



Issue Date: 07 December 2018

BALCA Case No.: 2019-TLN-00016
ETA Case No.: H-400-18171-710634

In the Matter of:

WIEGARDT BROTHERS INC.,

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Brian Graham, Esq.
Austin, TX
For the Employer

Matthew Bernt, Associate Solicitor and
Heather Filemyr, Esq.
Office of the Solicitor
Division of Employment and Training Legal Services
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Sean M. Ramaley
Administrative Law Judge

DECISION AND ORDER DIRECTING GRANT OF CERTIFICATION

This case arises from Wiegardt Brothers, Inc.’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 hire foreign workers under this

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

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 August 29, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 10 seafood processors for the period of October 1, 2018, to April 1, 2019. (AF 180-229).³ Employer indicated that the nature of its temporary need was “peakload.”

In support of its temporary need Employer stated:

Wiegardt Brothers, Inc. offers shellfish processing of shucked and live oysters and Manila clams. The temporary need comes as there has been an increase in demand from restaurants and high end supermarkets for live oysters still in the shell (non-shucked oysters). The company regularly employs permanent workers to perform the processing duties that go into producing its line of products. However, as a result of the increased demand mentioned above coupled with the length of time it takes to produce the shucked and unshucked product, the company needs to supplement its permanent staff on a temporary basis with temporary employees who will not become a part of the regular operations. Please also note that during this time of the year the processing operations are high due to holiday demand including Thanksgiving, Christmas and Chinese New Year. During these months the oysters are in prime condition to eat, as opposed to the late summer when oysters go through their reproductive cycle which turns them soft and milky and not as appealing to eat. The sales during these months increase for the company as the majority of the product is sold which calls for an increase of labor.

(AF 180).

Employer also submitted a monthly sales chart for the years 2015 – 2017, as well as a monthly sales summary for the same period. (AF 198-203).

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 issued a notice of deficiency on September 10, 2018, listing eight deficiencies in the Employer's application. (AF 167-179). The CO requested additional information and an amendment to the application to cure the deficiencies. On September 20, 2018, Employer provided the additional information and made the requested amendments to its application and job order. (AF 49-166).

On October 1, 2018, the CO issued a Notice of Acceptance of the Employer's temporary labor certification application for ten seafood processors, notifying Employer that its application had been "accepted for processing." 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."

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).

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, which essentially mirrors the regulatory language found at 20 C.F.R. § 655.42 with the exception that the regulation does not specifically note that an employer "may contact the Department to request assistance with identifying alternative publications that serve the local area..." 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 42).

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.

The CO directed the Employer to submit its recruitment report by the deadline of October 25, 2018. The CO noted specific information that must be included in the recruitment report. (AF 45-47). 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 42).

On October 25, 2018, Employer submitted its recruitment report. (AF 35-40). Employer provided the information requested by the CO including the required information regarding the placement of the job order, posting of the notice of filing at two locations at the place of employment, and notice that Employer had placed its first and second advertisements in the Chinook Observer on Wednesday, October 10, 2018 and Wednesday October 17, 2018.

On October 30, 2018, the CO issued a Final Determination Denial to the Employer. The CO stated that Employer had failed to show that:

- (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 23).

Specifically, the CO denied the Employer’s application due to a deficiency in “Employer conducted recruitment pursuant to 20 C.F.R. §655.40(b).” The CO noted that this regulation provides 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, and all employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.48. (AF 26). The CO further noted that Employer’s recruitment report indicated that the newspaper advertisements for the job opportunity are to be placed in the Chinook Observer on October 10, 2018, and October 17, 2018, and therefore, the CO concluded the recruitment was not conducted within 14 calendar days from the date of the Notice of Acceptance letter. Accordingly, the CO stated Employer failed to demonstrate it placed newspaper advertisements within the required timeframe in compliance with Departmental regulations at 20 CFR 655.40(b) and “[f]or this reason, the application is denied.”

On November 1, 2018, two days after the CO issued the denial, Employer through counsel, responded to the CO by email in which Employer stated that it had conducted recruitment on October 2nd, the day after the October 1, 2018 Notice of Acceptance was issued. Employer provided an email confirming that Employer had promptly placed the newspaper advertisements, but the deadline for posting an advertisement in the local newspaper for the week was Monday (October 1, 2018) at 9:00 A.M. Therefore the advertisement could not run on October 3, 2018, but would run on October 10 and October 17, 2018, the first dates possible. Employer also clarified that the local newspaper only runs on Wednesday, and thus, the first two Wednesdays in which the advertisement could run were October 10th and October 17th. Accordingly, Employer noted it was impossible to post both advertisements within the 14 days. Employer pointed out that it had done everything possible to comply with the instructions for recruitment and requested that the CO reconsider the decision. (AF 20-21).

On November 5, 2018, the Chicago National Processing office responded to the Employer referring the Employer again to the October 30, 2018 Denial letter and reiterating the Employer's right to appeal the decision by requesting administrative review of the denial. (AF 17-19).

By letter received on November 8, 2018, Employer made a timely request for administrative review of the CO's determination. (AF 1-6). 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.F. §655.40(b). Employer states that it does not dispute that the two required newspaper ads ran on October 10, 2018, and October 17, 2018, or that the publication of the second newspaper ad was beyond 14 calendar days from the October 1st Notice of Acceptance. Employer does dispute that the posting date of the second newspaper ad amounts to employer's failure to comply with the requirement of 20 C.F.R. §655.40(b) to "conduct the recruitment" within 14 calendar days.

Employer asserts two arguments in support of its position that it had not violated the regulatory requirement that it had conducted its recruitment within the 14-day period noted in Section 655.40(b). First, Employer argues that the requirement that recruitment be conducted within 14 days should be viewed in the plain meaning of "conduct" which it asserts would require the Employer to merely "commence and initiate the recruitment steps" within 14 days, which it, in fact, had done. In support of this argument Employer cites the online Merriam-Webster dictionary for its position that the plain and ordinary meaning of conduct is "to direct or take part in the operation of a particular act or event." Accordingly, Employer argues since it had directed the newspaper to run the ads on October 3, 2018, it had complied with the 14-day requirement. Employer attached as Exhibits the Merriam-Webster online definition for the word "conduct" (Exhibit 1) as well as information from the Chinook Observer showing that it is only published on Wednesdays, and that ads must be placed before 9:00 A.M. on Monday to appear in that week's edition. The information provided from the Chinook Observer also states that it is the official legal newspaper for Pacific County, and it is the largest newspaper on the Washington coast, with a circulation of more than 5,000. (Exhibit 2).

Employer also asserts that its interpretation of conduct is consistent with the usage of the term in in the DOL Notice of Acceptance (and the regulations) which states that all “recruitment steps requiring action from the employer must be conducted within 14 calendar days,” but in the next sentence states that “employer’s conducted recruitment” which includes the notice of job opportunity “must be posted for 15 consecutive days.” Thus all recruitment steps could not be completed within the 14 calendar day requirement. Employer argues that the only way to reconcile these provisions is to conclude that “conduct” recruitment carries its ordinary meaning of “commencing, directing, or taking part in something.”

Employer’s second argument for why the CO erred in determining that the employer failed to timely conduct recruitment is that it would have been impossible to post two ads in the local newspaper within 14 calendar days of the Notice of Acceptance. Again Employer cites to its attached exhibits which provide the specific information related to the Chinook Observer regarding the deadline for posting an ad (Monday at 9:00 A.M.) and the fact that the newspaper is only published on Wednesdays. (Exhibit 2). Employer points out that the ads were requested promptly after the October 1, 2018 Notice of Acceptance and the ads ran on the first two possible Wednesdays, October 10 and October 17, 2018. As the deadline for posting an ad is 9:00 A.M. on Monday, and the Notice of Acceptance was not issued until Monday October 1, 2018, the Employer could not have requested its ads prior to 9:00 A.M. on October 1, 2018, such that the ads would have run on Wednesday October 3, 2018, and Wednesday October 10, 2018. Accordingly Employer argues that it did all it could to fully comply with the regulatory recruitment requirements and deadlines.

By Order issued on November 21, 2018, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before November 30, 2018. No brief or further legal argument was submitted by the Employer, other than its November 7, 2018 request for administrative review. (AF 1-16).

Attorney Heather Filemyr 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 November 30, 2018, on behalf of the Certifying Officer. The Solicitor argues that the CO’s denial of the Employer’s request for emergency processing of its application for temporary labor certification should be affirmed because the CO correctly determined that the Employer failed to carry its burden of demonstrating it was entitled to certification based on the evidence before the CO.

The Solicitor also argues that the Department’s position on the 14-day recruitment deadline found in the regulation at 20 C.F.R. §655.40(b) is reflected in a response to a 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 argues that ETA’s provided response to the FAQ should be given deference as “ETA’s interpretation of its own regulation [which] is entitled to deference.” The Solicitor argues that the posted FAQ supports that a “recruitment activity may be completed later than 14 days after the NOA only if the activity ordered is of a duration longer than the 14 day window, such that the activity cannot be completed within the 14 day timeframe.” The Solicitor asserts that “[t]his is not the case with newspaper advertisements.”

The Solicitor argues that although employer submitted evidence concerning the publication schedule of the Chinook Observer which demonstrated that Employer was precluded from publishing two advertisements in that newspaper within the 14 day window following the Notice of Acceptance, BALCA lacks authority to consider this evidence because it was not before the CO at the time she issued her Final Determination.

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 14-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 October 1, 2018 Notice of Acceptance was issued. The CO's determination was based on the undisputed fact that Employer's two recruitment ads ran on October 10, 2018, and October 17, 2018. The October 17, 2018 ad ran two days after the 14-day deadline, which was October 15, 2018.

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).

Other cases have also affirmed the CO's denial where Employer failed to comply with the 14 day recruitment deadline. In general these cases also involve 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 Conominiums*, 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 Employer makes two arguments in support of its position that it did in fact comply with the regulatory requirement that it conduct its recruitment within 14 days of the Notice of Acceptance. Employer first argues that "conduct recruitment" should be interpreted according to the plain meaning of "conduct" which it asserts would require the Employer to merely "commence and initiate the recruitment steps" within 14 days, which in fact, it had done. Secondly, Employer argues that it did everything within its power to comply with the 14-day deadline.

In its brief, the Solicitor offers some insight into the Department of Labor's interpretation of the regulatory provision pertaining to the fourteen day recruitment deadline. Solicitor cites ETA's (Employment and Training Administration) posted response to a Frequently Asked Question (FAQ) regarding the interpretation of the 14-day deadline which 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

The Solicitor argues essentially that the above FAQ reflects ETA's reasonable interpretation of the regulation pertaining to the fourteen day deadline for Employer conducted recruitment. The Solicitor states "ETA's interpretation of its own regulation is entitled to substantial deference," citing *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006) (quoting *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997), for the principle that agencies should receive substantial deference of the agency's own ambiguous regulation); 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.").

The undersigned finds it is appropriate to take official notice of the FAQ, which is readily available online and which the Solicitor argues reflects the Department's official interpretation of the pertinent regulatory provision, although it is noted that the Department's position as noted in the FAQ is not contained in the regulation, nor in the Preamble to the regulation.⁴

The undersigned finds that the above FAQ is a reasonable interpretation of the regulation and some deference to the interpretation is warranted. The undersigned also understands the FAQ, pertaining to the 14-day deadline for recruitment, to require compliance with the 14-day requirement if possible, but where not possible, a reasonable variation from the 14-day deadline would be permissible so long as the recruitment was initiated within the 14-day period. Based on this interpretation, which the undersigned finds to be reasonable, Employer's argument that its regulatory obligation to "conduct recruitment" would be achieved by merely initiating

⁴ The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges provide at 29 C.F.R. §18.84 that "[o]n motion of a party or on the judge's own, official notice may be taken of any adjudicative fact or other matter subject to judicial notice."

recruitment within the 14-day period in all cases, is rejected. However, where circumstances are such that there is no possible way compliance can occur within the 14-day period, the FAQ would require that recruitment be initiated within the 14-day period and completed as soon as possible.⁵ As noted in the FAQ, as well as 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.

In the instant case, there is no possible way the Employer could have complied with the 14-day requirement due to the fact that the Notice of Acceptance was issued on a Monday, and the deadline for posting an ad in the local newspaper utilized for the recruitment ad is 9:00 Monday morning, in order to be included in the upcoming Wednesday edition. Consequently, the Employer had no choice but to run the ad for the following two Wednesdays, October 10, and October 17, 2018, even if Employer had requested the ad immediately after receiving the Notice of Acceptance, which presumably issued sometime after 9:00 A.M. Monday, October 1, 2018. Clearly Employer performed in accordance with ETA's response to the FAQ, which Solicitor asserts should be given deference. Specifically pertinent to this situation ETA's response to the FAQ 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.

As the Solicitor asserts that the ETA's response to the FAQ is the Department's reasonable interpretation of the regulation regarding the 14-day recruitment deadline, the undersigned finds that the Employer reasonably relied on this interpretation in concluding that it had complied with the regulation in this case, because its recruitment ad could not have been completed within the 14-day deadline.

Although evidence submitted with the Employer's request for review is not admissible in this matter, Employer did make the CO aware of the impossibility of completing its recruitment advertising in its November 1, 2018 email to the CO, requesting reconsideration of the CO's determination, submitted two days after the Final Determination was issued on October 30, 2018. (AF 20-21). The CO responded to these emails referring the Employer again to the October 30, 2018 denial. As the CO included these emails in the Administrative record and they were submitted prior to the Employer's request for administrative review, the undersigned finds this information is properly considered. *See Miller's Quality Processors of Arkansas, 2019-TLN-00001* (finding that "additional evidence [submitted by the Employer] demonstrating it had

⁵ The Solicitor argues in her brief, that the FAQ only pertains to the situation where the CO directs a different recruitment period or where the activity is of a duration longer than the 14-day window, such as the example given in the FAQ where the job order must be posted for 15 business days under certain circumstances. However, the FAQ does not state that the posting of the job order for 15 business days is the only example of when recruitment cannot be completed within 14 days. In the instant case circumstances were such that the advertisements could not be posted within the 14-day window and would appear to fall within the exception to the 14-day period noted in the FAQ.

placed an order for newspaper advertisements prior to the deadline” was properly considered, where the CO had included this additional evidence with the Administrative Record).

Thus, in light of the circumstances presented in this case, and acknowledging both the Department’s interpretation of the 14-day recruitment deadline, and that it would have been impossible for Employer to place both of its ads in the local newspaper within the 14-day deadline, the undersigned finds that it would be fundamentally unfair to deny certification where Employer performed its required advertising recruitment in compliance with the Department’s guidance, and there was nothing reasonably within the Employer’s control which would have allowed Employer to complete its advertising recruitment within the 14-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 14-day deadline for posting its two newspaper advertisements).

The undersigned finds that a slight variation in the 14-day recruitment deadline in this case is warranted, 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 the Chinook Observer for its print recruitment advertisement, and that the Employer submitted its recruitment report in a timely fashion by the October 25, 2018 deadline specified by the CO, and that 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:

SEAN M. RAMALEY
Administrative Law Judge