



Issue Date: 24 October 2018

BALCA Case No.: 2019-TLN-00001

ETA Case No.: H-400-18155-604841

In the Matter of:

MILLER'S QUALITY PROCESSORS
OF ARKANSAS, INC.,
Employer.

DECISION AND ORDER DIRECTING GRANT OF CERTIFICATION

This case arises from Miller's Quality Processors of Arkansas' ("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 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). For the reasons set forth below, the CO's denial of temporary certification is reversed.

Statement of the Case

On July 4, 2018, Miller's Quality Processors of Arkansas, Inc. ("Employer") filed an H-2B application for Temporary Employment Certification for two "Meat Processors" from October 1, 2018 to June 26, 2019. (AF 135-53). The CO issued a Notice of Deficiency on July

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (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.

16, 2018, identifying four deficiencies in the original application. (AF 125-34). On July 26, 2018, Employer filed its response to the Notice of Deficiency with the requested information, and on August 10, 2018, the CO issued a Notice of Acceptance. (AF 98-14, 90-97). The Notice of Acceptance advised Employer that “[a]ll recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter.” (AF 91) (emphasis in the original). Employer filed its Recruitment Report on September 4, 2018. (AF 75-88).

On September 17, 2018, the CO issued a Final Determination, denying the H-2B application for failing to meet the strict deadline set forth by 20 C.F.R. § 655.40. (AF 63-74). The CO explained Employer was required to place two advertisements in a newspaper of general circulation no later than August 24, 2018; the Recruitment Report, however, showed Employer did not place its newspaper ads in the *Russellville Courier* until August 26, 2018 and August 28, 2018. (AF 66, 79-80).

On October 1, 2018, Employer filed a Request for Reconsideration with Alternative Request for Review of Denial of Certification, along with evidence demonstrating it had placed an order for newspaper advertisements prior to the deadline. (AF 1-7, 29-53).

On August 13, 2018, three days after the CO issued the Notice of Acceptance, Employer’s counsel, Kathleen McDonald, requested a quote for a newspaper advertisement from AdNet Advertising Agency, Inc. (“AdNet”). (AF 29-31). An AdNet representative responded to Ms. McDonald’s inquiry the following day. (AF 34-36). The parties made some minor revisions to the advertisement, and Ms. McDonald submitted an order and Employer’s credit card information on AdNet’s payment form. (AF 36-37). The form explicitly states the payor must provide all requested billing information. (AF 37). Ms. McDonald provided the name on the credit card, the credit card number, expiration, security code, and payment amount, but failed to fill out the section for billing address or e-mail address. (*Id.*). On August 20, 2018, an AdNet representative contacted Ms. McDonald and requested the missing billing information, which Ms. McDonald promptly provided. (AF 42-43). The following day, the AdNet representative contacted Ms. McDonald once again, this time to ask her to double-check the credit card information. (AF 44). Ms. McDonald identified and corrected the error, and successfully submitted the payment. (AF 48, 50). The advertisements were published in the *Russellville Courier* on Sunday, August 26, 2018 and Tuesday, August 28, 2018. (AF 79-80).

Legal Analysis

BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. 20 C.F.R. § 655.61(a); *see also M.A.G. Irrigation, Inc.*, 2017-TLN-00033, slip op. at 4 (Apr. 25, 2017) (citing *Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4; *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012)). In this case, after receiving the CO’s Final Determination, Employer submitted additional evidence demonstrating it had placed an order for newspaper advertisements prior to the deadline. The CO included this additional evidence with the Administrative Record. Accordingly, it is properly considered.

Here, the CO denied certification because Employer did not comply with regulatory deadlines. The H-2B regulations state that “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.” 20 C.F.R. 655.40(b). Section 655.42(a) requires the employer to “place an advertisement ... on 2 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.”

Employer seeks reversal of the CO’s determination, arguing “the *plain and unambiguous* language of the regulation requires the ads to be *placed* within the 14-day period,” and the evidence shows Employer placed the advertisement “on August 13 when it sent its approval of the ads to the ad company.” (AF 4) (emphasis in the original). Employer argues in the alternative, “[e]ven if the ad placement was not complete until the ad company received the payment, that payment ... occurred on August 21,” before the August 24 deadline.

Employer argues the term “place” in this context refers to “the ordering by a consumer of an ad to be run at some specific time.” (AF 5). In support of this proposed definition, Employer submitted several exhibits demonstrating how the newspaper advertising industry uses the terms “run” and “place,” (AF 55-61), and pointed to an example in which BALCA has used the term “run” to “specifically refer to the act of appearing in the various media at a particular time.” (AF 5) (citing *Levine*, 2008-PER-00080, slip op. at 2 (Nov. 12, 2008)). Accordingly, Employer posits “[i]f the intent of the newspaper ad requirement was for ads to actually *run*, or both *be placed and run*, within 14 days of the issuance of the Notice of Acceptance, the word ‘run’ or the phrase ‘be placed and run’ would have been the words/phrase used.” (AF 4) (emphasis in the original).

Although the argument has surface appeal, Employer fails to cite any legal authority in which BALCA or any other tribunal has interpreted 20 C.F.R. §§ 655.40(b) and 655.42(a) in such a way. Contrary to Employer’s proposed definition, BALCA has interpreted §§ 655.40(b) and 655.42(a) to require the employer’s two advertisement be published in the newspaper within the 14-day window. *A New Image Landscape, Inc.*, 2017-TLN-000046, slip op. at 4 (May 5, 2017) (“Employer was required to place its job advertisements by March 3, 2017, within fourteen days of the NOA. Employer failed to place its job advertisements within the fourteen-day window by placing the ads on March 5 and March 6.”); *M.A.G. Irrigation, Inc.*, 2017-TLN-00033, slip op. at 5 (Apr. 25, 2017) (“Employer placed two newspaper advertisements with Taunton Daily Gazette on February 22, 2017 and February 26, 2017. However, the placement of the two newspaper advertisements fail to comply with the regulations, because Employer was required to conduct its recruitment activity within 14 days of the Notice of Acceptance [issued February 7, 2017].”).

I therefore reject Employer’s argument that the regulation is satisfied when an employer submits its order for newspaper advertisement within 14 days of the Notice of Acceptance, and conclude Employer failed to comply with 20 C.F.R. §§ 655.40(b) and 655.42(a). The Notice of Acceptance was issued on August 10, 2018, therefore the publication deadline was August 24, 2018. Employer failed to meet that deadline, as its newspaper advertisements were published on August 26, 2018 and August 28, 2018.

Employer next argues it should not be penalized for problems arising from forces outside its control. (AF 5). It posits “[Employer] and its agent [Ms. McDonald] performed all their

required actions, and due to the mistake of a third party, the employer's ads were published later than intended. There is nothing different that the employer should have done in this situation." (AF 4). Employer cites *SDG Post Oak, LP*, 2011-PER-01576 (Aug. 17, 2015). In that case, the CO denied an employer's application for permanent employment certification because "the online job advertisement through Hotjobs/Monster.com erroneously listed the experience requirement as '1-2 years' in the caption above the text advertisement—whereas the approved draft advertisement ... stated the minimum experience requirement as six months." *Id.* at 2. BALCA found the "Employer placed a compliant advertisement pursuant to the CO's instructions, and the header added to advertisement by the publisher was not part of that advertisement." *Id.* at 6. Reversing the CO's determination, BALCA held that "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." *Id.*

I find this argument persuasive. Although Ms. McDonald submitted an incomplete payment form with incorrect credit card information, the evidence suggests AdNet did not even attempt to process the payment until August 20, 2018. By that time, it was impossible for Employer to have complied with the regulations. As the Notice of Acceptance was issued on Friday, August 10, 2018, at least one of the newspaper advertisements had to run on either Sunday, August 12, 2018, or Sunday, August 19, 2018. *See* 20 C.F.R. § 655.42(a). If AdNet did not even attempt to process the payment – a pre-condition for publication – until August 20, 2018, there is nothing Employer could have done differently to comply with the regulations, including submitting a completed payment form with the correct credit card information. I conclude that it would be fundamentally unfair to deny certification based on a third-party's failure to accept payment for 6 days after Employer submitted its order.

ORDER

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

SO ORDERED.

For the Board:

PAUL C. JOHNSON, JR.
Administrative Law Judge

PCJ, Jr./PML/ksw
Newport News, Virginia