

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 May 2019

BALCA Case No.: 2019-TLN-00121
ETA Case No.: H-400-17319-080552

In the Matter of:
SIGMA F, INC.,
Employer.

Certifying Officer: Marva Hamilton
Chicago National Processing Center

Employer: Sigma F, Inc.
Kevin Lashus, Esq.¹
FisherBroyles, LLP
Austin, Texas

Appearance: Sarah M. Tunney, *Esquire*
Office of the Solicitor
Department of Labor
Washington DC
For the Certifying Officer

Before: Peter B. Silvain, Jr.
Administrative Law Judge

**DECISION AND ORDER AFFIRMING CERTIFYING OFFICER'S
ORDERED ASSISTED RECRUITMENT**

This case arises from Sigma F. Incorporated's ("Employer") request for review of the Certifying Officer's ("CO") decision to impose a one year period of assisted recruitment on the Employer for its 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

¹ While attorney Lashus filed the initial appeal of the CO's determination, he neither entered an appearance before the undersigned nor filed a brief in the matter.

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);² 20 C.F.R. § 655.6(b).³ 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 certain adverse determinations by the CO, including the CO’s decision to impose assisted recruitment on an employer for future Applications for Temporary Employment Certification, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a), 20 C.F.R. § 655.71(b).

PROCEDURAL HISTORY

On January 1, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer. (AF 192-219).⁴ Employer requested certification for four “Laborer[s]”⁵ from April 1, 2018 until December 1, 2018, based on an alleged peakload need for workers during that period. (AF 192).

On January 2, 2018, the CO issued a Notice of Acceptance of the Employer’s application and the Employer began recruitment. (AF 184-191). After the Employer submitted its requisite recruitment report, the CO granted the Employer’s request for certification of four Laborer workers on February 22, 2018. (AF 181-184).

Subsequently, the CO initiated an audit of the Employer’s recruitment on October 23, 2018. (AF 175-180). In its Notice of Audit Examination (“NOAE”), the CO requested specific documentation and explanations from the Employer. (*Id.*). The Employer, however, failed to provide all of the requested material, thus prompting the CO to issue a Request for Supplemental Information on January 15, 2019. (AF 83-86). Upon reviewing the additional information supplied by the Employer, the CO determined that the Employer offered wages to three employees that exceeded the wage amount listed in its advertising, thereby violating 20 C.F.R. § 655.41(b). (AF 8-13). As a result, pursuant to 20 C.F.R. § 655.71(a), the CO decided to impose a one year period of assisted recruitment on the Employer from March 22, 2019 through March 22, 2020. (*Id.*).

² 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).

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

⁵ SOC (O*Net/OES) occupation code 37-2011 and occupation title “Janitors and Cleaners, Except Maids and Housekeeping Cleaners.” (AF 192).

By a letter received on April 5, 2019, the Employer requested administrative review of the CO's Notice of CO-Ordered Assisted Recruitment. (AF 1). On April 18, 2019, the undersigned issued a Notice of Docketing and Order Setting Briefing Schedule, permitting Employer and counsel for the Certifying Officer ("Solicitor") to file briefs within seven business days of the undersigned receiving access to the Appeal File. 20 C.F.R. § 655.61(c). That same day, the Office of Administrative Law Judges received the Appeal File from the CO. Only the Solicitor filed a brief.

ISSUE

Whether the CO's decision to impose assisted recruitment on the Employer for a period of one year was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

APPLICABLE STANDARDS

The H-2B program permits employers to hire foreign workers on a temporary basis to "perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States]." 8 U.S.C. § 1101(a)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must receive a "labor certification" from the United States Department of Labor ("DOL" or the "Department"), ETA by applying for certification with ETA's Chicago National Processing Center. 8 C.F.R. § 214.2(h)(6)(iii); 20 C.F.R. § 655.20.

The CO may only grant an employer's application to admit H-2B workers for temporary nonagricultural employment if the employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

Once the certification has been granted, an employer is required to comply with the Department's regulations governing temporary employment of H-2B workers at 20 C.F.R. Part 655, Subpart A. Further, pursuant to 20 C.F.R. § 655.70, the CO may conduct an audit on any adjudicated certification. If, as a result of the audit, the CO determines that a violation that does not warrant debarment has occurred, 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. 20 C.F.R. § 655.71(a). Following a CO's imposition of assisted recruitment, the employer may request administrative review, for which the procedures set forth in 20 C.F.R. § 655.61 govern. 20 C.F.R. § 655.71(b).

In reviewing a CO determination under the procedures set forth in 20 C.F.R. § 655.61, BALCA must uphold the CO's determination unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Brook Ledge*, 2016-TLN-00003 (May 10, 2016); *Three Season Landscape Contracting Services*, 2016-TLN-00045 (June 15, 2016). Furthermore, "BALCA has a limited standard 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 only contain legal arguments and evidence actually submitted before the CO." *Bassett Construction, Inc.*, 2016-TLN-00023 (Apr. 1, 2016) (citing 20 C.F.R. § 655.61(e)).

Upon reviewing all the evidence, BALCA must take one of the three following actions: (1) affirm the CO's determination, (2) reverse or modify the CO's determination, or (3) remand to the CO for further action. 20 C.F.R. § 655.61(e)(1)-(3).

LAW AND ANALYSIS

As part of the employer-conducted recruitment of U.S. workers "must contain terms and conditions of employment that are not less favorable than those offered to the H-2B workers and, at a minimum, must comply with the assurances applicable to job orders as set forth in [20 C.F.R.] § 655.18(a)." 20 C.F.R. § 655.41(a). In particular, all advertising used in such recruitment must contain, *inter alia*, the following:

The wage that the employer is offering, intends to offer or will provide to the H-2B workers or, in the event that there are multiple wage offers, the range of applicable wage offers, each of which must equal or exceed the highest of the prevailing wage or the Federal, State, or local minimum wage[.]

20 C.F.R. § 655.41(b)(7).

In the case at hand, the CO found that the Employer violated the aforementioned provision by failing to include the entire range of wages that would be paid to workers. (AF 8-13). Specifically, the CO noted that in both the Employer's ETA Form 9142 application and its advertisements in the *Austin-American Statesman*, the Employer indicated that it would pay an hourly wage of \$11.28 an hour and a possible overtime hourly wage \$16.92 an hour. (AF 9). Following its certification for four H-2B workers, however, the Employer paid Jamie Correa an hourly wage of \$13.00 an hour with an overtime wage of 19.50 an hour, Jesus Correa an hourly wage of \$12.00 an hour with an overtime wage of 18.00 an hour, and Salvador Rocha an hourly wage of \$11.75 an hour with an overtime wage of 17.63 an hour. (*Id.*). As a result, the CO determined that the Employer violated the advertising requirements at 20 C.F.R. § 655.41(b)(7) by paying three of its four H-2B workers more than the regular and overtime wage rates it advertised to U.S. workers. (*Id.*).

While the Employer failed to file a brief in this appeal, its reason for this discrepancy in wage rates is elucidated in its response to the CO's Request for Supplemental Information. That is, in an email sent to the CO on November 29, 2018, counsel for the Employer wrote:

Please note that 4 H2B workers are being paid at a higher pay rate. This is because these workers are being paid at a higher pay rate. This is because these workers (Jamie Correa, Jesus Correa, Reynaldo Correa, and Salvador Rocha) arrived late due to the fact that the employer's petition for H2B workers was hit by the cap and they repitioned when USCIS increased the cap, and the start date

was pushed from April 1st to June 15th, 2018. The employer therefore wanted to catch them up on pay for the time lost waiting to be approved.

(AF 87). This explanation, while beneficent from a personal or business perspective, is still in contravention to the employer-conducted recruitment requirements as the advertisements in the *Austin-American Statesman* failed to apprise U.S. workers that the Employer would offer wages higher than the listed rate of \$11.28 an hour for regular time and \$16.92 an hour for overtime. The regulations specifically provide that if the Employer intends to offer “multiple wage offers, the range off applicable wage offers” must be included in the newspaper advertisements to U.S. workers. 20 C.F.R. § 655.41(b)(7).

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 a 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 affected by similarly employed H-2B workers. *See* 20 C.F.R. § 655.1(a).

Therefore, upon review of the evidence, I find that the Employer violated the advertising requirements set forth in 20 C.F.R. § 655.41(b)(7) by not advertising the full range of wage offers to U.S. workers that it ultimately paid three of its H-2B workers. As such, the CO reasonably acted within her discretion when she decided to impose one year of assisted recruitment on the Employer as a result of this violation. Accordingly, I find that the CO’s decision was not arbitrary, capricious, or otherwise not in accordance with law.

CONCLUSION

Based on the evidence of record, and for the foregoing reasons, I find that Employer has violated the regulatory advertising requirements, thereby meriting a one-year period of CO-assisted recruitment. Therefore, the CO-Ordered Assisted Recruitment is upheld.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the CO's decision is **AFFIRMED**.

For the Board:

Peter B. Silvain, Jr.
Administrative Law Judge