



**Issue Date: 31 August 2009**

**BALCA Case No.: 2009-TLN-00077**

ETA Case No.: C-09131-45139

*In the Matter of:*

**QUALITY CONSTRUCTION & PRODUCTION LLC,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

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 ("the 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).

### **Statement of the Case**

On May 11, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Quality Construction and Production LLC ("Quality" or "the Employer"). AF 459.<sup>1</sup> The Employer requested certification for 74 fitters from August 3, 2009, until May 28, 2010. *Id.* The Employer included with its application, *inter*

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<sup>1</sup> Citations to the 511-page appeal file will be abbreviated "AF" followed by the page number.

*alia*, copies of the newspaper advertisements it had published when recruiting domestic workers for these positions. AF 503-504. The Employer advertised the positions in the Sunday April 19, 2009, and Tuesday April 14, 2009, editions of *The Crowley Post-Signal*. *Id.* The advertisements directed interested parties to apply at “Lafayette Career Solutions, 706 E Vermillion St, Lafayette, LA 70501, Re JO# 327422.” *Id.*

On June 10, 2009, the CO issued a *Request for Further Information* (“the RFI”). AF 196-204. In the RFI, the CO identified several deficiencies requiring corrective action. In this decision, I will focus on only 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. AF 198. The CO requested that the Employer “submit rebuttal information and/or evidence indicating the employer complied with the DOL’s regulatory requirement regarding recruitment.” *Id.*

On June 18, 2009, the Employer filed a response to the RFI. AF 101-195. With respect to the newspaper advertisements’ content, the Employer objected to the CO’s assertion that that the advertisements referred interested parties to the SWA “rather than” the Employer. In particular, the Employer wrote, “We provided our name and location in our ads . . . so that anyone in our local community could come here directly for walk-in or gate hires, as we are not a metropolitan area, and all readers of our local community newspaper know where we are as we have been here for years.” *Id.* The Employer suggested that “[a]ny non-local person not coming as a result of our local newspaper advertising will see our sign if they come to Lafayette as we are on the major thorough-fare coming into Lafayette.” *Id.* The Employer also noted that it had “signs posted about our location and the community advertising our temporary jobs,” and observed that the telephone book contains its address and phone number. AF 101-102. Similarly, the Employer wrote that the job order placed with the SWA contained its e-mail address, fax number, street address, and office telephone number. AF 102.

In addition, the Employer explained that it submitted a draft of its newspaper ad to the SWA’s central office. *Id.* After adopting the lone change suggested, the Employer used the draft’s wording in its advertisements. *Id.* The Employer wrote that it contacted ETA’s Chicago National Processing Center “with questions trying to understand what the new rule meant.” *Id.* The ETA representative

“only gave [the Employer] the general information that the greater number of ways any interested U.S. worker could reach [the Employer] – the better.” *Id.* To that end, the Employer provided an e-mail address in its job order. *Id.* The Employer “did not interpret DOL regulations as prohibiting any applicant from utilizing the fax machine, email, or telephone of the State Workforce Agency” to provide contact information. *Id.* Since some “locals may not have a telephone or a fax machine[,] and the location of the State Workforce Agency local office is well-known,” the Employer believed that its advertisement “would increase the number of ways any interested party could” apply directly. *Id.* The Employer concluded its discussion of this issue with the following:

The new rules says [sic] that we should supply ‘appropriate’ contact information for applicants to send resumes ‘directly’ to us. We believed the postal service would be slow and letters delayed or lost. We did not believe we could automatically assume any interested applicant would have a fax machine or email capacity from their home but we know the SWA has always allowed an interested worker to use their fax machine and/ or email by which to send resumes to employers. If the new rule were more specific about what wording to put in the newspaper ad we would have done it, for example, we would have put our email address in the newspaper if the new rule specified this.

*Id.*

On July 24, 2009, the CO issued a *Final Determination* denying the Employer’s application on multiple grounds. AF 92-100. Regarding the advertisements, the CO observed that the Employer did not refute its failure to comply with 20 C.F.R. § 655.17(a). AF 98. The CO rejected the Employer’s assertion that the rule contains confusing wording, noting that § 655.17 “uses clear, plain language.” *Id.* Having found that the Employer’s response to the RFI did not resolve the deficiency, the CO denied the application. *Id.* The Employer’s appeal followed.

### **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. AF 503-504. Since the Employer did not comply with the program’s recruitment requirements, the CO properly denied certification.

In its appellate brief, the Employer relied on language from the preamble to the Department’s Final Rule in asserting that it advertised properly the positions. In particular, the Employer observed how, in discussing § 655.15, the preamble states that the Department will deem acceptable advertisements that “do not depart from the descriptions contained in the accepted job order.” *See* 73 Fed. Reg. 78,020, 78,032 (Dec. 19, 2008). However, the Employer did not address the limiting language that immediately precedes the quoted passage. Specifically, the preamble notes that, to place a job order, employers must submit to the SWA “information regarding all of the job duties and terms and conditions of the job offer: The job duties, the minimum qualifications required for the position (if any), any special requirements, and the rate of pay.” *Id.* The preamble continues, “*This information* is normally submitted to the SWA for acceptance prior to the employer’s recruitment; as long as the employer’s advertisements do not depart from the descriptions contained in the accepted job order, they will be deemed acceptable by the Department.” *Id.* (emphasis added). Read within this context, this passage suggests that the Department will deem acceptable advertisements listing “the job duties and terms and conditions of the job offer” as described in the accepted job order. By its own terms, the passage relied upon by the Employer does not apply to information contained in an advertisement that the SWA does not use when preparing the job order and is therefore not required to be submitted to the SWA. Accordingly, the SWA’s acceptance of the job order does not preclude review of the advertisement’s application instructions. Likewise, the Employer has offered no authority for the proposition that an SWA employee’s approval of a draft advertisement prevents the Department from enforcing its own regulations.<sup>2</sup>

The Employer also 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

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<sup>2</sup> Since the ETA representative did not misstate the Employer’s advertising obligations, I decline to address whether any reliance would estop the Department from enforcing § 655.17(a).

unambiguous requirement to instruct applicants to send it resumes directly. Last, the Employer argued that directing interested parties to apply at the local SWA office actually increased the number of applicants and lessened the burden on applicants lacking access to the internet or a fax machine. Regardless of its good faith beliefs, the Employer cannot elect to comply with only those regulations it determines are supported by good policy decisions. Since the Employer did not comply with the Department's advertising requirements, I affirm the CO's denial.

**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