



Issue Date: 30 October 2009

BALCA Case No.: 2010-TLN-00004
ETA Case No.: C-09236-46309

In the Matter of:

EAST BERNSTADT COOPERAGE 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 ("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). Following the CO's denial of an application under 20 C.F.R. § 655.32, the applicant may request review by the Board of Alien Labor Certification Appeals ("the Board" or "BALCA"). § 655.33. The administrative review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and "such evidence as was actually submitted to the CO in support of the application." § 655.33(a), (e).

Statement of the Case

On August 24, 2009, the Employment and Training Administration (“ETA”) received an application from East Bernstadt Cooperage Inc. (“the Employer”) requesting certification for 50 production workers from October 1, 2009, through June 30, 2010, based on a peakload need. AF 59; *see* AF 14.¹ On August 28, 2009, the CO issued a *Request for Further Information* (“RFI”) identifying several deficiencies in the application that required remedial action. AF 54-58. The CO found, *inter alia*, that the Employer did not submit a complete recruitment report. AF 56-57; *see* 20 C.F.R. § 655.15(j) (2009). The CO directed the Employer to submit evidence of compliance with the program’s domestic recruitment requirements and a complete recruitment report. AF 56-57.

On September 8, 2009, ETA received the Employer’s response to the RFI.² The response contained, *inter alia*, a copy of the newspaper advertisement the Employer had published in the *Lexington Herald-Leader*. AF 24. The advertisement identified the Employer by name and city and instructed interested parties to “[a]pply at [the] nearest one-stop career center.” *Id.* The advertisement did not include the Employer’s contact information.

On September 23, 2009, the CO issued a *Final Determination* denying certification. AF 14-19. While the CO offered two reasons for denying certification, I will only address one in affirming the CO’s determination. Citing 20 C.F.R. § 655.17(a), the CO found that the Employer failed to comply with the regulatory requirements regarding advertising. AF 17-19. In particular, the CO wrote that the Employer’s published advertisements did not comply with 20 C.F.R. § 655.17(a) because they lacked “appropriate contact information for applicants to send resumes directly to the employer.” AF 19.

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

² The response is undated and does not have an ETA date stamp. *See* AF 22. The index to the Appeal File prepared by the CO lists September 8, 2009, as the receipt date.

On October 8, 2009, the Employer filed a request for BALCA review. *See* AF 1-12. While the request contained argument regarding a number of the issues identified in the *Final Determination*, the Employer did not address the CO's finding that the Employer failed to include appropriate contact information in its newspaper advertisements. *See* AF 2-5. On October 9, 2009, I issued a *Notice of Docketing* setting the briefing schedule. On October 15, 2009, BALCA received the Appeal File. On October 22, 2009, the Associate Solicitor for Employment and Training Legal Services ("the Solicitor") filed a brief on behalf of the CO. Citing *Quality Construction & Production LLC*, 2009-TLN-77 (Aug. 31, 2009), the Solicitor urged affirmance of the denial based on the Employer's failure to provide appropriate contact information in the advertisements. The Employer did not file an appellate brief.

Discussion

When conducting domestic recruitment under the H-2B program, all advertising must contain, *inter alia*, "[t]he employer's name and appropriate contact information for applicants to send resumes *directly* to the employer." 20 C.F.R. § 655.17(a) (emphasis added). As observed *supra*, the Employer's advertisements instructed applicants to "[a]pply at [the] nearest one-stop career center." AF 24; *see generally* Kentucky Office of Employment and Training, *Locating Kentucky One-Stop Career Centers*, <http://www.oet.ky.gov/des/wis/wfservices.htm> (last visited Oct. 29, 2009). Since the Employer did not comply with the H-2B program's recruitment requirements, the CO properly denied certification.

In *Quality*, BALCA affirmed a denial of certification when the employer's advertisements directed applicants to apply with the local State Workforce Agency ("SWA"). 2009-TLN-77, slip op. at 3-5. Specifically, BALCA found that 20 C.F.R. § 655.17(a) unambiguously requires that the advertisement instruct applicants to send resumes directly to the employer. *Id.*, slip op. at 4-5.³ Like the petitioner in *Quality*, the

³ I note that, before the current rule took effect on January 18, 2009, ETA required advertisements to "direct applicants to report or send resumes to the SWA for referral to the employer." *Procedures for H-2B Temporary Labor Certification in Non-Agricultural Occupations*, 72 Fed. Reg. 19,961, 19,964 (Apr. 20, 2007). In the preamble to the proposed new rule, ETA explained that requiring employers to recruit "under

Employer directed interested individuals to apply with a state agency and provided no contact information for direct submission of resumes. Accordingly, I find that 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

their own direction rather than the SWA's" should "improve application processing and consistency while ensuring protections for U.S. workers." Labor Certification Process and Enforcement for Temporary Employment in Occupations Other than Agriculture or Registered Nursing in the United States, 73 Fed. Reg. 29,942, 29,948 (proposed May 22, 2008).