



**Issue Date: 10 November 2011**

**BALCA Case No.: 2012-TLN-00001**

ETA Case No.: C-11255-55536

*In the Matter of:*

**MARSHFIELD FOREST SERVICE, INC.,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Ginny Muilenburg  
Agent, Labor Consultants International  
Coeur d'Alene, Idaho  
*For the Employer*

Gary M. Buff, Associate Solicitor  
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Washington, DC  
*For the Certifying Officer*

Before: **WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

**DECISION AND ORDER**  
**VACATING DENIAL OF CERTIFICATION AND**  
**REMANDING FOR FURTHER PROCESSING**

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 September 12, 2011, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Marshfield Forest Service, Inc. (“the Employer”) for 41 forest and conservation workers. AF 72-79.<sup>1</sup> The Employer stated that it has a temporary seasonal need for the workers from November 12, 2011 to March 31, 2012. AF 72. The Employer indicated that as part of its effort to hire domestic workers for the position, it placed a job order with the South Carolina State Workforce Agency (“SWA”) from July 8, 2011 to July 19, 2011. AF 76. The Employer provided the SWA job order identification number as SC508012. *Id.* With its application, the Employer submitted a copy of a document titled “South Carolina Job Order Print Document,” which shows that the earliest date to display job order number 508012 for 41 temporary workers is July 8, 2011 and the last day that the job order will display is July 19, 2011. AF 114. The document does not contain a computer date stamp, but contains a “Print Date” of July 8, 2011 at 4:58:35 p.m. *Id.*

On September 15, 2011, the CO issued a *Request for Further Information* (“RFI”), notifying the Employer that the Employer failed to satisfy all the requirements of the H-2B program. AF 67-71. The CO identified three deficiencies with the Employer’s application, only one of which is at issue on appeal. The CO determined that the Employer failed to comply with the required pre-filing recruitment obligations under 20 C.F.R. § 655.15(e) because the Employer’s SWA job order was placed more than 120 days before the Employer’s date of need for the workers. AF 69. The CO requested that the Employer provide evidence that it satisfied the pre-filing advertisement requirements,

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<sup>1</sup> Citations to the 125-page appeal file will be abbreviated “AF” followed by the page number.

and reminded the Employer that all recruitment must have occurred prior to the date that it filed its application. *Id.*

The Employer responded to the RFI on September 20, 2011. AF 42-66. The Employer stated that it placed a job order with the South Carolina SWA from July 16, 2011 to July 29, 2011, and submitted a copy of a document titled “South Carolina Job Order Print Document.” AF 65-66. The document shows that the earliest date to display job order number 508012 for 41 temporary workers is July 16, 2011 and the last day that the job order will display is July 29, 2011. AF 65. This document does not contain a computer date stamp, but contains a “Print Date” of July 16, 2011 at 5:00:06 p.m. *Id.*

On September 29, 2011, an analyst at the Chicago National Processing Center (“CNPC”) emailed the Foreign Labor Certification (“FLC”) Coordinator at the South Carolina SWA to confirm the opening and closing dates of the Employer’s job order, number 508012. AF 39. The FLC Coordinator responded on September 30, 2011, stating that according to the information on the order, the earliest date to display the job order on the system was July 8, 2011, and the last date that the job order will be displayed on the system in July 19, 2011.<sup>2</sup> *Id.*

On October 14, 2011, the CO denied certification on the ground that the Employer’s job order was placed 127 days before its date of need in violation of Section 655.15(e). AF 31-34. The CO noted that while South Carolina SWA job order 508012 that was submitted with the Employer’s RFI materials showed that it was open from July 16, 2011 to July 29, 2011, South Carolina SWA job order 508012 that was submitted with the application shows that the job order was open from July 8, 2011 through July 19, 2011. AF 33. The CO stated that it reviewed both copies of job order 508012, found that they indicated inconsistent opening and closing dates, and therefore contacted the South Carolina SWA to verify the dates that the job order was opened and closed. AF 33-34.

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<sup>2</sup> The FLC Coordinator’s email states:

This was copied from the order:

Earliest date to display this job order on the system: 7/8/2011  
Last date this job order will be displayed on the system: 7/19/2011  
Hoping this is helpful to you.

AF 39.

The South Carolina SWA informed the CO that job order 508012 was opened on July 8, 2011 and closed on July 19, 2011, as indicated on the Employer's originally submitted job order. AF 34. The CO found that because the Employer's job order began more than 120 days prior to its stated date of need, the Employer had failed to comply with the pre-filing recruitment requirements at 20 C.F.R. § 655.15(e).

The Employer requested BALCA review on October 20, 2011. AF 1-29. On appeal, the Employer reiterates its argument that the job order was in fact posted with the South Carolina SWA from July 16, 2011 to July 29, 2011, and pointed to the print date on the SWA job order.

BALCA received the administrative file from the CO on October 27, 2011, and the CO filed a Statement of Position on November 3, 2011. The CO argues that the Employer failed to comply with the pre-filing requirements by placing a job order more than 120 days prior to the Employer's date of need. The CO also notes that the CNPC verified the dates of the Employer's job order with the South Carolina SWA.

## **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. Twenty C.F.R. § 655.15(e) provides, in relevant part:

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 for H-2B workers, identifying it as a job order to be placed in connection with a future application for H-2B workers. Unless otherwise directed by the CO, the SWA must keep the job order open for a period of not less than 10 calendar days. Documentation of this step shall be satisfied by maintaining a copy of the SWA internet job

listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the text of the job order and the start and end dates of posting.

There are two South Carolina SWA job orders in the record before me, both with the identification number 508012. The job order submitted with the Employer's application is titled "South Carolina Job Order Print Document" and states that the earliest date to display the job order is July 8, 2011, and the last date the job order will be displayed is July 19, 2011. *Id.* This page does not contain a computer date stamp, but contains a "Print Date" of July 8, 2011 at 4:58:35 PM. AF 114. The Employer also submitted a copy of the posting from the South Carolina job order system called "OneStop." AF 113. The posting from OneStop shows that job order number 508012 was created on July 8, 2011 and that the job order will be inactive after July 19, 2011. *Id.* The OneStop posting contains a computer date stamp of July 8, 2011. *Id.*

The job order submitted with the Employer's RFI response is titled "South Carolina Job Order Print Document" and states that the earliest date to display the job order is July 16, 2011, and the last date the job order will be displayed is July 29, 2011. AF 65. This page does not contain a computer date stamp, but contains a "Print Date" of July 16, 2011 at 5:00:06 PM. *Id.* The Employer also included a copy of the OneStop posting for job order number 508012, which does not include a computer date stamp, but shows that the listing was created on July 16, 2011 and will be inactive after July 29, 2011. AF 64.

There is no indication that the job order or OneStop posting submitted with the Employer's RFI materials is in any way a forgery. It looks identical to the job order submitted with the Employer's application in every respect except start and end dates. Additionally, the "Print Date" on the copy of the job order submitted with the RFI response is July 16, 2011 at 5:00 p.m. AF 65. I find that this print date is credible evidence that this SWA job order is authentic and was not created after the Employer received the RFI on September 15, 2011.

The CO never actually made a determination on the authenticity of the SWA job order submitted with the Employer's RFI response materials. In denying certification, the CO found that the two job orders "indicated inconsistent, overlapping opening and

closing dates.” AF 34. The CO sent an email to the FLC Coordinator at the South Carolina SWA on September 29, 2011 to confirm the opening and closing dates for job order 508012, but made no mention of the two job orders that it received from the Employer. AF 39. On September 30, 2011, the FLC Coordinator responded to the email, stating, “this is copied from the order:” the “earliest date to display this job order on the system: 7/8/2011” and the “last date this job order will be displayed on the system: 7/19/2011.” *Id.*

While one could infer from this email that only one job order was placed by the Employer, it is problematic that the CO never explained to the FLC Coordinator that it received two virtually identical SWA job orders from the Employer, with the exception of the dates. Because the CO never raised this issue to the FLC Coordinator, the FLC Coordinator’s response is insufficient to cast doubt on the authenticity of the Employer’s job order submitted with its RFI response. If the CO had informed the FLC Coordinator that it received two SWA job orders, one that purported to run from July 8, 2011 to July 19, 2011, and the other from July 16, 2011 to July 29, 2011, the FLC Coordinator could have provided information about whether both of these SWA job orders contained accurate information, or if only one of these job orders contained accurate information. The CO did not do that, and I find that there is nothing in the record that would cause me to doubt that both of the job orders were properly placed with the SWA and ran for the dates indicated. Additionally, the FLC Coordinator’s reference to the job order in the future tense (“last date this job order *will be* displayed”) leads me to believe that the FLC Coordinator was looking at an initial SWA job order request form, rather than looking at the system to see how long the job order actually ran on the SWA’s website. These ambiguities in the FLC Coordinator’s response prevent me from finding that the SWA job order stating that it will run from July 16, 2011 to July 29, 2011 is anything but bona fide.

Accordingly, I find that the weight of the evidence in the record shows that the Employer originally placed the job order on July 8, 2011, but subsequently re-activated the same job order on July 16, 2011. Therefore, I find that the Employer did in fact place a job order with the South Carolina SWA from July 16, 2011 to July 29, 2011. As this recruitment was conducted within 120 days of the Employer’s date of need, I find that the

Employer complied with the pre-filing requirements at Section 655.15(e). Based on the foregoing, the CO's denial of certification must be vacated and remanded for further processing.

**ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **VACATED** and **REMANDED** for further processing consistent with this decision.

For the Board:

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**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge