



Issue Date: 22 September 2010

BALCA Case No.: 2010-TLN-00078

ETA Case No.: C-10211-50699

In the Matter of:

NICO ART LINK INC.,
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 Nico Art Link Inc. ("the Employer").

AF 70-81.¹ The Employer requested certification for five “Retail Salespersons” from October 1, 2010 until February 1, 2011. AF 70. The Employer enclosed its recruitment report, which stated: “each advertisement consisted of only one H-2B job opportunity so as to sufficiently apprise potential workers of their job duties.” AF 81.

On August 3, 2010, the CO issued a Request for Further Information (“RFI”). AF 64-69. The CO noted that the Employer stated in its recruitment report that it only advertised for one H-2B job opportunity. AF 66. Therefore, the CO required the Employer to prove that it complied with all of the regulatory recruitment requirements at 20 C.F.R. §§ 655.15. The CO requested that the Employer provide a copy of its job order along with all of its newspaper advertisements. AF 67.

On August 9, 2010, the Employer responded to the RFI. AF 44-63. In its response, the Employer wrote that the recruitment report might have been misleading because “one H-2B job opportunity did not mean one opening but meant that the employer placed an advertisement on the newspaper for the subject H2B job which has five openings.” AF 44. The Employer also included with its response a supplemental recruitment report, which showed that fifteen domestic workers were not hired because they “failed to respond to [the Employer’s] request to send in references.” AF 47-48. The Employer attached a copy of its job order, although it appeared from the document that the order had not yet been submitted to the State Workforce Agency (“SWA”), and therefore did not have a job order number. AF 58. The job order listed the Employer’s address as “111110 Mall Circle, while the Employer’s application showed that it was “11110 Mall Circle.” *Id.* The Employer also included its newspaper advertisements, which directed applicants to apply by sending a resume to the Employer’s corporate headquarters in Virginia. AF 61.²

On August 20, 2010, the CO denied the Employer’s application for temporary labor certification. AF 39-43. Citing to 20 C.F.R. §§ 655.15(e)(2) and 655.15(f)(3), the CO found the Employer’s job order and newspaper advertisements failed to comply with the pre-filing recruitment requirements. AF 43. Specifically, the CO stated that the Employer included a copy of a job order from the SWA, but it failed to include a job order number, so it is impossible to determine if the actual job order was submitted. *Id.*

¹ Citations to the 81-page appeal file will be abbreviated “AF” followed by the page number.

²The job opportunity was in Maryland, while the Employer’s headquarters was in Virginia.

Further, the CO noted that the Employer's address on the job order was listed incorrectly. *Id.* Moreover, the incorrect address was actually the worksite rather than the Employer's business address. According to the CO, both the job order and the newspaper advertisements failed to include the work hours and days. *Id.* 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 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 pre-filing recruitment as it pertains to the job order and the newspaper advertisements have numerous deficiencies. However, since a single deficiency is cause for denial, only the most pertinent issues will be addressed on appeal. Based on the record before the CO, it is impossible to determine what information was actually contained in the job order. The copy of the job order submitted to the CO still contains a link to allow the Employer to submit the job order to the SWA, and therefore was still able to be changed at the Employer's discretion.

However, since the Employer failed to submit a final job containing a job order number from the SWA, the CO was forced to evaluate the Employer's compliance based on the information before him. The H-2B regulations require that the job order and newspaper advertisements contain multiple pieces of information, including the work hours and days. Although the job order does mention that it is a "dayshift," the order is devoid of any mention of the work days, or what specific hours the applicants will be required to work. Additionally, the newspaper advertisements submitted by the Employer also fail to include this information.

In its request for review, the Employer's defense is twofold. First, it argued that the SWA only allowed the Employer to enter the number of hours per week, not the specific work hours or days. Secondly, the Employer argued that the newspaper advertisements did not contain the work hours and

days because “due to the nature of the job, work hours and days [varies].” AF 5. The Employer’s arguments, however, lack merit. Even assuming that the SWA’s job order system does not allow the Employer to enter all of the required information to comply with the H-2B program, a newspaper advertisement certainly does not present the same problem. Furthermore, while the Employer argued that the job requires varied hours, it has chosen to avail itself of the H-2B program, and the H-2B program requires that Employer advertise the work days and hours 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