

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 24 November 2009

BALCA Case Nos.: 2010-TLN-00014; 2010-TLN-00015

ETA Case Nos.: C-09231-46245; C-09231-46243

In the Matter of:

BPS INDUSTRIES, 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 August 17, 2009, the Department of Labor's Employment and Training Administration ("ETA") received applications for temporary labor certification from BPS Industries, Inc., ("BPS" or "the Employer") requesting certification for 75 "Welders, Cutters, and Welder-Fitters" as well as 50

“Structural Metal Fabricators and Fitters” from October 1, 2009, until June 30, 2010. AF 183; AF₂ 340¹. On August 26, 2009, the CO issued a *Request for Further Information* (“RFI”) in each case citing multiple deficiencies, only one of which is relevant to this appeal. AF 176-182; AF₂ 332-339. Specifically, the CO found the Employer failed to provide a dated recruitment report. AF 182; AF₂ 337-338. The CO requested, *inter alia*, evidence of compliance with all of the regulating recruitment requirements. *Id.*

On September 1, 2009, the Employer submitted responses to the RFIs. AF 127-175; AF₂ 208-331. Relevant for the present purposes, the Employer submitted its newspaper advertisements from the *Jennings Daily News*. AF 148; AF₂ 251. The advertisements, which ran the required two days, failed to include the wage offered for each position, whether overtime was available, or the hours and days of work. *Id.* The advertisements did note that each job was temporary in nature and contained the Employer’s address. *Id.*

On September 25, 2009, the CO issued a second RFI for each application. AF 120-126; AF₂ 200-206. The CO found, among other deficiencies, that the Employer had failed to comply with recruitment requirements. AF 125-126; AF₂ 205-206. Specifically, the CO found that the newspaper advertisements submitted by the Employer failed to satisfy 20 C.F.R. § 655.17 because the advertisements did not include “the work hours and days, whether or not overtime is available, and the wage offer.” *Id.*

On October 1, 2009, the Employer filed responses to the second RFIs. AF 102-119; AF₂ 182-199. The Employer wrote:

BPS has no explanation for the absence of these items in its advertisements, as BPS clearly included all of the regulatory requirements in its communication to the *Jennings Daily News*. However, BPS did comply with all of the other recruitment requirements, as previously demonstrated. There is, additionally, no reason to believe that the errors in the newspaper advertisements had any affect on the recruitment process.”

AF 104; AF₂ 184. The Employer asserted that the errors were “harmless.” *Id.*

¹BPS filed two separate applications for temporary labor certifications. The application for 2010-TLN-00014 requested certification for 75 welders, and any citation to the 222-page appeal file will be abbreviated as “AF” followed by the page number. The application for 2010-TLN-00015 requested 50 Structural Metal Fabricators and Fitters, and any citation to the 422-page appeal file will be abbreviated as “AF₂” followed by the page number. The second appeal file is identical to the first in almost all respects relevant to this appeal.

On October 22, 2009, the CO issued a *Final Determination* denying each of the Employer's applications. AF 93-101; AF₂ 171-180. The CO found that the Employer failed to comply with the advertisement requirements. AF 100; AF₂ 178. Citing to 20 C.F.R. § 655.17, the CO found that the job postings did not comply with regulatory requirements because the postings failed to list the wage offers, whether overtime was available, and the work hours and days. *Id.* The CO also noted that the Employer "failed to submit any further evidence demonstrating that the newspaper advertisements complied with the [regulatory requirements]." *Id.* The CO denied certification based on the Employer's failure to comply with the recruitment requirements at 20 C.F.R. § 655.17. The Employer's appeals 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" and "the wage offer." 20 C.F.R. § 655.17(f), (g). 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). Since the Employer failed to comply with the advertising requirements, the CO properly denied certification.

In its requests for review,² the Employer called its failure to include the work hours and days, whether overtime will be available, and the wage offer a "harmless error." AF 5; AF₂ 6. The Employer further asserted that it "undertook great effort to seek qualified U.S. workers . . . and the newspaper advertisement, flawed as it was, did prompt several applications." *Id.* In conclusion, the Employer wrote that far more workers responded to the job posting with the state workforce agency, "which is an indication of the declining relevance of newspaper classified advertising." *Id.*

Newspaper advertisements that comply with § 655.17 are required to adequately test the domestic labor market. By omitting three of the advertising components, the Employer did not conduct a proper

² The Employer was allowed to submit, in addition to the argument contained in its requests for review, a brief. On November 17, 2009, the Employer sent an email notifying BALCA that a brief was attached. However, the email did not contain an attachment. Counsel was notified via telephone and indicated that he would submit the brief to the same address. However, the Employer did not submit a brief by the November 18, 2009, deadline.

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. 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