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, 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).

STATEMENT OF THE CASE

On November 16, 2010, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Stapp Construction (“the
Employer”). AF 40-47.  

The Employer requested certification for 8 construction laborers from March 1, 2011 to December 15, 2011. AF 40.

On November 19, 2010, 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 did not comply with all requirements of the H-2B program and because the Employer did not establish that its need for nonagricultural labor is temporary in nature. AF 33-39. Among the five deficiencies listed in the RFI, the CO found that the Employer failed to provide evidence that it complied with the pre-filing requirement to publish an advertisement on two separate days as required by 20 C.F.R. § 655.15(f). AF 35-36. Therefore, the CO required the Employer to submit copies of its newspaper advertisements. AF 36.

The Employer responded to the RFI on December 1, 2010 and submitted, among other documentation, a copy of its newspaper advertisement publication order. AF 25-32. The “Ad Preview” on the printout of the Employer’s advertisement publication order stated: “STAPP Construction Inc has seasonal employment opportunities for Construction Laborers. No Skills or exp. nec. $10.00 hr. 801-656-0746 ask for Ernesto.” AF 30.

On December 16, 2010, the CO denied certification. AF 15-24. The CO determined that the Employer failed to correct four of the five deficiencies identified in the RFI, and among the deficiencies, the Employer found that the content of the Employer’s newspaper advertisement did not comply with the newspaper advertisement content requirements at 20 C.F.R. § 655.17. AF 19. The Employer’s appeal followed the CO’s denial.

DISCUSSION

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 the employer files its petition. 20 C.F.R. § 655.5(a)(1). Therefore, the CO must determine whether the Employer conducted the recruitment steps required by the H-2B regulations that are designed to apprise U.S. workers of the job opportunity in the labor application. The H-2B regulations require an employer to conduct several

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1 Citations to the 50 page appeal file will be abbreviated “AF” followed by the page number.
recruitment steps prior to filing an application for temporary labor certification. 20 C.F.R. § 655.15. The regulation at 20 C.F.R. § 655.15(f) requires, in pertinent part:

(1) During the period of time that the job order is being circulated for intrastate clearance by the SWA under paragraph (e) of this section, the employer must publish an advertisement on 2 separate days, which may be consecutive, one of which must be a Sunday advertisement (except as provided in paragraph (f)(2) of this section), in a newspaper of general circulation serving the area of intended employment that has a reasonable distribution and is appropriate to the occupation and the workers likely to apply for the job opportunity. Both newspaper advertisements must be published only after the job order is placed for active recruitment by the SWA.

Additionally, under 20 C.F.R § 655.17, the newspaper advertisements must contain the following information:

(a) The employer’s name and appropriate contact information for applicants to send resumes directly to the employer;
(b) The geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;
(c) If transportation to the worksite(s) will be provided by the employer, the advertising must say so;
(d) A description of the job opportunity (including the job duties) for which labor certification is sought with sufficient detail to apprise applicants of services or labor to be performed and the duration of the job opportunity;
(e) The job opportunity’s minimum education and experience requirements and whether or not on-the-job training will be available;
(f) The work hours and days, expected start and end dates of employment, and whether or not overtime will be available;
(g) The wage offer, or in the event that there are multiple wage offers, the range of applicable wage offers, each of which must not be less than the highest of the prevailing wage, the Federal minimum wage, State minimum wage, or local minimum wage applicable throughout the duration of the certified H-2B employment; and
(h) That the position is temporary and the total number of job openings the employer intends to fill.

Here, the Employer’s newspaper advertisement did not provide the geographic area of employment, a description of the job opportunity, the work hours or work days, the expected start and end dates of employment, or the total number of job openings. Therefore, the Employer did not comply with the advertisement content requirements provided at 20 C.F.R. § 655.17, and the CO properly denied certification. Because I find that the CO properly denied certification based on the Employer’s
failure to comply with the pre-filing recruitment requirements, I need not address the other three grounds for denial.

**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