

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 11 March 2010

BALCA Case No.: 2010-TLN-00038
ETA Case Nos.: C-100006-48540

In the Matter of:

FREEMONT FOREST SYSTEMS, INC.,
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 January 6, 2010, the Department of Labor's Employment and Training Administration ("ETA") received applications for temporary labor certification from Freemont Forest Services, Inc., ("the Employer"), requesting certification for 40 "Forest & Conservation Worker[s]" from April 1, 2010, until

December 31, 2010. AF 63.¹ The Employer submitted with its application copies of job advertisements placed with *The Oregonian* on December 11-13, 2009. AF 82-84. The advertisements did not include the work hours for the job opportunity. *Id.*

On January 12, 2010, the CO issued a *Request for Further Information* (“RFI”) citing multiple deficiencies, only one of which is relevant to this appeal. AF 56-62. Citing to 20 C.F.R. § 655.17(f), the CO found that the Employer failed to satisfy the advertising requirements of the H-2B program by failing to include the work hours. AF 59. The CO requested that the Employer provide “evidence of all newspaper advertisements . . . [that] complied with [the] advertising requirements of [the H-2B program].” AF 59.

On January 20, 2010, the Employer responded to the RFI. AF 28-55. In its response, the Employer wrote: “I failed to indicate the work hours associated with the employment opportunity. In the ad . . . I failed to be specific with the days and hours worked and if overtime was expected.” AF 28. The Employer then stated that it would run an additional advertisements and forward the information to the CO. AF 29.

On February 2, 2010, the Employer filed a supplemental response to the RFI. AF 18-27. The Employer indicated that it ran new advertisements on January 23-24, 2010, in order to correct the identified deficiencies. AF 18. The new advertisements included the following: “work 8 hrs/day, 5 days/week, with little or no overtime.” AF 26-27.

On February 4, 2010, the CO issued a *Final Determination* denying the Employer’s applications. AF 14-17. The CO found that the Employer failed to comply with the advertisement requirements. AF 16. Citing to 20 C.F.R. § 655.17(f), the CO found that the job postings did not comply with regulatory requirements because the postings failed to list the work hours. *Id.* The CO also stated that he reviewed the Employer’s responses to the RFI, but “all recruitment must be completed prior to filing the Application for Temporary Employment.” AF 17. The CO denied certification based on the Employer’s

¹The 113-page Appeal File will be abbreviated “AF” followed by the page number.

failure to comply with the recruitment requirements at 20 C.F.R. § 655.17. The Employer's appeal followed.

Discussion

When conducting domestic recruitment under the H-2B program, all advertising must contain, *inter alia*, “[t]he work hours and days, expected start and end dates of employment, and whether or not overtime will be available.” 20 C.F.R. § 655.17(f). These recruitment requirements are “designed to reflect what the Department has determined, based on program experience, are most appropriate to test the labor market.” *See* 73 Fed. Reg. 78,020, 78,031 (Dec. 19, 2008). The newspaper advertisement requirements listed . . . must be completed before an Employer files an application for temporary labor certification. 20 C.F.R. § 655.15(a). Since the Employer failed to comply with the advertising requirements, the CO properly denied certification.

In its request for review, the Employer called its failure to include the work hours a “harmless error” and argues that the Department of Labor does not “require perfection.” AF 3-4. The Employer also asserted that it conducted an adequate test of the labor market based on the number of responses it received with its advertisements. AF 4-5. The Employer further argued that “the CO is estopped from stating the new ads were outside the job order dates because he knew or had notice of the lapsed SWA job order dates when he specifically instructed [the] employer to provide additional information.” AF 6.

Newspaper advertisements that comply with § 655.17 are required to adequately test the domestic labor market. By omitting one of the advertising components, the Employer did not conduct a proper test of the labor market to determine if labor certification was required. While the Employer may consider the error “harmless,” the Department has determined that these steps are necessary in order to protect domestic workers. Although the Employer may argue that its response demonstrated an “adequate” test, it offers no substantial proof that such a test occurred. Had the Employer, for example, included the appropriate information, the number of responses might have increased. The Department specifically chose the criteria contained in the advertisement requirements because those criteria lead to an “adequate test” of the labor market. By deleting one of these criteria, the Employer falls below the adequate standard set forth by the Department.

The Employer also argues that the CO should be estopped from “stating the new ads were outside the job order dates” simply because the CO requested additional information from the Employer. The Employer, however, fails to cite to any authority that would substantiate its claim for estoppel. Further, the regulations clearly require that all recruitment take place *prior* to the filing of the application. *See Cross Roads Masonry*, 2010-TLN-00030, slip op. at 3 (January 25, 2010). I find that the Employer’s estoppel claim lacks merit given the Employer’s lack of authority to support its position as well as the regulation, which mandates an opposite conclusion from the one the Employer urges this board to reach. Therefore, Since the Employer did not comply with the Department’s advertising requirements, I affirm the CO’s denial.

Order

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer’s decisions are **AFFIRMED**.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge