



Issue Date: 25 January 2010

BALCA Case No.: 2010-TLN-00030

ETA Case No.: C-09322-47264

In the Matter of:

CROSS ROADS MASONRY,
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 18, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Cross Roads Masonry ("the

Employer”). AF 87-119.¹ The Employer requested certification for 11 “Brick Mason Helper[s]” from February 1, 2010, until November 30, 2010. AF 87. The application included two newspaper advertisements listed in the *Richmond Register*. AF 116-119. The newspaper advertisements listed, *inter alia*, a wage of “8.00 to \$11.49” per hour. *Id.* The Employer’s application also included a prevailing wage determination, which listed the prevailing wage as \$11.49. AF 96-101.

On November 23, 2009, the CO issued a *Request for Further Information* (“RFI”) identifying two deficiencies, only one of which is relevant to this appeal. AF 81-86. The CO found that the Employer failed to comply with pre-filing recruitment requirements. AF 84. Citing to 20 C.F.R. 655.17(g), the CO noted that all newspaper advertisements must contain the wage offer, and the CO had “reason to believe that the employer [was] offering a wage which does not equal or exceed . . . the prevailing wage.” *Id.* As a result, the CO requested that the Employer provide evidence of newspaper advertisements with the correct prevailing wage. AF 85.

On November 30, 2009, the Employer submitted a response to the RFI. AF 57-80. The Employer attached copies of newspaper advertisements which ran in the *Richmond Register* from November 28, 2009, to November 29, 2009. AF 79-80. The advertisements listed the wage as \$11.49 per hour. *Id.*

On December 21, 2009, the CO issued a *Final Determination* denying the Employer’s application on a single ground. AF 53-56. Citing 20 C.F.R. § 655.15(a), the CO found that the Employer failed to satisfy all pre-filing recruitment activities before filing its application. AF 56. Specifically, the CO asserted that 20 C.F.R. § 655.15(f) required the Employer to run “newspaper advertisements . . . during the time period the job order [was] being circulated for intrastate clearance by the State Workforce Agency.” *Id.* The CO noted that the new advertisements submitted by the Employer ran “twenty-four (24) days after the job order was closed and six (6) days after the application was received.” *Id.* As a result, the CO denied certification because “placing an amended newspaper advertisement after an application has been submitted to the Chicago NPC and after a job order has been closed is not permitted by the regulations.” *Id.* The Employer’s appeal followed.

¹ Citations to the 102-page appeal file will be abbreviated “AF” followed by the page number.

In the Employer's request for review, it does not deny that its new advertisements ran outside of the "initial job order period." AF 2. Instead, the Employer asserted that it "cured its deficiency by re-running its advertisements and thus, offered the amended wage rate to U.S. applicants and temporary workers while abiding by the regulations." *Id.* The Employer further argued that "there was no other possible manner for the employer to adequately respond to the subject RFI and no other means for the employer to provide sufficient documentation to overcome the wage rate deficiency listed." *Id.* Finally, the Employer argued that the CO did not order the Employer to "open another SWA job order . . . [or] to disregard the advertisement requirements and publish a singular amended advertisement for the next available run date in order to publish the amended advertisement while the SWA job order remained open." *Id.*

Discussion

When conducting domestic recruitment under the H-2B program, 20 C.F.R. §§ 655.15(d)(3) and 655.17(g) require an Employer to publish two print advertisements that must include, *inter alia*, the wage offer. The wage offer must be "the highest of the prevailing wage, the Federal minimum wage, State minimum wage, or local minimum wage." 20 C.F.R. § 655.17(g). The newspaper advertisement requirements listed in § 655.15(d) must be completed before an Employer files an application for temporary labor certification. 20 C.F.R. § 655.15(a)

There is no doubt that the Employer listed a wage lower than the prevailing wage of \$11.49 in its original newspaper advertisements. Likewise, the Employer does not contest that the subsequent advertisements were placed after the Employer filed its application for temporary labor certification. The regulations require that job postings contain the appropriate wage offer in order to adequately test the domestic labor market and therefore protect U.S. workers. *See Hampton Inn*, 2010-TLN-00007, slip op. at 4 (November 9, 2009). The regulations also require that this recruitment take place before an application for temporary labor certification is filed. The Employer failed to provide evidence of a job posting with the correct prevailing wage prior to its application. As a result, the CO could not determine if the Employer adequately tested the domestic labor market, and therefore 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