



**Issue Date: 17 July 2013**

**BALCA Case No.: 2013-TLN-00056**  
**ETA Case No.: H-400-13074-227549**

*In the matter of:*  
**BIG SKY MOBILE CATERING COMPANY,**  
*Employer*

Certifying Officer: Chicago National Processing Center

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

This matter arises under the temporary nonagricultural labor or services provisions of the Immigration and Nationality Act, 8 USC § 1101(a)(15)(H)(ii)(b), and the implementing regulations at 8 CFR Part 214 and 20 CFR Part 655, Subpart A. The provisions, referred to as the “H-2B program,” permit employers to bring foreign nationals to the United States to fill temporary nonagricultural jobs when there are not sufficient domestic workers who are able, willing, qualified, and available to perform such services or labor. *See* 8 CFR § 214(2)(h)(1)(ii)(D).

Prior to applying for a visa under the H-2B program, employers must file an Application for Temporary Employment Certification with the U.S. Department of Labor’s Employment and Training Administration (“ETA”). 20 CFR § 655.20. The applications are reviewed by a Certifying Officer (“CO”) within ETA, who makes a determination to either grant or deny the requested certification. 20 CFR § 655.23. If the CO denies certification, in whole or in part, an employer may request review before an Administrative Law Judge on the Board of Alien Labor Certification Appeals (“BALCA or the Board”). 20 CFR § 655.33(a).

**BACKGROUND**

On May 27, 2013, Big Sky Mobile Catering Company (“Employer”) submitted an application for temporary labor certification to the Department of Labor’s Employment and Training Administration (“ETA”). AF 135-151.<sup>1</sup> Employer requested certification for a job titled “Sack Lunch in Charge.” AF 135.

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<sup>1</sup> Citations to the 151-page appeal file will be abbreviated “AF” followed by the page number.

The CO issued a Request for Further Information (“RFI”) on May 30, 2013, notifying Employer that its application failed to satisfy all the requirements of the H-2B program. AF 128. On June 3, 2013 Employer responded to the Request for Further Information. AF 74-127.

The CO issued a Final Determination denying certification on June 21, 2013. AF 65. The CO noted that Employer corrected 1 of the 4 deficiencies identified in the Department’s Request for Further Information, but that 3 deficiencies remain uncorrected: (1) Employer failed to comply with recruitment requirements related to offering the prevailing wage; (2) Employer did not satisfy pre-filing recruitment requirements related to the job order and newspaper advertisements; and (3) Employer submitted one application for multiple worksites which are not within the same area of intended employment. AF 68-73.

Employer requested Administrative Review of the CO’s Final Determination on June 21, 2013. AF 1-64. The Department of Labor, Office of the Solicitor submitted the Certifying Officer’s brief on July 11, 2013, and in an email dated July 12, 2013 Employer clarified that the binder of information it sent with its request for an Administrative Review is to be considered its brief.

### **DISCUSSION**

The CO listed, as one deficiency in Employer’s application, Employer’s failure to satisfy pre-filing recruitment requirements related to the job order and newspaper advertisements.

Under 20 C.F.R. § 655.17, 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 through 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.

The job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.17. 20 C.F.R. § 655.15(e)(2).

The CO, in the RFI, requested documentation showing that Employer complied with the pre-filing recruitment requirements and indicated that, as Employer listed multiple worksites that may require extensive traveling between worksites, Employer must submit the advertisements and job order to verify compliance. AF 132. In its response to the RFI, Employer submitted the job order and print advertisements.

The CO reviewed the submissions and noted that the print ads placed with the Missoulian Classified did not list the employer's name, the job order posting did not list the employer's contact information, and both advertisements did not state the expected start and end dates of employment. AF. 71. Consequently, the CO found that the employer's documentation did not provide evidence that the employer was in compliance with the regulations at 20 CFR § 655.17 and denied the application. AF 72.

Employer, in its brief, first points out that “Nowhere on the doleta.gov website is it listed what specifically needs to be in a job advertisement. Only after receiving the RFI for ETA form 9142 were any specific requirements listed out.” AF 7. According to Employer, “The 20 CFR should be available for download on the doleta.gov website if its contents are what are to be complied with for form submissions.” *Id.* Employer adds that “The business name was not listed in the Missoulian print ad as I was unaware that this was needed. Many businesses list job ads and only a contact phone # or email address.” *Id.* at 8.

Regarding the alleged failure to satisfy the requirement that the ads include Employer's name and appropriate contact information, Employer argues that “Appropriate contact information was listed.” *Id.* Employer states that “The email, stacey2070@yahoo.com, was listed in the print ad as this is where the resumes were to be sent” and “the ads did not list my name as a contact, but the email has my name with it.” *Id.*

As for the requirement that the ads include the expected start and end dates of employment, Employer admits that “neither ad gives a specific start and end date of employment.” *Id.* Nevertheless, Employer argues, “Both ads list the job opportunity as ‘seasonal’ and talk about ‘fire camp,’” “Specific dates could have been listed” but “in the United States it is well known that fire season starts in late Spring/early Summer and goes through the entire summer, ending in late Fall,” and “The SWA ad does mention that the job is between 4-150 days.” *Id.*

The Office of the Solicitor argues, in its brief, that the “failure of the employer to have the start and beginning time of the job, its contact information and name in its advertisement is a defect that cannot be remedied.” DOL Brief at 5.

In sum, Employer's advertisements lacked information required by 20 C.F.R. § 655.17. First, Employer admitted that the Missoulian print ad did not include the Employer's name. Second, although the print ad included Employer's email address, the job order did not include any contact information. Third, Employer admitted that neither ad provided an estimated start

and end date of employment. The information it did list regarding the length of employment—such as mentioning that the job is between 4 and 140 days—fails to satisfy the requirement. The Department of Labor requires the information listed in § 655.17 in advertisements because such information is necessary for an adequate test of the domestic labor market. *Freemont Forest Systems, Inc.*, 2010-TLN-38, slip. op. at 3 (Mar. 11, 2010) (“the Department has determined that these steps are necessary in order to protect domestic workers”). By omitting some of the requirements, Employer did not conduct an adequate test of the labor market. *See BPS Industries, Inc.*, 2010-TLN-14 and 15, slip op. at 3 (Nov. 24, 2009).

Therefore, I find that Employer’s advertisements and job order failed to comply with the requirements set forth in 20 C.F.R. § 655.17. Accordingly, I affirm the CO’s denial of certification on this basis.<sup>2</sup>

## ORDER

The Certifying Officer’s Final Determination denying certification is hereby AFFIRMED.

DANIEL F. SOLOMON  
ADMINISTRATIVE LAW JUDGE

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<sup>2</sup> Because the denial of certification can be upheld on this basis alone, there is no need to address the additional grounds for denial cited by the CO in the Final Determination.