



**Issue Date: 16 May 2012**

**BALCA Case No.: 2012-TLN-00034**

ETA Case No.: C-12086-58821

*In the Matter of:*

**LIVINGSTON CONSTRUCTION, INC.,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Wesley Livingston  
President, Livingston Construction, Inc.  
Northport, Alabama  
*Pro Se for the Employer*

Gary M. Buff, Associate Solicitor  
Harry S. Sheinfeld, Counsel for Litigation  
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 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). 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).

### **STATEMENT OF THE CASE**

On March 26, 2012, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary peakload labor certification from Livingston Construction, Inc. ("the Employer"). AF 84-100.<sup>1</sup> The Employer requested certification for 15 carpenters from April 1, 2012 through January 31, 2013. AF 84. The Employer indicated that three months of experience as a woodworker was required, and that three days of on-the-job training would be available. AF 87. The Employer also submitted a copy of its newspaper advertisements with its H-2B application. The advertisements state that "no transportation nor on the job training available." AF 97-98.

On March 29, 2012, 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. AF 76-83. Among the four deficiencies identified, the CO found that the Employer's newspaper advertisements stated that no on-the-job training was available, but the Employer's application stated that three days of on-the-job training was available. AF 79. The RFI required the Employer to provide evidence that it complied with the regulatory requirements within seven calendar days.

The CO denied the Employer's application on April 13, 2012, finding that the Employer failed to respond to the RFI. AF 73-75. On April 19, 2012, the Employer

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<sup>1</sup> Citations to the 100-page appeal file will be abbreviated "AF" followed by the page number.

submitted its RFI response materials. AF 20-72. With respect to the availability of on-the-job training, the Employer stated that it “is offering 3 days of on-the-job training [...] for all applicants hired.” AF 39. The Employer acknowledged that there were some differences between the job requirements on the Employer’s application and the newspaper advertisements. *Id.*

On April 23, 2012, the Employer requested BALCA review, contending that it timely submitted its RFI response materials. AF 1-19. The Employer stated that it submitted its RFI response materials both by fax and by email on April 5, 2012. AF 2. As proof that it timely responded to the RFI, the Employer submitted an email sent by its agent to RFI.H2B.Chicago@dol.gov on April 5, 2012. AF 4. The email appears to have been copied and pasted into a Word document, rather than printed from the agent’s email. The page does not contain a computerized date stamp. *Id.*

The Board received the appeal file in this matter on May 2, 2012, and counsel for the CO filed a brief on May 9, 2012. The CO contends that there is no evidence that the Employer timely filed its RFI response materials. However, the CO asserts that even if the Employer did timely respond, its response failed to resolve a major deficiency identified by the RFI. The CO argues that the Employer’s advertisements do not comply with the H-2B regulations because they failed to indicate the availability of on-the-job training. The Employer did not file a brief with the Board.

## **DISCUSSION**

The H-2B regulations provide that “[f]ailure to comply with an RFI, including not providing all documentation within the specified time period, may result in a denial of the application. Such failure to comply with an RFI may also result in a finding by the CO requiring supervised recruitment under § 655.30 in future filings of H-2B temporary labor certification applications.” 20 C.F.R. § 655.23(d).

The CO issued an RFI on March 29, 2012, requiring the Employer to submit its response by April 5, 2012. The Chicago National Processing Center (“CNPC”) did not receive the Employer’s RFI response until April 19, 2012. AF 21. Although the Employer asserts that it emailed and faxed its RFI response to the CNPC on April 5, 2012, its documentation does not conclusively establish that it timely submitted its RFI

response. The email that the Employer submitted has been copied and pasted into another document, raising the possibility that the date or the recipient's email address could have been modified. Furthermore, there is nothing to indicate that the RFI response was actually attached to the email. Therefore, I find that the Employer failed to timely respond to the RFI, and denial was proper under Section 655.23(d).

Assuming *arguendo* that the Employer's RFI response was timely filed, the Employer's RFI response fails to overcome a deficiency identified in the RFI. The H-2B regulations provide that newspaper advertisements must state whether or not on-the-job training will be available. 20 C.F.R. § 655.17(e). Although the Employer's application clearly states that three days of on-the-job training will be available, the Employer's newspaper advertisements state that no on-the-job training will be available. The Employer's response to this discrepancy is that it will offer three days of on-the-job training for all applicants hired. AF 39. The Employer's statement does not cure the failure to accurately advertise the terms of employment. Accordingly, even if I found that the Employer timely responded to the RFI, denial of certification would still be proper due to the Employer's failure to comply with Section 655.17(e).

### **ORDER**

Accordingly, 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