



Issue Date: 14 June 2011

BALCA Case No.: 2011-TLN-00029

ETA Case No.: C-11097-54676

In the Matter of:

DEVELOPMENT RESOURCE MANAGEMENT, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: P. Matthew Carruthers, Jr., Esquire
Greenville, South Carolina
For the Employer

Gary M. Buff, Associate Solicitor
Clarette H. Yen, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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, seasonal, peakload, or intermittent basis, as defined by the

Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Following the CO’s denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a).

STATEMENT OF THE CASE

On April 7, 2011, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Development Resource Management, Inc. (“the Employer”) for one “technologist/information analyst” from May 2, 2011 to May 1, 2012. AF 46-53.¹ The Employer listed the minimum education and experience requirements as a Bachelor’s degree in computer science and 24 months experience as a technologist/information analyst. AF 49. Additionally, the Employer indicated that experience and proficiency with land and survey systems, Revit, Autocad, 3DSMax, Photoshop, Illustrator, Java, Javascript, and Visual Basic was required for the position. *Id.* With its application, the Employer submitted a recruitment report, which provided information regarding four applicants that the Employer found did not possess the minimum skills, education, or work experience required for the position. AF 55-56.

On April 12, 2011, the CO issued a *Request for Further Information* (“RFI”), notifying the Employer that it was unable to render a final determination for the Employer’s application because the Employer failed to satisfy all the requirements of the H-2B program. AF 40-45. Among the three deficiencies identified, the CO found that the Employer failed to sign and date the recruitment report and the Employer failed to clearly document the lawful job-related reasons for not hiring the U.S. workers who applied or were referred to the position. AF 44. The CO required the Employer to provide a written recruitment report identifying each recruitment source by name, stating the name and contact information of each U.S. worker who applied or was referred to the job opportunity, and explaining the lawful job-related reasons for not hiring any U.S. workers who applied or were referred to the position. AF 44-45. Additionally, the CO

¹ Citations to the 56-page appeal file will be abbreviated “AF” followed by the page number.

required the Employer to provide the resumes of the applicants listed in the recruitment report and identify how the each applicant's lack of experience was concluded. AF 45.

The Employer responded to the RFI on April 18, 2011. 18-39. The Employer submitted a signed and dated recruitment report with its RFI response materials, but did not provide the resumes of the four U.S. applicants identified in the recruitment report. AF 34-35.

The CO denied the Employer's application on May 9, 2011 based on the Employer's failure to provide resumes for the applicants listed on the recruitment report in violation of 20 C.F.R. § 655.15(j). AF 14-17. On May 18, 2011, the Employer appealed the denial and submitted copies of the four U.S. applicants' resumes. AF 1-13.

DISCUSSION

The scope of the Board's 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 that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e). Although the Employer submitted additional evidence with its appeal, this evidence was not submitted to the CO in response to the RFI, and therefore, I may not consider the four resumes that the Employer submitted on appeal in determining whether the CO erred in denying temporary nonagricultural labor certification.

The CO may only grant an employer's petition to admit nonimmigrant workers on H-2B visas for temporary nonagricultural employment in the U.S. if there are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of filing the petition and in the place where the foreign worker is to perform the work. 20 C.F.R. § 655.5(b)(1). Accordingly, an employer is required to recruit U.S. workers for employment prior to filing an application for temporary employment certification. 20 C.F.R. § 655.15(d). When an employer files its application for temporary nonagricultural employment, it must submit a signed and dated recruitment report that identifies each recruitment source by name, states the name and contact information of each U.S. worker who applied or was referred to the job opportunity, and explain the lawful job-related reason(s) for not hiring any U.S. workers who applied or

were referred to the position. 20 C.F.R. § 655.15(j)(2)(i)-(iii). The H-2B regulation at Section 655.15(j)(3) provides:

The employer must retain resumes (if available) of, and evidence of contact with (which may be in the form of an attestation), each U.S. worker who applied or was referred to the job opportunity. Such resumes and evidence of contact must be retained along with the recruitment report for a period of no less than 3 years, and must be provided in response to an RFI or in the event of an audit or investigation.

The H-2B regulations also provide that failure to comply with an RFI, including not providing all documentation within the specified time period, may result in a denial of the application. 20 C.F.R. § 655.23(d).

In this case, the CO's RFI explicitly requested that the Employer provide the resumes of the applicants listed in the recruitment report and identify how the each applicant's lack of experience was concluded. AF 45. The Employer failed to comply with the RFI and timely provide the U.S. applicants' resumes to the CO, and the Employer's submission of the requested documentation on appeal does not cure the deficiency. Therefore, I find that the CO's denial of certification was proper under 20 C.F.R. §§ 655.15(j)(3) and 655.23(d).

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