



Issue Date: 07 December 2009

OALJ Case No.: 2010-TLC-00012
ETA Case No.: C-09243-20405

In the Matter of

LE BOGE, LLC., d/b/a THE STABLES AT LE BOCAGE,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER

On November 23, 2009, Le Boge, LLC., d/b/a The Stables at Le Bocage (“the Employer”) filed a request for review of the Certifying Officer’s 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).¹ On October November 27, 2009, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). In administrative review cases, the administrative law judge has five working days after receiving the file to “review the record for legal sufficiency” and issue a decision. § 655.115(a).

¹ 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.

Statement of the Case

On August 31, 2009, the United States Department of Labor's Employment and Training Administration ("ETA") received the Employer's application for temporary labor certification. AF 100-125.² In particular, the Employer requested certification for four "Farmworkers, Farm and Ranch Animals" between October 29, 2009, and August 29, 2010. AF 105.

On September 3, 2009, ETA issued a notice informing the Employer that its application had not been "accepted for consideration." AF 79-84. The Employer responded to the notice on September 9, 2009. AF 53-78. On September 16, 2009, the CO accepted the application for processing. AF 44-47. The acceptance letter contained the following instructions related to the Employer's duty to advertise:

Local Advertisements: Place an advertisement on 2 separate days, which may be consecutive, one of which must be a Sunday, in a local newspaper of general circulation serving the area of intended employment. If your job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, you must, in place of one Sunday edition, advertise in the regularly published daily edition with the widest circulation.

Multi-State Advertisements: Place one (1) advertisement in a newspaper of general circulation in the following states:

Arkansas, Mississippi

Labor Supply State: Texas

AF 46.

On September 21, 2009, the Employer submitted a recruitment report to the CO. AF 41-43. In its report, the Employer stated that it had placed advertisements with the local newspaper on June 7, 2009, and June 17, 2009. *Id.* According to the report, the Employer also placed a job order with the local State Workforce Agency ("SWA") that ran for 60 days, beginning on June 3, 2009. *Id.*

On September 29, 2009, the CO notified the Employer via email that the recruitment report was deficient because the advertisements were placed prior to the filing of the application. The CO noted that contrary to 20 C.F.R. § 655.100(b)(2)(ii) which requires advertisements to run

² Citations to the 125-page Administrative File will be abbreviated "AF" followed by the page number.

after the application has been accepted for processing. AF 38-39. On October 28, 2009, the Employer submitted a follow-up recruitment report. AF 28-37. The recruitment report outlined a single advertisement placed with the local newspaper on October 4, 2009, as well as a new job order listed with the Louisiana SWA. 32-37.

On November 13, 2009, the CO denied certification based on deficiencies contained in the Employer's recruitment report. AF 25-27. Specifically, the CO found that the Employer's recruitment report "does not indicate any activity regarding the Multi-State Advertisements, does not indicate that two (2) local advertisements were placed, nor does it indicate that the advertisement fully discloses the details of the job opportunity as instructed by the Letter of Acceptance."³ *Id.* The CO found the Employer failed to conduct all required positive recruitment and denied certification. *Id.* The Employer's appeal followed.

Discussion

When conducting recruitment under the H-2A program, the Employer must "run two print advertisements" in a newspaper serving the area of intended employment. 20 C.F.R. § 655.102(d)(2). Additionally, the Employer must "recruit in all States currently designated as a State of traditional or expected labor supply with respect to each area of intended employment in which the employer's work is to be performed." 20 C.F.R. §655.102(d)(4). This recruitment entails placing an advertisement in a paper of general circulation in the appropriate states. Since the Employer did not comply with the program's recruitment requirements, the CO properly denied certification.

In its request for review, the Employer wrote:

We respectfully apologize in that the employer misunderstood what was required from them as far as the way the advertisement was conducted. We contacted several agencies including the SWA, and were told that the SWA job order was all that we needed in regards to the other states advertisements. After several calls and countless research we realized that was not the case. Please give us the

³ In addition to faulting the Employer for failing to advertise for *two* days in a local newspaper or placing advertisements in Arkansas, Mississippi, or Texas, the CO also found the advertisement that was placed was deficient because the content did not comply with 20 C.F.R § 655.103. Since I will affirm the CO's denial because the Employer failed to advertise for the requisite days or in the multi-state area, there is no need to address the content of the advertisements that were actually published.

opportunity to submit the evidence requested in order to obtain approval of the case. At this time I am submitting the updated advertisement evidence and recruitment report.⁴

AF 2. In his brief, the CO noted the Employer's concession that it did not comply with recruitment requirements, and wrote, "All of the recruitment requirements that [the Employer] professed not to understand are spelled out in the Letter of Acceptance."

The regulations required the Employer to advertise in a local newspaper for two days as well as place advertisements in the states of Arkansas, Mississippi, and Texas after the CNPC accepted the application for processing. *See* 20 C.F.R. § 655.102(d) (describing requirements for positive recruitment steps, including newspaper advertisements and job orders); 20 C.F.R. § 655.100(b)(2)(ii) (requiring employers with dates of need occurring prior to July 1, 2009, to conduct post-filing recruitment under the direction of the CNPC); 74 Fed. Reg. 17,597, 17,599 (April 16, 2009) (extending the transition rule at § 655.100(b)(2) to employers with dates of need prior to January 1, 2010). By the Employer's own admission, it did not take these positive recruitment steps before the CO issued his denial, and therefore, failed to follow regulatory requirements. Without these steps, the Employer could not obtain an appropriate test of the labor market, and the CO properly denied certification.

Order

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

For the Board:

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JOHN M. VITTON
Chief Administrative Law Judge

⁴ With its Request for Review, the Employer included an updated recruitment report along with additional evidence of advertisements placed in newspapers in Louisiana, Arkansas, Mississippi, and Texas. However, because this is an expedited administrative review, my review is limited to the evidence submitted to the CO. Since the Employer did not submit this documentation to the CO, I will not consider it when conducting my review. *See* 20 C.F.R. 655.115(a).