 655.71, subsection (a), "If . . . the CO determines that a violation has occurred that does not warrant debarment, the CO may require the employer to engage in assisted recruitment for a defined period of time for any future Application for Temporary Employment Certification."

In *Sigma F, Inc.*, 2019-TLN-00121 (May 8, 2019), BALCA reviewed a CO's determination to impose assisted recruitment by considering whether that determination "was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Sigma F. supra*, slip op. at 3. Administrative Law Judge Peter B. Silvain, Jr., observed

The importance of strict compliance with the recruitment requirements outlined in 20 C.F.R. § 655.41 is well-settled. *See, e.g., Ridgebury Management LLC*, 2014-TLN-00020 (April 7, 2014); *BPS Industries, Inc.*, 2010-TLN-00014; 2010-TLN-00015 (Nov. 24, 2009) ("recruitment requirements are 'designed to reflect what the Department has determined, based on program experience, are most appropriate to test the labor market'"); *Freemont Forest Systems, Inc.*, 2010-TLN-00038 (March 11, 2012) ("by omitting one of the advertising components, the Employer did not conduct a proper test of the labor market to determine if labor certification was required"); *Mangkang, LLC dba Ark Chinese Restaurant*, 2016-TLN-00058 (Aug. 16, 2016) (upholding a denial of certification on the basis of the employer's failure to publish a newspaper advertisement that met all the requirements of 20 C.F.R. § 655.41); *Burnham Companies*, 2014-TLN-00029 (May 19, 2014) ("the employer must test the labor market . . . through recruitment efforts, which include publicizing advertisement of the job opportunity . . . which fully disclose the wages, terms, and conditions of the temporary job opportunity."). Although strict enforcement of the regulations can sometimes lead to harsh results, it also ensures the wages and working conditions of U.S. workers will not be adversely effected by similarly employed H-2B workers. *See* 20 C.F.R. § 655.1(a).

Accordingly, I must affirm the CO's determination to impose assisted recruitment unless it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

II. THE CO's DETERMINATION

On March 8, 2018, the CO granted Employer's application for temporary labor certification under the H-2B program (AF pp. 248-250). Thereafter, Employer filed an attestation on Form ETA-9142-B-CAA-2 (AF pp. 139-140), in which Employer represented it would place a new order for the job opportunity with the State Workforce Agency ("SWA"), and

. . . place one newspaper advertisement, which may be published online or in print, on any day of the week, meeting the advertising requirements of 20 C.F.R. 655.41, *during the period of time the SWA is actively circulating the job order for intrastate clearance* (emphasis added).

(AF p. 139).

Thereafter, in response to an audit request under 20 C.F.R. section 655.70 (AF pp. 30-35), Employer admitted it had not placed its advertisement during the entire period the SWA was circulating the job order. Employer explained it had run the newspaper ad on June 18, 2018, relying on advice from the Federation of Employers & Workers of America ("FEWA"), although in fact the job order had closed two days earlier (AF pp. 19-20).

The CO concluded

The employer failed to publish its additional advertisement, in support of the attestation, *during the period of time the SWA actively circulated the job order for intrastate clearance*. As such, the employer failed to show that it complied with the Department's regulations at 20 CFR § 655.42 and 20 CFR § 655.56 (emphasis in original).

(AF p. 5).

I can find no fault with the CO's conclusion. Employer admits it did not publish the relevant newspaper advertisement until after the period in question had run. Accordingly, under 20 C.F.R. section 655.71, subsection (a), the CO could exercise her discretion to place Employer on assisted recruitment for one year.

Employer admits all of this (AF, p. 1). Its defense is essentially a plea for mercy. At the time it printed the newspaper advertisement, it believed its agent, FEWA, had arranged for the SWA job order to remain open until June 22, 2018, and that its placement of the advertisement was therefore timely. Employer stresses its reliance on FEWA's expertise in the matter and contends Employer acted reasonably under the circumstances. Employer further contends it has "been using H-2B visas for nearly 20 years and have never had a mistake in the recruitment process that we are aware of." *Id.*

But the CO remains unmoved. She argues,

Reliance on an agent does not absolve the employer from meeting the regulatory requirements of the program. The employer “voluntarily chose this attorney [or agent in this case] as [its] representation in the action, and [it] cannot now avoid the consequence of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation . . .” *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 396 (1993) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962)); *see also Harrison Poultry*, 2018-PED-00001 (June 29, 2018) (articulating the principle that “reliance on guidance and advice from these agents and representatives does not absolve Employer of its own liability for its non-compliance with the core requirements of the PERM process”).

(CO’s Brief, pp. 5-6). As a general rule, the CO is correct. If Employers were free to disavow the mistakes of their authorized agents, an incompetent agent might be of greater value to an Employer than a competent one, with the CO having repeatedly to waive the statutory and regulatory requirements it is her job to enforce. And while I am sympathetic to Employer’s claimed twenty-year record of compliance, it does not appear in the record before me except as a point of argument. Accordingly, I cannot conclude the CO abused her discretion in this instance.

The determination of the CO is affirmed.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge