



Issue Date: 02 March 2012

BALCA Case No.: 2012-TLN-00018

ETA Case No.: C-11361-56628

In the Matter of:

LARRY'S OYSTERS LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Malvern C. Burnett, Esquire
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For the Employer

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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 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). 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 December 27, 2011, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary seasonal labor certification from Larry’s Oysters, LLC (“the Employer”). AF 58-173.¹ The Employer requested certification for 45 oyster boat deckhands from January 15, 2012 through July 1, 2012. AF 58. The Employer indicated that as a part of its pre-filing recruitment, it placed a job order with the Louisiana State Workforce Agency (“SWA”). AF 62. With its application, the Employer submitted a copy of its SWA job order. AF 92-93.

The Employer’s SWA job order includes the Employer’s main address in Bourg, Louisiana, states the deckhand job is “regular,” full-time, and that the duration of employment is more than 150 days. AF 92. The start and end dates of the position are not specified, and the job’s actual work hours are not specified. *Id.* The Employer stated that the minimum hourly wage is \$8.93 per hour, and the maximum hourly wage is \$13.41 per hour, but did not state whether overtime will be available. *Id.* Additionally, the Employer did not indicate whether transportation to the worksite is provided. *Id.*

On January 3, 2012, the CO issued a *Request for Further Information* (“RFI”), notifying the Employer that it failed to satisfy all the requirements of the H-2B program. AF 52-57. The CO determined that the Employer’s job order did not indicate the geographic area of employment with enough specificity, did not indicate if transportation to the worksite will be provided by the Employer, the work hours and days, expected start and end dates of employment, whether overtime will be available, and that the position is temporary. AF 54.²

¹ Citations to the 173-page appeal file will be abbreviated “AF” followed by the page number.

² The CO also identified two other deficiencies, which are not at issue on appeal. AF 55-57.

The Employer responded to the RFI on January 9, 2012. AF 36-51.³ Regarding the job order deficiencies, the Employer argued that the location of the position in Bourg, Louisiana is clearly stated in on the job order. AF 37. The Employer also contended that the SWA's online form does not permit the Employer to provide the specific dates of employment. *Id.* The Employer stated that transportation to and from the worksite is not offered, and therefore it was not mentioned in the job order. AF 38.

On January 27, 2012, the CO denied the Employer's application based on the Employer's failure to comply with the job order content requirements at 20 C.F.R. § 655.15(e)(2) and (f)(3). AF 11-15. Specifically, the CO found that the job order does not indicate the geographic area of employment, the work hours and days, expected start and end dates of employment, whether or not overtime is available, and that the position is temporary. AF 15. The Employer requested BALCA review on February 9, 2012, asserting that the geographic location of the job opportunity was clearly indicated in the job order. Additionally, the Employer argues that it was unable to state the work hours and days, expected start and end dates of employment, and whether overtime would be available when it completed the online SWA job order form. The Employer also contends that it is obvious from the job title of "deckhand – oyster boat" that the position is temporary in nature. The Employer asserts that the fact that the Employer did not specify that the job opportunity was temporary in nature had a positive effect on its recruitment of domestic workers.

The Board received the appeal file on February 17, 2012, and the CO filed a brief on February 24, 2012, arguing that the CO properly denied certification because the Employer's SWA job order did not include the work hours and days, the expected start and end dates of employment, whether or not overtime would be available, and that the position was temporary. The Employer filed a brief on February 28, 2012, reiterating the arguments raised in its request for BALCA review.

³ A duplicate of the Employer's RFI response that was transmitted electronically is located at pages 16-35 of the appeal file.

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, including placing a job order with the State Workforce Agency ("SWA") in the area of intended employment. 20 C.F.R. § 655.15(e). The job order must contain all of the information required under Section 655.17. 20 C.F.R. § 655.15(e)(2).

Under 20 C.F.R § 655.17, a SWA job order and 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 SWA job order did not contain information regarding the work hours or work days, the expected start and end dates of employment, whether or not

overtime will be available, and a statement that the position is temporary in nature. The Employer's argument that the SWA's online job order form did not permit the Employer to include this information is not persuasive. The SWA job order form may not have a specific prompt requesting this information, but it is clear that the Employer could have included all of the required information within the job description section of the online job order form, which is where it included other specifics about the job opportunity.

Accordingly, I find that the Employer did not comply with the advertisement content requirements provided at 20 C.F.R. §§ 655.17(f) and (h), and 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