



Issue Date: 22 September 2010

BALCA Case No.: 2010-TLN-00077

ETA Case No.: C-10211-50697

In the Matter of:

DVIR'S RETAIL, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **WILLIAM S. COLWELL**
Associate 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 July 30, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from DVIR's Retail, LLC, ("the Employer").

AF 106-119.¹ The Employer requested certification for twenty “Retail Salespersons” from October 1, 2010 until April 1, 2011. AF 106.

On August 3, 2010, the CO issued a Request for Further Information (“RFI”). AF 101-105. The CO noted the pre-filing recruitments at 20 C.F.R. § 655.15 and requested that the Employer provide a copy of its job order along with all of its newspaper advertisements. AF 103-104.

On August 9, 2010, the Employer responded to the RFI. AF 63-100. In its response, the Employer wrote:

To evidence that the Employer has met the requirement of placing two-day newspaper advertisements, we have enclosed herein a copy of the payment receipt for the advertisements with the context of the actual advertisement indicating that the advertisements were placed on June 13, 2010 and June 16, 2010. . . . We also attached a copy of the three job orders which were posted at the website of [the] Florida Workforce Exchange (“SWA”).

AF 64. The job order did not include the work hours and days, although it did note that the job was a “day shift.” AF 81. The Employer also included the proof of its newspaper advertisement, which did not mention the work hours or days. AF 100.

On August 20, 2010, the CO denied the Employer’s application for temporary labor certification. AF 57-62. Citing to 20 C.F.R. §§ 655.15(e)(2) and 655.15(f)(3), the CO found² the Employer’s newspaper advertisements failed to “contain the work hours and days, expected start and end dates of employment, and whether or not overtime would be available.” AF 61. Having found that the Employer failed to satisfy pre-filing recruitment, the CO denied the Employer’s application. The Employer’s appeal followed.

Discussion

When conducting domestic recruitment under the H-2B program, the Employer must place an active order with the SWA as well as place newspaper advertisements. 20 C.F.R. § 655.15. The job

¹ Citations to the 119-page appeal file will be abbreviated “AF” followed by the page number.

² The CO cited numerous other deficiencies, which will not be addressed on appeal.

order must contain: “The 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.

The Employer’s newspaper advertisements failed to include the work hours and days. The Employer argued in its request for review that the job requires varied hours. However, the Employer failed to address the requirement whatsoever by mentioning, at the very least, that the work hours and days varied. The Employer has chosen to avail itself of the H-2B program, and the H-2B program requires that Employer advertise the work hours and days prior to filing for certification. If the Employer chooses to utilize the program, then it must comply with the Department’s requirements, which are specifically put in place to protect domestic workers. *See Chris Orser Landscaping*, 2010-TLN-00031 (BALCA Feb. 5, 2010). The Employer failed to adequately satisfy the recruitment requirements, and 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

Washington, D.C.
WSC:AH