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Issue Date: 28 March 2014

OALJ Case No.: 2014-TLN-00018

ETA Case No.: H-400-14031-707870

In the Matter of

Delta Centrifugal Corporation,
Employer

Certifying Officer: Chicago Processing Center

Before: **CHRISTINE L. KIRBY**
Administrative Law Judge

DECISION AND ORDER

The above-captioned case involves a request for certification of non-immigrant foreign workers (“H-2B workers”) for temporary nonagricultural employment under the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), and the implementing regulations promulgated by the Department of Homeland Security at 8 C.F.R. Part 214 and 20 C.F.R. Part 655, Subpart A. The provisions 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 655.23. If the CO denied 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 C.F.R. § 655.33(a).

In this case, Delta Centrifugal Corporation (“Employer”) has filed a timely request for expedited administrative review of the Certifying Officer’s February 28, 2014, partial certification of temporary labor certification. On March 18, 2014, I issued a Notice of Docketing informing the parties that they had five days from receipt of the administrative file (“AF”) to submit written briefs. On March 19, 2014, the AF was received by the Office of Administrative

Law Judges. In a telephonic communication with my law clerk, Employer stated that it did not desire to submit a brief. On March 25, 2014, the Solicitor filed a written brief. This *Decision and Order* is based on my review of the AF and Solicitor's brief.

Statement of the Case

On January 31, 2014, Employer filed an ETA Form 9142B, H-2B Application for Temporary Employment Certification. (AF 71-97). Employer requested certification for eight Computer Numeric Controlled ("CNC") Machinists to be employed from October 1, 2013, to July 31, 2014.¹ On the ETA Form 9142B as well as the ETA Form 9141 (Application for Prevailing Wage Determination), the job title was listed as "CNC Machinist." (AF 71, 73, 88, 89).

In the ETA form 9141 the job duties were described as:

Set up and operate machine tool, **including a 4 axis Computer Numeral Code ("CNC") Lathe and CNC Mill** to produce precision parts, consistently holding +/- .001 tolerance; responsible for shop mathematics, Mastercam coding, measuring equipment (including micrometers & calipers), lay out, and machining procedures; and, required to interpret part drawings using geometric tolerance, edit machine codes, and calculate surface footage and feeds for all material grades, using tool geometry, and depth of cut limits. **Retest and rewrite CNC programs** to insure proper functioning. Determine the sequence of machine operations and develop programs that run the machine tools. (emphasis added). (AF 89).

In the ETA form 9141, the education requirements were listed as high school/GED with no other degree, major or field of study required. Neither training nor employment experience was required. No special requirements were listed. (AF 90). The position for a "CNC Machinist" with this job description was posted with the Texas Workforce commission on January 10, 2014, with a closing date of January 22, 2014. (AF 94). The position for a "CNC Machinist" with this job description was also advertised in the Temple Daily Telegram on Sunday, January 12, 2014 and January 13, 2014. (AF 96-97). Employer submitted a *Recruitment Report* with its application indicating that twelve people applied for the position, but were not hired. Seven applicants were not hired because they had no knowledge of CNC Operation or measuring equipment, three were not hired because they were unable to be contacted, one applicant was not hired because he would not work for less than \$25 an hour, and one applicant had accepted a position with another company. (AF 92-93).

In the ETA form 9142B, the job duties were described as:

In this temporary position, each **CNC Machinist** will supplement workers already in place by performing manual tasks on machine tools. Specifically, each temporary worker will be required to set up and operate industry-standard

¹ In the statement in support of its application, Employer explained that it was submitting the application at that time due to a delay in obtaining a reasonable prevailing wage determination from the Department of Labor.

machines and machine implements. Each worker will set up and operate machine tools, **including 4 Axis Computer Numerical Code (“CNC”) Lathes and CNC Mills** to produce precision parts, consistently holding +/- .001 tolerances. S/he will be responsible for shop mathematics, Mastercam coding, measuring equipment (including micrometers and calipers), lay out, and machining procedures. Each machinist will interpret part drawings using geometric tolerances, edit machine codes, and calculate surface footage and feeds for all material grades, tool geometry and depth of cut limits. Further, each individual will **retest and rewrite CNC programs** to ensure proper functioning. Finally, in this position, the **CNC machinist** will determine the sequence of machine operations and develop programs that run the machine tools. Please see the statement in support for additional information regarding the job duties. (emphasis added) (AF 73).

On February 7, 2014, the CO issued a *Request for Information* (“RFI”) to Employer, asserting that Employer had failed to satisfy all the requirements of the H-2B program. The deficiency was described as “failure to submit a complete and accurate recruitment report.” The CO asserted that the submitted Recruitment Report did not satisfy the regulatory requirements because Employer did not adequately explain the lawful job-related reasons for not hiring each U.S. worker who applied or was referred to the position. The CO asserted that Employer rejected U.S. worker for requirements which were not listed on the ETA form 9142 in Section F.b., i.e., “no knowledge of CNC operation or measuring equipment.” The CO stated that Employer must provide a Recruitment Report that satisfies the regulatory requirements, and that the written recruitment report must identify each recruitment source by name; state the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker, including any applicable laid-off workers; and if applicable, explain the lawful job-related reasons for not hiring each U.S. worker who applied or was referred to the position. Employer was also instructed to amend Section F.b. of the ETA Form 9142 to include the requirement “knowledge of CNC operation or measuring equipment.” (AF 67-70).

On February 13, 2014, Employer filed its response to the RFI. (AF 47-66). Employer argued that its Recruitment Report had in fact contained the recruitment source, name and contact information of each applicant, and an explanation of the lawful job-related reasons for not hiring each applicant, in full compliance with the regulations. Employer stated that the Recruitment Report was signed no fewer than five days after the last newspaper ad ran and no fewer than two days after the job order closed. Employer argued that it had not offered less favorable terms and working conditions to U.S. workers and that the very same issue had been successfully addressed by Employer in previous ETA 9142 applications that were ultimately approved by the Department of Labor (“DOL”). Employer argued that since the exact issue had already been reviewed and decided on three previous occasions, requiring Employer to address it a fourth time was duplicative and burdensome, considering the time sensitivity of the present temporary peakload need.

In its response, Employer explained that no training, experience, or special requirements are required for this job opportunity. However, as is clear from the title of the position, “CNC

Machinist, ” it is implicit that a CNC Machinist must have knowledge of CNC operation and related measuring equipment. Employer clarified that applicants are not required to possess any experience or education beyond a high school diploma or GED. Employer argued that were the DOL to mandate that an employer make baseline knowledge of CNC operation and measuring equipment an actual experience requirement, it would be inconsistent with the standard applied to other positions. It argued that requiring such knowledge be listed as an experience requirement would be akin to mandating an employer note that experience with a hammer is a minimum requirement for a carpenter or that experience with the human body is a minimum requirement for a medical doctor.

Employer also submitted a portion of the Occupational Outlook Handbook published by the Bureau of Labor Statistics confirming that people interested in becoming Machinists should “be mechanically inclined and. . . have good math and computer skills to work with CNC machine tools and computerized measuring machines . . .” among other baseline abilities and qualities. (AF 50, 59-63).

On February 28, 2014, the CO issued a *Final Determination for Partial Certification*, stating that Employer’s Application for Temporary Employment Certification had been partially certified for only one machinist. The CO’s determination explained that Employer had been certified for only one rather than the eight requested workers because Employer had inappropriately rejected seven U.S. workers for having no knowledge of CNC operation or measuring equipment. The CO stated that the reason for rejection of seven workers was unlawful because the job opportunities and minimum education and experience requirements as listed in the advertisements and job order only required applicants to have a high school diploma/GED with zero experience required. The CO stated that Employer did not specify that the education and experience must include knowledge of CNC operation or measuring equipment. The CO acknowledged that the job duty description did, in fact, include the use of CNC operations and equipment, but stated that the job description’s intent is merely to inform applicants of the duties to be performed. The CO asserted further that the seven applicants who had been rejected did, in fact, meet the minimum requirements for the job opportunity and therefore Employer did not provide lawful job-related reasons for rejecting them.

Issues

1. Whether Employer should have listed “knowledge of CNC operation or measuring equipment” as a special requirement in its application and job advertisements.
2. Whether Employer properly rejected U.S. applicants for lawful job-related reasons.

DISCUSSION

Under 20 C.F.R. § 655.17, all advertising conducted to satisfy the required recruitment steps under § 655.15 before filing the Application for Temporary Employment Certification must meet the requirements set forth in this section and must contain terms and conditions of employment which are not less favorable than those to be offered the H-2B workers. All 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.

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

In its February 28, 2014, Final Determination, the CO only certified Employer for one rather than eight CNC Machinists Employer had requested, because Employer "did not specify that the **education experience** [of a CNC Machinist] must include knowledge of CNC operation or measuring equipment." (emphasis added). (AF 44). The CO acknowledged however in the Final Determination that the job duty description clearly included the ability to use CNC operations and equipment, but the CO dismissed this language as not being sufficient to make applicants aware of the requirement that they would need knowledge of CNC operation or measuring equipment to qualify for the job opportunity. (*Id.*). The CO cited to no authority to support its position as to the level of specificity required in the description of educational experience.

In its brief, the Solicitor states that Employer confuses lack of experience or training requirements with lack of skills requirements and thus asserts that Employer should have listed "knowledge of CNC operation or measuring equipment" as a **special requirement**, i.e., specific skill, in section F.5. of the application. The Solicitor thus seems to be modifying the reason that the certification was denied for seven workers. Certification was denied in the Final Determination for not specifying **education experience**, not for not specifying a **special skill requirement**. The Solicitor argues that U.S. workers who read the advertisement would not know what was required to attain the position and the CO would be unable to determine whether U.S. workers were available and improperly rejected.

Employer argues that it accurately stated that no training, experience, or special requirements are required for the job opportunity beyond a high school diploma or GED. Employer argues that by the very title of the advertised position, “CNC Machinist” it is implicit that a job applicant must have a baseline knowledge of CNC operation and related measuring equipment. Employer further argues that the description of job duties also was sufficient to inform applicants that the job required a baseline knowledge of CNC operations and equipment. Employer asserts that it has not offered the job on less favorable terms and working conditions to U.S. workers and that the very same issue has been addressed in previous ETA 9142 applications that were ultimately approved by the DOL.

In examining the complete administrative file, I note that Employer specifically sought certification and advertised for “CNC Machinist” rather than using the generic term “Machinist.” Employer further clarified in the job duty description that the job involved the ability to use CNC operations and machines. Certainly anyone applying for such a job was on notice that knowledge of CNC operations and machines was necessary for the job. For the CO to deny certification because applicants were not informed in the “education requirements” section of the application or advertisement that such knowledge was necessary for the position is disingenuous and requires a level of specificity in the application/job advertising that is not clearly set forth in the statute and regulations. The CO cited to no authority to support its position requiring this level of specificity.

The intent of the job advertising is to put applicants and the CO on notice of what is required to attain the position and insure that U.S. workers are not disadvantaged by being held to different, more stringent requirements. I find that in this case, the job advertising sufficiently accomplished these objectives. Certainly anyone applying for the job of a “CNC Machinist” was on notice that they would have to have knowledge of CNC operations and machines. I agree with Employer that such baseline knowledge was implicit in the job title and if there was any doubt, it was clear from the duty description. I find that the Employer properly rejected applicants who did not have this type of knowledge and that such applicants were, in fact, rejected for lawful job-related reasons. I disagree with the CO’s statement that the seven applicants in question met the minimum requirements for the job opportunity. I find that these applicants were lawfully rejected.

Furthermore, it appears that Employer did accurately list the “education requirement” as being “high school/GED.” While the Solicitor is correct that the application and advertisement would have been more accurate if it had listed “knowledge of CNC operations and machines” as a “special requirement,” I find that this failure did not result in applicants being misled into believing that they could qualify for and perform the job of a “CNC Machinist” without having basic knowledge of CNC operation or machines. I find that under the specific circumstances of this case, failing to list this special requirement was a harmless error. However, Employer is now on notice that to avoid this issue in the future, the application should list this requirement as a “special requirement.”

I am unable to evaluate whether this exact issue was addressed on previous occasions in Employer’s favor as it asserts as such documentation is not contained in the record. However,

the Solicitor is correct in arguing that the CO would not be precluded from bringing up a valid denial reason regardless of whether it was omitted in a previous application decision.

ORDER

The CO's decision is **REVERSED**, and the application for temporary labor certification is remanded for processing in accordance with the H-2B regulations.

CHRISTINE L. KIRBY
Administrative Law Judge