

**U.S. Department of Labor**

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**Issue Date: 31 July 2009**

**OALJ Case Nos.: 2009-TLC-00056  
2009-TLC-00057  
2009-TLC-00058**

**ETA Case Nos.: C-09089-19102  
C-09089-19138  
C-09089-19107**

*In the Matter of*

**BLONDIN ENTERPRISES INC.,**  
*Employer*

Certifying Officer: Robert E. Myers  
Chicago Processing Center

**DECISION AND ORDER**

On July 17, 2009, Blondin Enterprises Inc. (“the Employer”) filed a request for expedited administrative review of the Certifying Officer’s (“the CO”) determination in the above-captioned temporary agricultural labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.115(a) (2009).<sup>1</sup> On July 23, 2009, the CO submitted the Administrative File. In expedited administrative review cases, the administrative law judge must review the CO’s determination for legal sufficiency and issue a decision within five working days after receiving the Administrative File. 20 C.F.R. § 655.115(a)(2).

**Statement of the Case**

On March 30, 2009, the Department of Labor’s Employment and Training Administration (“ETA”) received the Employer’s application for temporary labor certification.

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<sup>1</sup> On December 18, 2008, the Department of Labor (“DOL”) published new rules governing this process that became effective January 17, 2009. 73 Fed. Reg. 77,110 (Dec. 18, 2008). Subsequently, on March 17, 2009, DOL issued a proposal to suspend these rules for nine months and reinstate the rules that were in effect on January 16, 2009. 74 Fed. Reg. 11,408 (Mar. 17, 2009). On May 29, 2009, DOL adopted the proposal as a Final Rule, which would have taken effect on June 29, 2009. 74 Fed. Reg. 25,972 (May 29, 2009). On July 1, 2009, the United States District Court for the Middle District of North Carolina preliminarily enjoined DOL from temporarily suspending the new rules. *N.C. Growers’ Ass’n v. Solis*, No. 1:09CV411 (M.D.N.C. July 1, 2009). As a result, I will apply the rules that became effective January 17, 2009, which were codified in Title 20 of the Code of Federal Regulations.

See AF 56.<sup>2</sup> The Employer requested certification for 4 Delimber Operators, 4 Fellerbuncher Operators, and 6 Logging Tractor Operators from June 15, 2009 through April 15, 2010. AF 61-64. On April 3, 2009, the CO issued a letter informing the Employer that the application was “not being accepted for processing” and requesting corrective action.<sup>3</sup> AF 56-59. The Employer made the requested corrections and submitted an amended application. AF 45-55. Satisfied with the response, on April 10, 2009, the CO accepted the Employer’s application for processing and provided instructions for domestic recruitment for the job opportunities.<sup>4</sup> AF 35-38; see 20 C.F.R. § 655.100(b)(2)(ii) (requiring employers with periods of need beginning prior to July 1, 2009, to conduct, *inter alia*, post-filing recruitment).

On May 15, 2009, ETA received the Employer’s recruitment report. AF 32-33. Therein, the Employer reported that it received 4 referrals to its Job Order: 3 for Logging Tractor Operators, and 1 for all three job openings. The Employer sent out 4 logging applications in response. The Employer did not hire the first applicant because he did not have the required work experience and did not return the Employer’s phone calls for further inquiry. The other three applicants were not hired because they did not return applications to the Employer and thus the Employer could not determine whether they had the required experience and qualifications. The Employer also stated that it had placed advertisements in its local paper that ran on April 24 and April 26, 2009. The Employer asserted that it did not receive any inquiries from its newspaper advertisements.

The CO granted certification for all 14 job opportunities.<sup>5</sup> AF 28-30. The CO informed the Employer that it was required to continue to cooperate with the State Workforce Agency (“SWA”) by accepting all referrals and that it must update the final recruitment report within 48 hours of the end of its recruitment period.

On May 29, 2009, the Employer informed ETA that it was delaying the start date of its workers from June 15, 2009, until July 15, 2009. AF 25-26. It explained that the landholding company, which held its contract, had delayed the start date due to a “sluggish demand for finished labor products, high mill inventory of timber in mill yards, and lack of markets to deliver wood that would be harvested by our company.” ETA granted the Employer’s request to delay the start date. AF 21-23.

On July 8, 2009, the Employer informed ETA that it had been notified by its contractor that the start date for its workers was being delayed again, from July 15, 2009, until August 1,

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<sup>2</sup> Citations to the Administrative File will be abbreviated as “AF” followed by the page number. All citations are to the 94-page Administrative File for OALJ Case No. 2009-TLC-00056, ETA case number C-09089-19138.

<sup>3</sup> For ETA case number C-09089-19102, the CO’s letter is dated April 6, 2009.

<sup>4</sup> For ETA case number C-09089-19102, the CO’s letter is dated April 17, 2009.

<sup>5</sup> The CO sent three separate certification letters for each job opportunity. For case numbers C-09089-19138 and C-09089-19107, the letters were dated May 18, 2009 and for C-09089-19102 the certification letter was dated May 15, 2009.

2009. AF 19-20. Again, the Employer stated that the delay was due to the lack of demand for finished lumber products. The Employer asserted that landowners were prohibiting it from harvesting due to excessive amounts of water in the woods as a result of record rainfall in June. On July 13, 2009, pursuant to 20 C.F.R. § 655.107(d)(2), the CO reviewed the reasons for the request. AF 15-17. The CO found that delaying the start date would have an adverse effect on the underlying test of the labor market as the newspaper advertisements were outdated. The CO noted that all of the newspaper advertisements were placed more than two months from the latest request to amend the start date of employment: two were placed on April 24, 2009 and one on April 26, 2009. The CO also contended that more than one amendment to the start date of employment would deter U.S. workers who apply. AF 16. Specifically, the CO stated:

The deterrence will be a result of the U.S. workers expectation to begin employment on the date listed in the job order or advertisement, which must change when the employer amends the start date to a later date. By granting the second amendment request to the start date, the U.S. worker's expectation will have to change again and will likely result in doubts by the U.S. workers that a job exists or at least that the date in which the job will start is too uncertain. These factors will have an adverse impact and chilling effect on the recruitment of U.S. workers.

In its July 17, 2009, request for expedited administrative review, the Employer asserted that the delay in the start date was due to the national recession. AF 2-3. The Employer explained that in its thirty-five years of operations the vast quantity of markets have allowed it to deliver timber and pulp wood products without delay or restraint, but in light of the current recession, the local mills that utilize its lumber have restricted their demand for finished products. The Employer contended that the local pulp mills in Maine have experienced a twenty to thirty percent reduction in market demand, and the local lumber mills have reduced their demand for finished product by fifty percent. In support of its request, the Employer submitted letters from Daaquam Lumber, its landholding company, and Stetson Timberlands, Inc., one of its clients. See AF 4-5.<sup>6</sup> The Employer also asserted that its recruiting of U.S. workers has continued nonstop through the Maine Career Center and the Leon Job Site.

On July 23, 2009, I issued an *Order Setting Briefing Schedule* permitting the parties to file briefs by the close of business on July 29, 2009. The order also recommended that the parties confer regarding resolution of the matter and include a status report on those efforts at the time either party filed a brief. Only the CO filed a brief.

### **Discussion**

In administrative review cases, 20 C.F.R. § 655.115(a)(2) requires the ALJ to review the record to determine the legal sufficiency of the CO's determination. Since the regulations do not define "legal sufficiency," I apply an arbitrary and capricious standard when conducting an

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<sup>6</sup> 20 C.F.R. § 655.115(a)(1) prohibits me from receiving "evidence in addition to what the CO used to make the determination." While the Administrative File contains these letters, I have not considered them in reaching my decision because the CO did not do so himself.

administrative review. *See Bolton Springs Farm*, 2008-TLC-28, slip op. at 6 (ALJ May 16, 2008). Based on the record before me, I conclude that the CO did not act arbitrarily or capriciously in denying the Employer's amendment request. Accordingly, I affirm his determination.

20 C.F.R. § 655.107(d)(2) provides, "Applications may be amended to make minor changes in the total period of employment, but only if a written request is submitted to the CO and approved in advance." The regulations do not define "minor," and the regulatory history provides no guidance for interpreting the term. In considering whether to approve the request, the CO "will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect(s) of a decision to approve on the adequacy of the underlying test of the domestic labor market for the job opportunity." *Id.*

The CO provided two reasons for denying the amendment request. First, the CO concluded that an additional amendment to delay the start date would have an adverse effect on the underlying test of the labor market because the newspaper advertisements would be outdated. Second, he reasoned that more than one amendment would deter U.S. workers who apply. He stated that "the U.S. worker's expectation will have to change again and will likely result in doubts by the U.S. workers that a job exists or at least that the date in which the job will start is too uncertain." The CO asserted that such factors would "have an adverse impact and chilling effect on the recruitment of U.S. workers."

For the reasons that follow, I find that the CO was neither arbitrary nor capricious in determining that the requested amendment would render the Employer's advertisements stale.<sup>7</sup> Section 655.102(d)(2) requires publication of two print advertisements (one of which must be on a Sunday) as part of the Employer's positive recruitment of domestic workers. Regarding timing, § 655.102(g) states that the employer must run two newspaper advertisements during the period of time that the job order is being circulated by the SWA for interstate clearance. It specifies that the newspaper ads "must be published only after the job order is accepted by the SWA for intrastate/interstate clearance." Section 655.103 provides more advertising requirements, but does not address timing. Thus, aside from requiring that the newspaper advertisements be published after the SWA accepts the job order for intrastate/interstate clearance, there is no rule regarding the timing of the newspaper advertisements to aid in assessing whether the amendment would affect the adequacy of the underlying test of the labor market.

Section 655.102(e)(1) states that "[t]he employer must submit a job order to the SWA serving the area of intended employment no more than 75 calendar days and no fewer than 60 calendar days before the date of need for intrastate and interstate clearance." Read together, §§ 655.102(e)(1) and 655.102(g) indicate that ETA would generally consider advertisements published more than 75 days before an employer's start date to be stale. Specifically, an employer may publish its advertisements only after the SWA accepts the job order. As an

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<sup>7</sup> Finding the CO's first reason sufficient to affirm his denial of the amendment request, I express no opinion on the second reason offered.

employer cannot submit a job order more than 75 days before its start date, advertisements published before the job order could even be placed would be considered stale. The Employer published advertisements on April 24 and 26, 2009—99 and 97 days, respectively, from the proposed start date of August 1, 2009. Since the Employer published the advertisements at least three weeks before it could have even placed the job order with the SWA had it initially indicated a start date of August 1, the CO logically concluded that granting the amendment request would render inadequate “the underlying test of the domestic labor market for the job opportunity.”<sup>8</sup> In doing so, the CO did not act arbitrarily or capriciously. Accordingly, I must affirm his decision.

### **Order**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

**A**

**JOHN M. VITTON**  
Chief Administrative Law Judge

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<sup>8</sup> That the Employer filed its application under the transition regulation at 20 C.F.R. § 655.100(b)(2) does not change my analysis. While § 655.100(b)(2) altered the order and timeframes for some of the Employer’s filing and recruitment activities, §§ 655.102(e)(1) and 655.102(g) still provide a reasonable standard for determining whether the amendment would render the Employer’s post-filing advertisements stale.