

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 March 2010

BALCA Case No.: 2010-TLN-00048

ETA Case No.: C-10015-48796

In the Matter of:

PROGRESSIVE SOLUTIONS,
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 14, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Progressive Solutions, LLC ("the

Employer”) requesting certification for 40 “Forestry and Conservation Worker(s)” from March 15, 2010, until October 31, 2010. AF 127-170.¹ The application indicated that the Employer ran advertisements in the *Northwest Florida Daily News* from December 20, 2009, until December 21, 2009. AF 129. The Employer also indicated its job order with the State Workforce Agency (“SWA”) circulated between December 21, 2009, and December 31, 2009. *Id.*

On January 21, 2010, the CO issued a *Request for Further Information* (“RFI”), in which he found the Employer failed to satisfy pre-filing recruitment. AF 115-123. Citing to 20 C.F.R. § 655.15(f)(1), the CO stated that the Employer failed to circulate its newspaper advertisements during the time the job order with the State Workforce Agency (“SWA”) was being circulated for clearance. AF 120.

On January 27, 2010, the Employer submitted a response to the RFI. AF 36-114. The Employer stated that “the job was listed with [the SWA] on Dec17th, but was not opened . . . until December 21st. We did not know until after the advertisement had run about the conflict of dates.” AF 59. The Employer also requested that the “Department accept our recruitment to stand as submitted.” *Id.* In an email dated February 2, 2010, the Employer again reiterated that “all of the information requested in the RFI is available except for compliance with the advertising, which we will [comply] and return. We started the advertising one day earlier than the SWA listing; thus unless the department waives this requirement one time, the one way we can correct this is by re-advertising.” AF 35. On February 10, 2010, the Employer submitted new job advertisements dated January 31, 2010, and February 1, 2010. AF 24-28. The Employer also stated that the new SWA closing date was February 5, 2010. *Id.*

On February 12, 2010, the CO issued a *Final Determination* denying the Employer’s application. AF 18-23. Citing to 20 C.F.R. § 655.15(f)(1), the CO stated: the Employer failed to submit newspaper advertisements that were placed [during the circulation of] the job order.” AF 21. The CO noted that the first newspaper advertisement ran one day before the job order with the SWA was circulated. AF 21. The CO denied certification based on the Employer’s failure to follow pre-recruitment requirements, and the Employer’s appeal followed.

¹ Citations to the 170-page Administrative File will be abbreviated “AF” followed by the page number.

Discussion

When conducting domestic recruitment under the H-2B program, the employer must place an “active job order with the SWA serving the area of intended employment no more than 120 calendar days before the employer’s date of need.” 20 C.F.R. § 655.15(e). Additionally, “during the period of time that the job order is being circulated for intrastate clearance by the SWA . . . the employer must publish an advertisement on 2 separate days” 20 C.F.R. § 655.15(f). These pre-filing steps must be taken before an employer may file its application for temporary labor certification. 20 C.F.R. § 655.15(a).

The Employer admitted in its response to the RFI that it failed to advertise two consecutive days during the circulation of the job order with the SWA. Pre-filing recruitment steps are put in place to protect domestic workers and allow the Department of Labor to determine whether or not the Employer adequately tested the labor market. Further, the Employer cannot cure a pre-filing deficiency with a *post-filing* job advertisement. *See Cross Roads Masonry*, 2010-TLN-00030 (January 25, 2010).

The Employer argued in its request for review that it made a “good faith effort,” and the denial was “unreasonable.” AF 4-5. The Employer also asserted that it was unaware of the mistake until it received the RFI from the Employer. *Id.* Yet the Employer had the ability to review the pre-filing recruitment information before filing its application. Careful scrutiny would have revealed that the job advertisements did not comply with the regulations. Moreover, it is not unreasonable to deny an application because the Employer failed to properly follow the regulatory requirements. The regulations require that the Employer conduct recruitment before filing an application, and exact compliance is required in order to protect domestic workers. *See Chris Orser Landscaping*, 2010-TLN00031 (Feb. 5, 2010). The Employer failed to follow the pre-filing recruitment steps, so the CO properly denied certification.

Order

For the foregoing reasons, 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