



Issue Date: 09 September 2010 BALCA Case No.: 2010-TLN-00074

ETA Case No.: C-10197-50553

In the Matter of:

HANDY ANDY SNOW REMOVAL,
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 July 16, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Handy Andy Snow Removal ("the Employer") requesting certification for 25 "Landscaping and Groundskeeping Workers" from November

15, 2010, until April 30, 2011. AF 89.¹ On August 4, 2010, the CO issued a *Request for Further Information* (“RFI”).² AF 47-51. Citing to 20 C.F.R. § 655.15, the CO wanted to “verify that the advertisements complied with 20 C.F.R. § 655.17 . . . [and] verify that the employer . . . place[d] an active job order with the SWA serving the area of intended employment no more than 120 calendar days before the employer’s date of need.” AF 50. As a result, the CO required the Employer to submit the job order and all newspaper advertisements. AF 51.

On August 10, 2010, the Employer submitted a response to the RFI. AF 12-46. The Employer included a “receipt” showing that job #53459911 for a snow removal laborer was posted from June 17, 2010 until July 4, 2010. AF 42. The receipt did not contain the content from the job order. *Id.*

On August 13, 2010, the CO denied the Employer’s application. AF 7-11. Citing to 20 C.F.R. § 655.15, the CO found that the Employer had failed to comply with the pre-filing recruitment regulations. AF 10-11. Specifically, the CO wrote:

The employer failed to provide a copy of the job order. Instead, the employer elected to provide a copy of an internet page, which only included the employer’s SWA job order [number] with the date posted. . . .The information was inadequate in that it failed to provide the information needed to determine if the employer satisfied the regulatory requirements.

Further, the employer indicated on its [application] that the job order opened on June 17, 2010 and closed on July 4, 2010. However the employer’s dates of need are November 15, 2010 through April 30, 2011, implying that the job order began 151 days before the employer’s start date of need and ended 134 days before the employer’s start date of need. . . . Pursuant to 20 C.F.R. § 655.15(e), an employer must place an active job order with the SWA serving the area of intended employment no more than 120 calendar days before the employer’s start date of need.

AF 11. The CO concluded that the Employer failed to meet the “job order placement timeframe,” and denied the Employer’s application. The Employer’s appeal followed.

¹ References to the 97-page appeal file will be abbreviate “AF” followed by the page number.

² The CO had issued a prior RFI on July 20, 2010, but the RFI was not relevant to this appeal.

Discussion

When conducting domestic recruitment under the H-2B program, the employer must place an “active job order with the SWA serving the area of intended employment no more than 120 calendar days before the employer’s date of need.” 20 C.F.R. § 655.15(e). Additionally, “during the period of time that the job order is being circulated for intrastate clearance by the SWA . . . the employer must publish an advertisement on 2 separate days” 20 C.F.R. § 655.15(f). These pre-filing steps must be taken before an employer may file its application for temporary labor certification. 20 C.F.R. § 655.15(a).

In its requests for review, the Employer called its failure to circulate a job order within the 120 calendar day window a “harmless error.” AF 1. The Employer further asserted that the CO failed to specify that the recruitment dates were beyond the regulatory limits, and the Employer could have corrected the deficiency had the CO not “prejudiced” the Employer. *Id.*

The Employer does not dispute that its job order was circulated more than 120 days before its date of need. Nor does it dispute that it failed to adequately comply with regulatory requirements. Therefore, the CO properly denied certification. As for the Employer’s arguments that it committed a harmless error and was prejudiced by the CO, the SWA job circulation requirements found at 20 C.F.R. § 655.15 are required to adequately test the domestic labor market. By circulating the job order more than 120 calendar days before its date of need, the Employer did not conduct a proper test of the labor market to determine if labor certification was required. While the Employer may consider the error “harmless,” the Department has determined that these steps are necessary in order to protect domestic workers. Further, it is the Employer’s responsibility, not the CO’s, to ensure that its application complies with the H-2B requirements, and it is the Employer’s burden to prove that certification was appropriate. Since the Employer did not comply with the Department’s advertising requirements, the CO properly denied certification.

Order

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer’s decisions are **AFFIRMED**.

For the Board:

A

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Washington, D.C.
WSC:AH