



Issue Date: 07 May 2019

BALCA Case No.: 2019-TLN-00116
ETA Case No.: H-400-19007-125963

In the Matter of:

MOUNTAIN WATER WORKS,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Christopher Pooley, *Esq.*
Avon, Colorado
For the Employer

Before: John P. Sellers, III
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Mountain Water Works’ (the “Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”). 8 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA. 20 C.F.R. § 655.61(a).

¹ On April 29, 2015, the Department of Labor (the “Department”) 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. 80 Fed. Reg. 24042 (Apr. 29, 2015). In this Decision and Order, all citations to 20 C.F.R. Part 655 pertain to the IFR.

² See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B), pursuant to the Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

STATEMENT OF THE CASE

On January 7, 2019, the Employer filed with the CO an Application for Temporary Employment Certification, Form ETA-9142B (“Application”). (AF 40-91.)³ The Employer requested certification for three landscape laborers⁴ from April 1, 2019, until November 30, 2019, based on a seasonal need. (AF 40.)

On February 21, 2019, the CO issued a Notice of Acceptance (“NOA”) informing the Employer that DOL had accepted its application for temporary labor certification for processing. (AF 31-39). The NOA explained that 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.” (AF 33). The NOA further stated: “All recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter.” (*Id.*) (Emphasis in original). The NOA also set forth “Instructions for Recruiting U.S. Workers,” which required the Employer to place a newspaper advertisement on two separate days, 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. (*Id.*) On two separate pages, the NOA 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 33, 35.) (Emphasis in original).

On March 4, 2019, the Employer filed a request to amend the number of workers sought from three to four. (AF 28-30.) In its request, the Employer stated that “[i]f the request is granted, Chicago NPC is authorized to amend Form ETA-9142 and the [E]mployer will amend the job order and advertisement.” (*Id.*) On March 11, 2019, the Employer submitted its recruitment report, which provided that its newspaper advertisements were placed on March 9, 2019, and March 10, 2019. (AF 27.)

On March 20, 2019, the Employer inquired as to the status of its application. (AF 25-26.) The CO responded on March 21, 2019, indicating that it had received the recruitment report dated March 11, 2019, but was prevented from further processing because the Employer’s listed newspaper advertisements did not comply with Department regulations at 20 C.F.R. § 655.42 through 20 C.F.R. § 655.46. (AF 22, 25.) The CO explained:

[t]he [E]mployer indicates in its recruitment report that the newspaper advertisements were placed on Saturday, March 9, 2019 and Sunday, March 10, 2019. The Notice of Acceptance letter, dated February 21, 2019, stated that, “[a]ll recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter.” Therefore, both newspaper advertisements were placed outside of the required timeframe and are not valid. In response to this email, the

³ “AF” refers to the Appeal File.

⁴ SOC (O*Net/OES) occupation code 37-3011 and occupation title “Landscaping and Groundskeeping Workers.” (AF 40.)

employer must notify the Department whether or not it placed additional newspaper advertisements within 14 calendar days from NOA date or there is some other valid reason the advertisements were not placed in a timely manner.

(AF 22-24.)

In response, the Employer stated that its amendment request was submitted along with supporting documentation in accordance with 20 C.F.R. § 655.35(d) on March 4, 2019. (AF 21, 23.) The Employer explained when it did not receive a response from the CO, it ran advertisements for three workers “to avoid any further delay associated with the request to increase the number of workers.” (*Id.*) The Employer sought to either withdraw its request to increase the number of workers or “readvertise when the CO makes a decision on the request,” stating that its “preference at this point is to have its application certified for three workers.” (*Id.*) On March 21, 2019, the CO reported that the Employer’s email was currently under review and that official notification would be issued once the review was complete. (AF 21.)

The CO issued a Final Determination denying the Employer’s Application on March 22, 2019. (AF 16-20.) In support of its denial, the CO concluded that the Employer did not meet the requirements of 20 C.F.R. § 655, subpart A, because the Employer failed to establish: (1) there are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of filing the petition for H-2B classification at the place where the foreign worker is to perform the work; and (2) the employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed. (AF 17.) The CO specified that the recruitment report filed on March 11, 2019, indicated that the Employer did not place its newspaper advertisements within 14 days of the issuance of the NOA, in violation of 20 C.F.R § 655.41 and 655.40(b). (AF 19-20.) Consequently, the CO denied certification.

By letter filed on April 9, 2019, the Employer requested administrative review of the CO’s Final Determination (“Employer’s Appeal”). (AF 1-15.) On April 17, 2017, BALCA received the Appeal File from the CO. On April 23, 2019, the undersigned issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). The Solicitor filed a brief on April 26, 2019.

DISCUSSION AND APPLICABLE LAW

BALCA’s standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date of the CO’s determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA must: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the 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).

The interim final rule controlling the Employer's *Application for Temporary Employment Certification*, 20 C.F.R. Part 655, "requires that the employer conduct recruitment of U.S. workers after its *Application for Temporary Employment Certification* is accepted for processing by the CO ... [in order] 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* ... This general requirement to test the U.S. labor market is needed to ensure that the importation of foreign workers will not have an adverse effect on U.S. workers." *Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 82 Fed. Reg. 24042, 24075 (Apr. 29, 2015); 20 CFR § 655.40. Therefore, before a temporary labor certification is issued, the State Workforce Agency (SWA) and the Employer must conduct recruitment steps designed to identify and inform qualified and available U.S. workers about the job opportunity. *See* 20 C.F.R. §§ 655.40-655.48. The requisite recruitment steps must be conducted within 14 calendar days from the date of the NOA. 20 C.F.R. § 655.40(b). Section 655.42(a) requires employers to place two newspaper advertisements on separate dates, one of which must be a Sunday.

BALCA has repeatedly held that an employer that fails to place its advertisements within the 14-day window set by the H-2B regulations fails to meet the terms of certification. *A New Image Landscape, Inc.*, 2017-TLN-00046 (May 5, 2017); *M.A.G. Irrigation, Inc.*, 2017-TLN-00033 (April 25, 2017); *A.E. Phillips & Son, Inc.*, 2018-TLN-00084 (Mar. 26, 2018); *H&R Drains & Waterproofing LLC*, 2016-TLN-00061 (Sept. 8, 2016); *Montauk Manor Condominiums*, 2016-TLN-00066 (Sept. 22, 2016); *Brightview Landscapes LLC - Indianapolis*, 2018-TLN-00114 (May 10, 2018). BALCA has further held that even a minor delay in placing job advertisements constitutes non-compliance with the requirements. *See A New Image Landscape, Inc.*, 2017-TLN-00046 (ads placed two and three days, respectively, outside 14-day window); *M.A.G. Irrigation, Inc.*, 2017-TLN-00033 (ads placed one and five days, respectively, outside 14-day window); *Brightview Landscapes LLC - Indianapolis*, 2018-TLN-00114 (first ad placed within the window, second ad placed one day after window closed). Furthermore, BALCA has held that substantial compliance with the advertisement requirements is insufficient to meet the employer's burden in establishing compliance with the regulations. *Whittle, Inc.*, 2016-TLN-00019 (Mar. 9, 2016) (rejecting employer's argument that it substantially complied with the H-2B advertising requirements, finding that "BALCA has strictly enforced the H-2B newspaper advertisement requirements in order to protect domestic workers.")

Here, the NOA was issued on February 21, 2019, requiring the Employer to conduct recruitment described in 20 C.F.R. §§ 655.41 through 655.48 within 14 calendar days, or by March 7, 2019. Specifically, the Employer was required to place two newspaper advertisements

on separate dates, one of which must have been a Sunday, by March 7, 2019. On Monday, March 4, 2019, three days prior to the end of the 14-day recruitment period, the Employer requested to amend its application. When it did not receive a response from the CO by March 7, 2019, the end of the 14-day recruitment period, the Employer placed advertisements on Saturday, March 9, 2019, and Sunday, March 10, 2019. The CO then denied certification after determining that the Employer's filing of its recruitment report was not in compliance by placing its newspaper advertisements two and three days after the 14-day recruitment period ended.

The Employer's argument is essentially one of equity, suggesting that it detrimentally waited for the CO to respond to its amendment request before placing its advertisements out of time. However, the Employer had already missed the deadline for placing one of its advertisements before even requesting to amend its application as both of the two Sundays within the 14-day recruitment period (February 23, 2019, and March 3, 2019)—one of which the Employer was required to place an advertisement—had passed. Thus, even if the CO had immediately responded to the amendment request, the Employer had already failed to comply with the newspaper advertising requirements within the 14-day recruitment period. 20 C.F.R. §§ 655.40(b), 655.42(a).

Moreover, the regulations do not indicate that an amendment request stays or restarts a recruitment period. Nor does the record indicate that the CO approved, revised, contradicted, or waived the instructions outlined in the NOA. Thus, the 14-day recruitment period ending on March 7, 2019, was unaffected by the amendment request, and any uncertainty or speculation on behalf of the Employer, therefore, does not excuse noncompliance with the applicable regulations. *Zeus Holding, LLC*, 2012-PER-00179 (Sept. 19, 2013) (employer seeking permanent labor certification does not meet its burden where it fails to comply with recruitment requirement based on speculation); *Skyway Group, Inc.*, 2000-INA-00265 (April 24, 2001) (employer's unwarranted assumption does not excuse failure to comply with permanent program regulation requiring recruitment of U.S. workers; employer must comply with regulation by offering job to qualified U.S. worker and then act on the results); *Trident Key Mart*, 2000-INA-00151, at *4 (Oct. 18, 2000) ("[e]mployer's reliance on speculation is not sufficient to excuse the failure to attempt to" comply with CO's request for records).

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. *M.A.G. Irrigation* at 6. As the Employer here did not comply with the requisite recruitment step outlined in 20 C.F.R. § 655.42 in the timeframe mandated by 20 C.F.R. § 655.40(b), it cannot make a case for certification. See *A New Image Landscape, Inc.*, 2017-TLN-00046; *M.A.G. Irrigation, Inc.*, 2017-TLN-00033; *A.E. Phillips & Son, Inc.*, 2018-TLN-00084; *H&R Drains & Waterproofing LLC*, 2016-TLN-00061; *Montauk Manor Condominiums*, 2016-TLN-00066; *Brightview Landscapes LLC - Indianapolis*, 2018-TLN-00114. Accordingly, I find the CO properly denied the Employer's H-2B Application for Temporary for Employment Certification.

CONCLUSION

Based on the evidence of record, I find that the Employer failed to comply with the recruitment steps outlined in 20 C.F.R. §§655.40(b) and 655.42(a). Although the Employer sought to amend its application prior to certification, it did not do so until *after* it had already failed to place a Sunday newspaper advertisement and a second newspaper advertisement within 14 calendar days of the NOA. Therefore, I find that the CO properly concluded that the Employer failed to show that there are insufficient qualified U.S. workers available to perform the temporary services or labor for which the Employer desires to hire foreign workers and that employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision denying the Employer's Application for Temporary Employment Certification be, and hereby is, **AFFIRMED**.

For the Board:

John P. Sellers, III
Administrative Law Judge