



**Issue Date: 24 November 2009**

**BALCA Case No.: 2010-TLN-00018**  
ETA Case No.: C-09268-46539

*In the Matter of:*

**HAMILTON SMITH RACING,**  
*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 September 25, 2009, the Employment and Training Administration (“ETA”) received an application from Hamilton Smith Racing (“the Employer” or “HSR”) requesting certification for two horse grooms from October 1, 2009, through May 31, 2010. AF 66; *see* AF 10.<sup>1</sup> The Employer’s submissions included a recruitment report signed by Heather Knisley on letterhead from Heather Knisley Racing. AF 74-77. On October 1, 2009, the CO issued a *Request for Further Information* (“RFI”) identifying several deficiencies in the application that required remedial action. AF 62-65. The CO found, *inter alia*, that the Employer did not complete its recruitment report in compliance with the regulatory requirements of 20 C.F.R. § 655.15(j). AF 64. Specifically, the CO observed that Heather Knisley of Heather Knisely Racing prepared, signed, and dated the Employer’s recruitment report, and therefore that the Employer’s recruitment report was prepared, signed, and dated “by an individual other than the employer.” AF 64-65. The CO directed the Employer to submit “evidence that it prepared, signed, and dated a written recruitment report no fewer than 2 calendar days after the last date on which the job order was posted and no fewer than 5 calendar days after the date on which the last newspaper or journal advertisement appeared.” AF 64. The CO also directed the Employer to submit a valid recruitment report and evidence of compliance with the program’s domestic recruitment requirements, including copies of the published advertisements. AF 64-65.

On October 8, 2009, ETA received the Employer’s response to the RFI.<sup>2</sup> The response contained, *inter alia*, an October 6, 2009, letter from the Employer’s point of contact, Hamilton Smith, explaining that the Employer ran a joint advertisement with several other petitioners from the Maryland Thoroughbred Horsemen Association. AF 27; *see* AF 20.<sup>3</sup> Mr. Smith explained that the group of petitioners appointed Heather

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

<sup>2</sup> The index to the Appeal File prepared by the CO lists October 8, 2009, as the receipt date.

<sup>3</sup> Ms. Smith wrote that the Employer has advertised jointly each year since ETA prohibited associations from filing joint applications on behalf of multiple members. AF 27. He also explained how he came to believe that ETA accepts joint advertising:

Knisley to interview all of the applicants for the advertised positions. *Id.* Mr. Smith added that he “personally viewed the recruitment report and agree[s] with its findings” because he “maintained regular communication with Heather regarding the recruitment process.” *Id.* The response also included copies of the newspaper advertisement the Employer had published in the *Baltimore Sun*. AF 32-33. The advertisement stated that there were 24 positions available at the Laurel Park Race Track. *Id.* The advertisement directed applicants to fax resumes to Ms. Knisley and to “reference” any of eight listed individuals, one of whom was Mr. Smith. *Id.* The Employer also submitted an October 6, 2009, version of the recruitment report that was again signed by Ms. Knisley. AF 28-31.

On October 22, 2009, the CO issued a *Final Determination* denying certification. AF 10-13. The CO explained that the Employer’s response to the RFI did not cure the application’s deficiency:

First, although the employer submitted a statement that attests to having reviewed and approved the recruitment efforts completed by Heather Knisley, the employer still failed to submit a recruitment report that was prepared, signed and dated by the employer himself, Hamilton Smith. Second, a review of the advertisements found that the employer failed to satisfy the advertising requirements set forth in 20 CFR 655.17. Specifically, in the advertisements the employer failed to provide the employer’s name, Hamilton Smith Racing, and appropriate contact information for applicants to send their resumes directly to the employer. The advertisements inform U.S. applicants to fax their resumes to the attention of Heather Knisley, an individual other than the employer himself, Hamilton Smith. In addition, the advertisements failed to state the total number of openings the employer intends to fill. The advertisements list a total of 24 openings, the total number of openings for various employers listed in the advertisements; Section B., Item 7. of the ETA Form 9142, however, asserts a need for two (2) workers.

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Under the advice of our attorney we were informed that the procedure of advertising in a joint manner was acceptable as long as the petitioners all filed individual 9142 forms with our own unique peak load evidence submitted. According to our counsel this was announced as an acceptable method of advertising at the 2007 Chicago H-2B Stakeholders Meeting in which this issue was addressed.

*Id.*

AF 13. Since the Employer “failed to adequately respond to the RFI . . . [or] provide sufficient documentation to overcome the deficiency,” the CO denied certification. *Id.*

On November 3, 2009, the Employer filed a request for BALCA review. *See* AF 1-8.<sup>4</sup> In its request, the Employer argued that “[t]he deficiencies cited in the decision did not make the playing field unfair for Americans, or render the advertisements misleading in any way.” AF 3. The Employer described the cited deficiencies as “technical and de minimis,” asserting that they “did not change the character and fairness” of its recruitment efforts. *Id.* Asserting that the joint advertising “follows the spirit as well as the letter of the law,” the Employer wrote, “Advertisement is very expensive and the ability to designate a point of contact person is very helpful.” *Id.* The Employer also observed that “the group advertisement method of recruitment rejected in the instant application has been accepted and approved consistently and without issue since” ETA prohibited associations from filing applications on their members’ behalf. *Id.* Citing the ETA case numbers, the Employer alleged that the agency has recently approved ten similar applications despite the petitioners’ use of joint advertisements. *Id.*

On November 4, 2009, I issued a *Notice of Docketing* setting the briefing schedule. On November 12, 2009, BALCA received the Appeal File. On November 17, 2009, the Associate Solicitor for Employment and Training Legal Services (“the Solicitor”) filed a brief on behalf of the CO. Citing *Extreme Industrial Services*, 2009-TLN-107 (Oct. 16, 2009), the Solicitor urged affirmance of the denial based on the Employer’s failure to advertise with appropriate contact information to allow applicants to send resumes directly to HSR. Regarding the Employer’s contentions about previous applications, the Solicitor explained that the CO had accepted the Employer’s attestations regarding compliance with the recruitment requirements without subjecting the applications to RFI scrutiny. The Solicitor added that only after the CO inquired about the particulars of the Employer’s recruitment effort for the instant application did he learn

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<sup>4</sup> On November 3, 2009, BALCA received appeals for a set of companion cases filed on behalf of three employers by the same attorney. The Appeal File contains a request for review purportedly filed on behalf of Timothy Salzman Racing, one of the two other employers. BALCA has a copy of HSR’s original request for review, and both letters’ bodies are identical. Accordingly, I will cite to the letter contained in the Appeal File despite its erroneous heading.

about HSR's noncompliance with 20 C.F.R. § 655.17(a). The Solicitor also wrote that "the CO repudiates any inference that the certification of previous application represents acceptance by the Department of HSR's 'group advertisement' . . . approach." The Solicitor noted that neither the regulations nor the relevant compliance guidance supports the Employer's position regarding joint advertisement and argued that, notwithstanding "[w]hatever may have gone [on] before, the CO correctly applied the pertinent law to the facts presented in the employer's application and RFI response." The Employer did not supplement the arguments made in its request for review by filing 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). The Employer's advertisement lacked the Employer's name and directed applicants to fax resumes to Ms. Knisley, an individual who agreed to conduct recruitment on behalf of a group of H-2B petitioners and who does not appear to be an employee of HSR. AF 33. Since the Employer did not comply with the H-2B program's recruitment requirements, the CO properly denied certification.

In *Quality Construction and Production, LLC*, BALCA affirmed a denial of certification when the employer's advertisements directed applicants to apply with the local State Workforce Agency. 2009-TLN-77, slip op. at 3-5 (Aug. 31, 2009). 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.<sup>5</sup> The Board also rejected the employer's contention that its manner of noncompliance with § 655.17(a)

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<sup>5</sup> 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 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).

actually increased the number of applications received from U.S. applicants. *Id.*, slip op. at 5 (“Regardless of its good faith beliefs, the Employer cannot elect to comply with only those regulations it determines are supported by good policy decisions.”).

Like Quality, the Employer directed interested individuals to apply with an unaffiliated third party and provided no contact information for direct submission of resumes. Furthermore, the advertisement did not even contain the Employer’s name.<sup>6</sup> Like Quality, HSR argues that its “technical and de minimis” noncompliance with § 655.117(a) did not invalidate its test of the labor market. This argument is premised on speculation.<sup>7</sup> ETA has determined that an adequate test of the labor market requires advertising that complies with § 655.17(a). Allowing any deviation from this unambiguous requirement is clearly beyond BALCA’s scope of review and would amount to rewriting the Department’s regulations. Accordingly, since the Employer’s advertising did not contain its name or provide sufficient contact information to allow applicants to submit resumes directly to HSR, I find that the CO properly denied certification.<sup>8</sup>

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<sup>6</sup> While the advertisement instructed applicants to “reference” any of the listed individuals—one of whom is the Employer’s point of contact—it did not explicitly state that Hamilton Smith Racing is hiring horse grooms.

<sup>7</sup> While some interested individuals responded to the joint advertisement, it is impossible to determine how many would have applied had HSR properly advertised its openings. In the preamble to the final rule implementing the PERM regulations, the Department explained that requiring an advertisement to contain the employer’s name “allows potential applicants to identify the employer, and . . . to better determine if they wish to apply for the advertised position.” Labor Certification for the Permanent Employment of Aliens in the United States, 69 Fed. Reg. 77,326, 77,348 (Dec. 27, 2004). The Department added that “[a]pplicants also may be unwilling to submit resumes to a blind advertisement, as they can not tell who will receive their resume.” *Id.* The same reasoning could apply to ETA’s decision to require H-2B advertisements to include the employer’s name.

<sup>8</sup> That the CO may have granted certification for petitioners who conducted joint advertising in the past would not estop the Department from properly applying the regulations when evaluating the instant application. See *Camp Rio Vista*, 2009-TLC-32, slip op. at 3 (ALJ Mar. 9, 2009).

**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