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Issue Date: 20 February 2013

OALJ Case No.: 2013-TLN-00028
ETA Case No.: H-400-12325-227539

In the Matter of:

WESTERN STATES RECLAMATION, INC.,

Employer

Certifying Officer: Chicago National Processing Center

Before: **PAUL R. ALMANZA**
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 non-agricultural 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); 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).

PROCEDURAL HISTORY

This case involves Western State Reclamation, Inc.'s ("Western States") December 15, 2012, Application for Temporary Labor Certification submitted to the Department of Labor's Employment and Training Administration ("ETA"). (AF 136-209)¹ As part of this application, Western States stated that anticipated worksites included Weld County, Colorado, and 25 other locations in Colorado. (AF 139, 143).

¹ Citations to the 209 page Administrative File are abbreviated as "AF."

Western States advertised the positions at issue in this matter in the Longmont Times-Call on December 8 and 9, 2012. (AF 149-150). Western States also posted the positions through Colorado's State Workforce Agency. (AF 151). The postings described the area of employment as "(Denver-Aurora Metro, Boulder, Larimer, Weld, El Paso, Teller, Pueblo, Baca, Bent, Cheyenne, Costilla, Crowley, Huerfano, Kiowa, Kit Carson, Las Animas, Lincoln, Logan, Morgan, Otero, Fremont Counties)."

Western States requested certification for eighteen landscaping and groundskeeping workers, Occupational Employment Statistics code 37-3011, from April 1, 2013, to November 30, 2013. (AF 136). Western States provided the following description of the job duties to be performed (no education or experience was required):

Landscape or maintain grounds of property using hand or power tools or equipment. Workers typically perform a variety of tasks, which may include any combination of the following: sod laying, mowing, trimming, planting, watering, fertilizing, digging, raking, sprinkler installation, and installation of mortarless segmental concrete masonry wall units.

(AF 138-39).

On December 20, 2012, the CO issued a request for further information ("RFI"), notifying Western States that it was unable to render a final determination because Western States did not comply with all requirements of the H-2B program. The CO identified two deficiencies in Western States' application: failure to comply with pre-filing recruitment requirements; and multiple areas of intended employment. (AF 129-35). Western States corrected the latter identified deficiency and it is not at issue in this appeal. (ETA's February 13, 2013, Statement of Position, fn. 1).

In response to the RFI, on December 21, 2012, Western States made two separate requests. The first, in response to the pre-filing recruitment requirements deficiency, was to delete Phillips, Prowers, Sedgwick, Washington, Yuma, Chaffee, and Custer counties from section F.c. of the application. (AF 126). The second, in response to the multiple areas of intended employment deficiency, was to delete Baca, Bent, Cheyenne, Costilla, Crowley, Huerfano, Las Animas, Otero, Prowers, and Pueblo counties from section F.c. of the application. (AF 127).

The CO issued the Final Determination and denied certification on January 14, 2013. (AF 115-120). The CO found that, as a result of the deletion of counties from the application that resolved the second deficiency identified in the RFI, the state workforce agency posting and newspaper advertisements in this case

have more areas of intended employment than what is left on the employer's ETA Form 9142. The areas listed on the job order and on the newspaper advertisements are no longer the true and accurate areas of intended employment as some of them have been excluded in the response to RFI. Applicants may have

been deterred from applying to this position as a result of the extra areas of intended employment.

(AF 119).

On January 31, 2013, BALCA received a letter on behalf of Western States requesting review of the CO's decision. (AF 1-114). The letter explains that Western States has worked hard to comply with applicable regulations given that they do not know exactly where the work will take place, given that they don't know where devastating fires requiring reclamation will occur. (AF 1-4). Western States also points out that in 2012, they had an analogous situation where: (1) their application included all Colorado counties; (2) they were asked to narrow their focus; (3) they did so by striking counties from the application; (4) ETA certified the application; and (5) "no one ever came back and said that the, changed and accepted 9142, application did not now match the recruitment report." (AF 2). The letter also states that Western States was "expecting the same consistent result" this year. (AF 2). Finally, the letter also states that from 2010 through 2013, either no U.S. workers applied for the job (2011, 2012, 2013), or in one year (2010), three applicants applied, two of whom did not want the job and the third never returned calls. (AF 3).

On February 13, 2013, the CO filed a statement of position asserting that Western States did not adequately respond to the RFI because they did not provide information showing that the area covered by the pre-filing recruitment coincided with the area covered by the application as amended. (ETA's February 13, 2013, Statement of Position, 2).

DISCUSSION

Scope of Review

The H-2B regulations limit the scope of the Board's review 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).

Pre-Filing Recruitment Requirements

The Department's regulations require an employer to satisfy certain pre-filing recruitment steps before filing an *Application for Temporary Employment Certification*. 20 C.F.R. § 655.15. Those steps include placing a job order with the relevant state workforce agency and running two advertisements in a newspaper. 20 C.F.R. § 655.15(e), (f). The job order and advertisements must tell applicants where the work is to take place by including the following information:

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....

20 C.F.R. § 655.17(b).

In this case, the job order and newspaper advertisements necessarily described a larger geographic area of employment than the job site locations listed in Western States' ETA Form 9142, as amended. For example, the job order and newspaper advertisements listed at least the following counties that were stricken from Western States' ETA Form 9142 in its response to the RFI: Huerfano, Otero, Las Animas, Crowley, Costilla, Cheyenne, Bent, and Baca. Based on this inconsistency, I affirm the CO's finding that Western States' pre-filing advertising did not meet the requirements of 20 C.F.R. § 655.17(b).²

While Western States is understandably frustrated that in 2012 it narrowed its work locations on its ETA Form 9142 and received certification even though its 2012 job order and newspaper advertisements were thus broader than its 2012 ETA Form 9142, "the fact that ETA may have let deficiencies slip through in the past should not estop the CO denying certification on a legally sufficient basis." *In the Matter of G.H. Daniels III & Assoc., Inc.*, BALCA Case No. 2012-TLN-00037, ETA Case No. C-12102-58984, slip op. at 5. (BALCA June 18, 2012).

Western States' amending its areas of intended employment on its application to reduce those areas necessarily meant that its job order and newspaper advertisements did not comply with 20 C.F.R. § 655.17(b) because after that amendment, they no longer accurately stated where the work at issue was to take place. Accordingly, 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:

PAUL R. ALMANZA
Administrative Law Judge

² This case does not involve an amendment to the area of employment listed on the ETA Form 9142 that does not so significantly reduce the area of employment so as to render the pre-amendment job posting and newspaper advertisements in violation of the regulatory requirement that they contain 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." 20 C.F.R. § 655.17(b). In such a case, a variance between the area of employment listed on the ETA Form 9142 and the area of employment listed on the job posting and newspaper advertisements may not result in a violation of 20 C.F.R. § 655.17(b) if the area of employment on the job posting and newspaper advertisements is sufficiently similar to the area of employment listed on the ETA Form 9142 as amended to meet the "enough specificity to apprise" regulatory standard. As this case does not involve such an amendment to the area of employment on the ETA Form 9142, I need not discuss this issue further.