U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 23 July 2010

BALCA Case No.: 2010-TLN-00069

ETA Case Nos.: C-10146-50182

In the Matter of:

FORESTALL COMPANY, 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 May 26, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Forestall Company, Inc., ("the Employer"), requesting certification for 225 "Forestry and Conservation Workers" from July 1, 2010, until April 15,

2010. AF 200.[1] The Employer included, *inter alia*, newspaper tear sheets for advertisements placed in *The Daily Home* on April 11, 2010; April 13, 2010; April 14, 2010; and May 5, 2010. AF 224-229. The Employer stated in the "Recruitment Information" section of ETA Form 9142 that "the advertisements were ran two separate times as the employer made changes, thus the job order and the advertisements were revised." AF 204.

On June 1, 2010, the CO issued a *Request for Further Information* ("RFI") citing multiple deficiencies, only one of which is relevant to this appeal. AF 194-196. Citing to 20 C.F.R. § 655.17, the CO found that the April advertisements did not comply with regulations because the advertisements inaccurately advertised for 325 workers rather than the 225 requested by the Employer. AF 196. Further, the CO stated that the Employer failed to submit an advertisement from May 9, 2010. *Id.* The CO requested that the Employer submit the additional May advertisement. *Id.*

On June 4, 2010, the Employer responded to the RFI. AF 155-193. In its response, the Employer wrote that it failed to secure all of its contracts this season, and as a result, the Employer needed less workers than reflected in the April advertisements. AF 173. Therefore, the Employer conducted a second round of additional advertisements on May 5, 2010 and May 9, 2010. *Id.* The Employer again attached the April advertisements and the May 5, 2010 advertisement. AF 179-184:

On June 24, 2010, the CO issued a *Final Determination* denying the Employer's application. AF 150-154. Citing to 20 C.F.R. §§ 655.15(e)(2) and 655.15(f)(3), the CO asserted that the Employer's advertisements failed because they did not accurately reflect the number of workers needed. AF 154. While the CO noted that the May 5, 2010 advertisement appeared to meet the regulatory requirements, the Employer "failed to provide evidence that it posted a Sunday advertisement on May 9, 2010 containing the accurate number of workers requested and rate of pay." *Id.* The CO found that the Employer failed to adequately prove that it complied with advertisement requirements under the H-2B regulations, and as a result, the CO denied certification. *Id.* The Employer's appeal followed.

[1]The 532-page Appeal File will be abbreviated "AF" followed by the page number.

In its Request for Review, the Employer stated that the May 9, 2010 advertisement was submitted, but the CNPC "misplaced" the additional tear sheet. AF 11. The Employer also submitted a Fed Ex receipt, which showed that documents were delivered to the CNPC on June 4, 2010. AF 16. The Employer also included a copy of the May 9, 2010 advertisement. AF 14.[2]

Discussion

H-2B employers are required to advertise job opportunities on "2 separate days, which may be consecutive, one of which must be a Sunday advertisement." 20 C.F.R. § 655.15(f). Further, the advertisement must contain "the total number of job openings the employer intends to fill." *See* 20 C.F.R. §§ 655.15(e)(2) and 655.17(h).

The Employer does not dispute that its April advertisements do not meet the regulatory requirements. Therefore, the only issue before the Board is whether the Employer's May advertisement(s) satisfied the requirements. Accordingly, the regulations require the Employer to publish an advertisement on two separate days, one of which must be a Sunday. As the CO noted, the May 5, 2010 advertisement meets the regulatory requirement. However, the Employer failed to submit proof that it published a compliant advertisement on a Sunday. Though the Employer noted in its response to the RFI that it published an advertisement on May 9, 2010, the Employer failed to submit proof of this advertisement both at the time of the application and in response to the RFI. Although the Employer claims that the CNPC "misplaced" the May 9, 2010 advertisement, it failed to offer persuasive proof of this allegation. Moreover, the appeal file appears to be complete, and it seems highly unlikely that the CO correctly filed every page of the Employer's response except for one page. Ultimately, it is the Employer's burden to prove that it has satisfied the H-2B requirements, and it failed to do so in the present case. *See Eagle Industrial Professional Services*, 2009-TLN-00073 (BALCA July 28, 2009). Since the Employer failed to meet its burden of proof that labor certification was appropriate, the CO properly denied certification.

[2] Although the Employer submitted the May 9, 2010 advertisement, the Board may not consider evidence that was not submitted to the CO. *See* 20 C.F.R. § 655.33.

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