



Issue Date: 05 February 2010

BALCA Case No.: 2010-TLN-00031

ETA Case No.: C-09329-47389

In the Matter of:

CHRIS ORSER LANDSCAPING,
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 November 21, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Chris Orser Landscaping ("the Employer"). AF 78-109.¹ The Employer requested certification for 16 "landscaping [and] grounds

¹ Citations to the 109-page appeal file will be abbreviated "AF" followed by the page number.

keeping workers” from April 2, 2010, until December 31, 2010. AF 78. The Employer included with its application, *inter alia*, copies of the newspaper advertisements it had published when recruiting domestic workers for these positions. AF 104-109. The Employer advertised the positions in the Friday, November 13, 2009, and Sunday, November 15, 2009, editions of the *Bucks County Courier Times* and *The Intelligencer*. *Id.* Interested parties were directed to “reference Job Order #661940 and apply online [at] www.cwds.state.pa.us at PA CareerLink Bucks County, 1260 Veterans Hwy., Bristol, PA.” *Id.* The application also indicated that a job order was circulated with the State Workforce Agency (“SWA”) from October 30, 2009, until November 21, 2009. *Id.*

On December 1, 2009, the CO issued a *Request for Further Information* (“the RFI”). AF 71-77. In the RFI, the CO identified several deficiencies requiring corrective action. 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. AF 75. The CO requested that the Employer “provide evidence that it complied with advertising requirements of H-2B employers under the regulation.” AF 75.

On December 15, 2009, the Employer filed a response to the RFI. AF 28-69. In its response, the Employer submitted, *inter alia*, copies of new advertisements the Employer had placed with the same newspapers on Friday, December 4, 2009, and Sunday, December 7, 2009. *Id.* The new advertisements directed applicants to apply directly with the Employer. Further, the Employer’s application listed a new job order placed with the SWA, placed on December 11, 2009. *Id.*

On January 7, 2010, the CO issued a *Final Determination* denying the Employer’s application on multiple grounds. AF 21-28. 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 23-24. The CO stated:

The employer provided tearsheets for new newspaper advertisements . . . with the proper employer contact information. However, pursuant to 20 C.F.R. 655.15(f)(1) the employer’s newspaper advertisements must be published during the period of time that the job order is being circulated, which was originally October 30, 2009, through November 21, 2009. The newspaper advertisements published during the period of time that the job order was being circulated remain deficient because they have the employer’s agent’s information as the point of contact, not the employer. The employer cannot cure

this pre-filing recruitment deficiency by placing new, post filing newspaper advertisements outside the regulatory timeframes for recruitment activity.

AF 24. The CO denied certification. The Employer's appeal followed.

In its request for review, the Employer argued that it "advertise[d] on Sunday Dec. 6, 2009 . . . for a total of three days fulfilling its obligation as request[ed] in the RFI." AF 1. The Employer suggested that the CO "overlooked" the new advertisements. *Id.* In its brief, the Employer also asserted that "the new job order, a follow[-]up to our original job order was placed [w]ith SWA on Dec. 11, 2009, and is still open. That job order falls within the 120 day time limit."

In his brief, the CO argued that the Employer's deficiency could not be corrected by the new advertisements. Although the CO offers little explanation, he noted in a footnote that "the stated deficiency in the original application cannot be overcome by issuance of new advertisements or job order[s] outside of the required periods prescribed by the regulations." Instead, the CO asserted that the Employer should have filed a new application.

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). Further, the Employer's advertisements must be placed in the newspaper "during the period of time that the job order is being circulated for intrastate clearance by the SWA." 20 C.F.R. § 655.15(f).

The record is clear. The Employer's original advertisements instructed applicants to "apply" with the SWA's local office, and the second "corrective" advertisements were not advertised in conjunction with the SWA's circulation of the job order. Neither of the advertisements² complied with the H-2B regulations.

² The CO argues that the Employer could not "cure" a deficiency with subsequent advertisements, but that issue need not be reached in this decision since neither advertisement complied with regulations.

The recruitment regulations are in place in order to protect domestic workers. While the Employer argues that its hiring of foreign labor has actually helped the domestic workforce, the Department has put in place regulations that help determine whether there are available domestic workers to fill positions before these jobs are offered to non-domestic workers. While it may be true, as the Employer asserted, that the regulations are complicated and hard to follow, exact compliance is required in order to ensure that domestic workers are protected. The Employer failed to require workers to apply directly to the Employer, and the subsequent advertisements were not filed within the time parameters. Therefore, 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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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge