



**Issue Date: 29 August 2011**

**BALCA Case No.: 2011-TLN-00034**

ETA Case No.: C-11171-55045

*In the Matter of:*

**TEXAS GENERAL BUILDERS, LLC,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Robert Wingfield, Jr.  
Amigos Labor Solutions, Inc.  
Dallas, Texas  
*For the Employer*

Gary M. Buff, Associate Solicitor  
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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 June 20, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Texas General Builders, LLC ("the Employer") for 28 helper carpenters. AF 52-59.<sup>1</sup> The Employer stated that it placed a job order with the Texas State Workforce Agency ("SWA") to advertise the job openings from May 27, 2011 to June 6, 2011. AF 56. Additionally, the Employer stated that it advertised the job opportunities in the Houston Chronicle on June 5, 2011 and June 8, 2011. *Id.*

On June 23, 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 45-51. Among the four deficiencies identified, the CO determined that the Employer failed to comply with the pre-filing recruitment regulation at 20 C.F.R. § 655.15(f)(1), which requires an employer to publish two newspaper advertisements during the period of time that the job order is being circulated for intrastate clearance by the SWA. AF 49. The CO determined that because the Employer placed its newspaper advertisements on June 5 and June 8, 2011, while the Employer's SWA job order expired on June 6, 2011, the Employer failed to comply with the relevant H-2B pre-filing requirement. AF 49-50. The CO required the Employer to submit a corrected ETA Form 9142 with the SWA job order and newspaper advertisement sections properly completed. AF 50.

The Employer responded to the RFI on June 30, 2011, stating that an error in processing occurred because the Houston Chronicle only runs employment advertisements on Sundays and Wednesdays. AF 7-44. The Employer included a copy

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<sup>1</sup> Citations to the 74-page appeal file will be abbreviated "AF" followed by the page number.

of its job order, showing a creation date of May 27, 2011 and a closing date of June 6, 2011, and copies of the newspaper advertisements that ran in the Houston Chronicle on Sunday, June 5, 2011 and Wednesday, June 8, 2011. AF 34-35. The Employer also included an unsigned letter from the Houston Chronicle, dated June 24, 2011, stating that it only publishes employment advertisements on Sundays and Wednesdays. AF 30.

The CO denied the Employer's application on July 25, 2011. AF 2-6. The CO determined that the Employer's failure to understand the newspaper's internal policy regarding which days employment advertisements are run does not excuse the Employer's failure to publish both newspaper advertisements during the correct time frame. AF 5-6. The Employer appealed the denial on August 4, 2011, arguing that an error was made that was beyond its control and that it conducted its domestic recruitment efforts in good faith. The CO filed a Statement of Position, arguing that the Employer's failure to place two newspaper advertisements during the time that the SWA job order was active is fatal to the Employer's application.

## **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 recruitment steps prior to filing an application for temporary labor certification. 20 C.F.R. § 655.15. Section 655.15(f)(1) provides:

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 [...], 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.

In this case, the Employer's second newspaper advertisement occurred on Wednesday, June 8, 2011, two days after its SWA job order expired. Accordingly, the Employer failed to comply with the requirements at Section 655.15(f)(1). The Employer's argument that the error was beyond its control is unpersuasive. The burden of proof to establish eligibility for temporary labor certification is on the petitioning employer, and therefore, it is the Employer's responsibility to ensure that its advertisements are in compliance with the regulatory requirements. *See, e.g., Eagle Industrial Professional Services*, 2009-TLN-73 (July 28, 2009).

Likewise, the Employer's argument that its error was inconsequential is not convincing. The Employment and Training Administration ("ETA") designed the recruitment steps "to reflect what the Department has determined, based on program experience, are most appropriate to test the labor market." Final Rule, *Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes*, 73 Fed. Reg. 78020, 78031 (Dec. 19, 2008). The failure to comply with the recruitment steps that the ETA determined are the best means by which to test the domestic labor market prevents the CO from fulfilling his statutory obligation to determine whether there are insufficient 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).

Based on the foregoing, I find that the Employer's failure to publish its two newspaper advertisements during the time the SWA job order was active is a clear violation of Section 655.15(f)(1). I recognize that, given the precise facts of this case, this result may appear to elevate form over substance. Nevertheless, as the Board has consistently explained, as an appellate body, BALCA simply does not have the discretion to waive the clearly stated regulatory requirements. *See generally, Ecosecurities*, 2010-PER-330 (June 15, 2011). Therefore, I find that 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