



Issue Date: 16 October 2009

BALCA Case No.: 2009-TLN-00107

ETA Case No.: C-09217-46072

In the Matter of:

EXTREME INDUSTRIAL SERVICES,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF
CERTIFICATION**

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 July 30, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Extreme Industrial Services ("Extreme" or

“the Employer”). AF 108.¹ The Employer requested certification for 45 cleaners from October 1, 2009, until May 31, 2010. *Id.* Troy Guffey is listed in Part J of the application as the “Preparer,” while part D of the application lists a different individual as the “Employer Point of Contact.” AF 109-111. Guffey’s title, according to the application, is President of DLD International, Inc. *Id.*

On August 11, 2009, the CO issued a *Request for Further Information* (“RFI”). AF 103-107. In the RFI, the CO requested, *inter alia*, evidence of the job order placed with the State Workforce Agency (“SWA”) pursuant to 20 C.F.R. § 655.17 and 20 C.F.R. § 655.15 (e)(2). AF 106.

On August 18, 2009, the Employer submitted a response to the RFI. AF 54-86. The Employer attached copies of two advertisements appearing in *The News-Record*. AF 79-80. Both advertisements instructed potential employees to apply in person at the Employer’s main office in Gillette, Wyoming. *Id.* Also attached to the Employer’s response was a copy of a job posting with the Gillette Workforce Center. AF 81-83. The job order attachment had been printed so that it covered three pages. *Id.* To properly view the job order, the three pages had to be lined up together horizontally. *Id.* Just like the newspaper advertisements, the job order directed interested applicants to apply in person at the main office in Gillette, Wyoming. AF 81. The job order listed Guffey as the contact person along with his fax number and phone number. *Id.* Both the fax number and phone number had area codes outside of the state of Wyoming. *Id.* The Employer’s name and main address in Gillette, Wyoming, also appeared directly beside Guffey’s name and number. *Id.* No Wyoming numbers were listed for the Employer. *Id.*

On August 24, 2009, the CO issued a second RFI. AF 50-53. In the second RFI, the CO identified multiple deficiencies. In this decision, I will only address in the deficiency listed in the *Final Determination*. The CO requested “proof that the job order . . . clearly indicates the appropriate contact information for the employer and appropriate contact information for applicants to send resumes directly to the employer.” AF 53.

On August 28, 2009, the Employer responded to the CO’s second RFI. AF 32-49. In reference to the job order, the Employer explained that the copy of the job order submitted to the SWA “did not format correctly resulting in the Employer Information address being listed on the second page.” AF 35.

¹ Citations to the 116-page appeal file will be abbreviated “AF” followed by the page number.

The Employer further wrote, “If the first page and second page are laid side by side, they will read correctly. . . . Please refer to the second page of the Job Order which states the Employer Information.” *Id.* The Employer did not address Mr. Guffey’s affiliation with the Employer or why the order contained only Mr. Guffey’s contact information. No other information was submitted pertaining to either Guffey’s status with the Employer or explaining the fax number and phone number.

On September 18, 2009, the CO issued a *Final Determination* denying the Employer’s application on a single ground. AF 23-27. Citing 20 C.F.R. §§ 655.15 (e)(2) and 655.17(a), the CO found that the Employer “submitted a job order that does not meet pre-filing recruitment requirements.” AF 26. The CO specifically noted that the job order “directed applicants to contact Guffey (the preparer of the application) at his telephone number or fax number with an area code indicat[ing] a location in Tennessee, while the job opportunity is in Wyoming.” The CO found the job order failed to satisfy 20 C.F.R. § 655.17(a), and therefore 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). A job order listed with the local SWA must also “satisfy all the requirements for newspaper advertisements contained in § 655.17.” 20 C.F.R. § 655.15(e)(2).

The contact information contained within the job order listed with the SWA raised a legitimate concern about whether the Employer complied with 20 C.F.R. §§ 655.15(e)(2) and 655.17(a). The job posting initially raised concerns because a discrepancy existed between the physical location of the fax number and the physical location of the job site. In order to clarify the ambiguity, the CO issued a second RFI. In his appellate brief, the CO correctly observed that the Employer’s response to the second RFI, “focuse[d] on the manner in which the copy of the job order was printed and did not address the deficiency in the employer contact information.” Since the Employer’s responses to the RFI failed to clarify the appropriateness of the Employer’s contact information listed on the job posting, the CO properly denied certification.

Regulations concerning pre-filing recruitment must be followed exactly. In a recent decision, the Board upheld a denial of certification where the job posting had potential job applicants send their resumes to the SWA rather than directly to the employer. *Quality Construction & Production LLC*, 2009-TLN-77 (Aug. 31, 2009). BALCA found that 20 C.F.R. § 655.17(a) contained an “unambiguous requirement to instruct applicants to send [the employer] resumes directly.” *Id.* at 5. The Board also found that the good intentions of the employer could not negate the mandate of the regulations and noted, “[t]he Employer cannot elect to comply with only those regulations it determines are supported by good policy decisions.” *Id.*

As the ruling in *Quality* makes clear, the Employer must demonstrate that the contact information given in the job posting strictly conforms to the regulations by providing information so that applicants could send resumes directly to the Employer, rather than a third party. The Employer has failed to do so. Based on the record, a determination cannot be made as to whether the job posting complied with 20 C.F.R. § 655.17 by providing the proper contact information for submitting resumes directly to the Employer.

The CO attempted to determine both Guffey’s relationship to the Employer as well as the appropriate contact information, but the Employer failed to properly respond to these requests. Since the job order instructed applicants to apply in person, it is unclear if the Employer can receive mail at the address listed. Exclusively requesting that applicants apply in person does not satisfy the regulation. Employers must provide information so that applicants can send resumes directly to the Employer. Without more information, the CO could not properly determine whether the Employer satisfied 20 C.F.R. § 655.17 by providing contact information sufficient to allow applicants to send resumes to the Employer. Finally, since Guffey’s affiliation with the Employer is unclear yet his fax number is the only one listed, there is also a question as to whether applicants who chose to send applications via fax sent their resumes to a third party. Since the Employer failed to establish that the information listed in the job posting allowed applicants to send resumes directly to the Employer, the CO’s decision to deny certification was proper.

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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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Washington, D.C.
WSC:ARH