

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 October 2009

BALCA Case No.: 2009-TLN-00100
ETA Case No.: C-09218-46098

In the Matter of:

METOMPKIN BAY OYSTER CO., INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Tish Sowards
KT Labor, Inc.
Lexington, Kentucky
For the Employer

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Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

DECISION AND ORDER

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("CO") denial of an 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. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2009). Following the CO's denial of an application under 20 C.F.R. § 655.32, the applicant may request review by the Board of Alien Labor Certification Appeals ("the Board" or "BALCA"). § 655.33. The administrative review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and "such evidence as was actually submitted to the CO in support of the application." § 655.33(a), (e).

STATEMENT OF THE CASE

On July 27, 2009, the Employment and Training Administration ("ETA") received an application from Metompkin Bay Oyster Co., Inc., ("the Employer") requesting temporary labor certification for 25 Oyster Shuckers from October 1, 2009, through May 31, 2010. (AF 120-150).¹

On August 12, 2009, the CO issued a *Request for Further Information* ("RFI"), identifying several deficiencies requiring corrective action. (AF 115-119). In this decision, I will focus on only one of the deficiencies. Citing 20 C.F.R. § 655.17(a), the CO found that the Employer's newspaper advertisements instructed those interested in the job opportunity to apply with the State Workforce Agency ("the SWA") rather than submit application materials to the Employer itself.² (AF 117). The CO requested that the Employer "provide proof of advertisements, including a Sunday ad, for its job opportunity, published during the job order time period (July 24, 2009 to August 3, 2009)," and stated that the "advertisements must include contact information in which applicants can directly contact the employer and send their resumes." *Id.*

¹ Citations to the Appeal File will be abbreviated "AF" followed by the page number.

² The CO stated that the Employer submitted an advertisement receipt which indicated that "interested U.S. workers reply to 'Salisbury Job Service Office, 917 Mt. Hermon Rd, Ste 1, Salisbury or the nearest job service office.'" Though an advertising receipt does appear elsewhere in the Appeal File, there is not a copy of a receipt, or any evidence of a newspaper advertisement, in the section of the Appeal File that contains the Employer's original submission.

The CO received the Employer's response to the RFI on August 17, 2009. (AF 69-114). The Employer included a copy of its newspaper advertisement, which indicated that job applicants should: "Bring ad to Salisbury Job Service Office, 917 Mt. Hermon Rd, Ste 1, Salisbury or nearest job service office. JOMD0889050." In the Employer's response, it stated that "a copy of the ad published, along with confirmation of ad run, or as labeled 'an Advertising Receipt' was provided in the recruitment report." (AF 69). On the issue of whether it provided adequate contact information in the ad, the Employer asserted that it did provide clear contact information by "giving the exact name and address of the workforce agency where the job is posted, as well as the job order #." Referencing the Federal Register, the Employer contended, "There is no reference of requirement to list employer address and/or phone# in newspaper ad (it is included in job order)." *Id.* The Employer further asserted that including such information "would be in direct conflict with security issues related to the company." *Id.*

On September 16, 2009, the CO issued a Final Determination denying the Employer's application on multiple grounds. (AF 60-64). Regarding the advertisements, the CO asserted, "the employer references proposed rules of the H-2B program in the *Federal Register*, and not the final rules located in 20 Code of Federal Regulations (CFR) Section 655. Specifically, 20 CFR 655.17(a) states the advertisement must contain 'appropriate contact information to send resumes directly to the employer.'" (AF 61). Having found that the Employer's response to the RFI did not resolve the deficiency, the CO denied the application.

On September 22, 2009, BALCA received the Employer's request for administrative review. (AF 1-56). In this request, the Employer reiterated its argument that it complied with the Final Rule as stated in the Federal Register. (AF 1).

The Board issued a Notice of Docketing on September 24, 2009. The CO filed a brief on October 7, 2009. Regarding the newspaper advertisement, the CO again pointed out that the regulations require an employer to include contact information for applicants to send resumes directly to the employer.

DISCUSSION

When conducting domestic recruitment under the H-2B program, all advertising must contain, *inter alia*, “[t]he employer’s name and appropriate contact information for applicants to send resumes *directly* to the Employer.” 20 C.F.R. § 655.17(a) (emphasis added). The Employer’s advertisements instructed applicants to “apply” with the SWA’s local office. (*See* AF 86). Since the Employer did not comply with the program’s recruitment requirements, the CO properly denied certification. Because I am affirming the denial on this ground, I do not reach the CO’s other reasons for denial in the Final Determination.

The Employer relied on the Department’s summary of the Final Rule’s advertising requirements. In discussing § 655.17, the preamble notes that the advertisement must, *inter alia*, “provide clear contact information to enable U.S. workers to apply for the job opportunity.” 73 Fed. Reg. 78,033. Although the Employer arguably may have complied with the more generally worded summary of its obligations found in the Final Rule’s preamble, it did not comply with § 655.17(a)’s unambiguous requirement to instruct applicants to send it resumes directly. Since the Employer did not comply with the Department’s advertising requirements, I affirm the CO’s denial.

ORDER

Based on the foregoing, **IT IS ORDERED** that the CO’s denial of certification is **AFFIRMED**.

For the Board:

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JOHN M. VITTON
Chief Administrative Law Judge