

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 29 July 2014**

OALJ Case No.: **2014-TLN-00034**

ETA Case No.: **H-400-14161-801937**

*In the Matter of:*

**QUALITY CONTROLLED MANUFACTURING, INC.,**  
Employer.

Appearances:

Becky J. Quinn, PHR, Santee, CA  
For the Employer

Jonathan Hammer, Esq., Office of the Solicitor, Washington, D.C.  
For the Certifying Officer, U.S. Department of Labor, Chicago, IL

Before: Pamela J. Lakes  
Administrative Law Judge

**DECISION AND ORDER**

This matter arises under the temporary nonagricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A. On July 11, 2014, Quality Controlled Manufacturing, Inc., (“Employer” or “QCMF”) filed a request for an administrative review of the Certifying Officer’s (“CO”) denial of its H-2B application. 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. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A.

Following the CO’s denial of an application under 20 C.F.R. § 655.32<sup>1</sup>, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”), to

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<sup>1</sup> The Department of Labor sought to amend these regulations in January 2011, 76 Fed. Reg. 3452, and February 2012, 77 Fed. Reg. 10038, but the Department has since stayed the implementation of these rules pending federal court litigation. *See* 78 Fed. Reg. 53643 (Aug. 30, 2013) (indefinitely delaying effective date of 2011 Wage rule.); *see, also Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (Apr. 26, 2012)

be heard by a panel of the Board or an individual member. 20 C.F.R. § 655.33(a). Based upon a review of the Appeal File, the request for review, and any legal briefs submitted, the Board is required (within ten days of receipt of the appeal file and five days of receipt of the CO's brief) to either affirm the denial of temporary labor certification, direct the CO to grant the certification, or remand the case to the CO for further action. 20 C.F.R. § 655.33(a), (e). In H-2B cases, the BALCA member or panel assigned to conduct the review may only consider the Appeal File and any legal briefs submitted by the parties. 20 C.F.R. § 655.33(e).

### STATEMENT OF THE CASE

On June 10, 2014, Employer filed an application with the Department of Labor's Employment and Training Administration ("ETA") for temporary labor certification for one Federal Aviation Administration ("FAA") Repair Station Trainer, to be employed from June 23, 2014 through September 13, 2014. (AF 83-102).<sup>2</sup> The job was classified as "Training and Development Managers" with an SOC (ONET/OES) Code of 11-3131. *Id.* Employer indicated that the nature of the temporary need was a "one-time occurrence." *Id.* The application included a statement of temporary need, which specified that:

Quality Controlled Manufacturing, Inc., recently became certified as an FAA Repair Station so that we can repair gear boxes for our customer. This is a new division of Quality Controlled Manufacturing, Inc. and previous repairs were completed by our customer, Pratt & Whitney Canada. We have hired United States Citizens for our Repair station and we are in need of the training and expertise on the models from the manufacturer we have contracted with. An employee of Pratt & Whitney Canada will provide the training and expertise to our newly hired Repair station employees. This training should take approximately 6 to 8 weeks. After completion of the training, it is anticipated that our employees will be certified and/or approved by our Customer, therefore eliminating the need for ongoing training. The event that will create a finite end date is when the Trainer and or the Customer are satisfied with our employees' expertise and delivery of First Articles for a variety of models.

(AF 83). The application described Employer's recruitment efforts: "In addition to the San Diego Union Tribune and the State Workforce Agency, this job was posted at San Diego Local Colleges and also on Craigslist." (AF 87). The advertisement was posted, in print, in the Union Tribune on April 20, 2014, and online from April 19, 2014 until May 18, 2014. *Id.*

On June 17, 2014, the CO issued a Request for Further Information ("RFI") and advised the Employer that the application was deficient, primarily because Employer had failed to comply with the required pre-filing recruitment obligations. In an attachment, the CO listed deficiencies upon failure to publish an advertisement in the newspaper on two separate days, during the period the job order was published. (AF 73). The CO listed nine deficiencies

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(temporary injunction from implementation of 2012 rule). Accordingly, I will refer to the regulations promulgated in 2008, 73 Fed. Reg. 78020 (Dec. 19, 2008), in this Decision and Order.

<sup>2</sup> Citations to the Administrative File will appear as "AF" followed by the pertinent page number.

pertaining to the information contained in the advertisement and job order. (AF 74-75). The RFI further advised Employer that the application was deficient, because of its failure to establish that the nature of the Employer's need was temporary; failure to satisfy the obligations of H-2B employers (by specifying qualifications that are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations); and failure to confirm contractor status. (AF 76-79). Further, the CO indicated that Employer failed to submit a complete and accurate recruitment report (as Employer did not adequately explain the lawful job-related reasons for not hiring U.S. workers who applied or were referred to the position).<sup>3</sup> (AF 80-81). Lastly, the CO noted that there were errors on the ETA Form.<sup>4</sup> (AF 81-82).

Employer responded to the CO on June 23, 2014, providing arguments relating to each claimed deficiency and supporting documentation. (AF 51-69). The Employer explained that its advertisement was published in the newspaper on April 20, two days after the State Workforce Agency ("SWA") job order was published. (AF 52). Employer contends that while the advertisement was only published in a newspaper one day, it was published thirty continuous days online. Employer argued that "[i]n today's technological world, QCMi would like to dispute that digital job announcements would not attract qualified individuals for this position" and "[Employer's] analysis over the past 3 years has determined electronic postings to be more than 10 times as effective as newspaper print." *Id.* Employer further explained that it did not receive any applicants from the SWA job order. *Id.* at 56. Employer also provided responses to the deficiencies in the content of its advertisement and recruitment report, as discussed in more detail below.

On the issue of the temporary nature of the employment, Employer explained that:

QCMi was recently awarded a Long Term Agreement from a customer to repair gearboxes for the PT6A family of engines. Currently, this repair was being completed by the customers in Canada. . . . QCMi must ensure that their employees adequately perform the disassembly and assembly of these gearboxes due to the sensitive nature of the work. Therefore, QCMi is looking to hire an experienced FAA Repair Station Trainer that has the required education and experience to oversee the work of QCMi's employees. Once QCMi's employees have worked in the gearboxes and received proper guidance on performing the work, the FAA Repair Station Trainer will no longer [be] needed.

(AF 54). Employer indicated that it fully intends to hire the FAA Repair Station Trainer as their employee and not as a contractor. *Id.* at 55.

On July 3, 2014, the CO issued a Final Determination that denied Employer's application. (AF 41-50). The denial was premised upon Employer's failure to establish that: (1)

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<sup>3</sup> The CO noted that, with respect to the three applicants, the Employer did not indicate whether it interviewed them or provide any documentation. (AF 80-81).

<sup>4</sup> The application listed the position as full time, 40 hours per week, with a weekly rate of pay of \$62.50, instead of "per hour"; additionally, Employer listed "Ca" as the county name in one section of the form. (AF 86, 87).

there are not sufficient qualified U.S. workers available and capable of performing the temporary services sought, and (2) the employment of foreign workers would not adversely affect the wages and working conditions of the U.S. workers similarly employed. (AF 41). The Final Determination indicated that Employer corrected three of the seven deficiencies identified in the RFI, however, the issues of recruitment and obligations of H-2B employers remained.<sup>5</sup> The CO concluded that Employer did not provide sufficient documentation to overcome these remaining deficiencies.

Employer filed a letter brief requesting redetermination/administrative review on July 11, 2014. (AF 1-40). The Director of the Chicago National Processing Center (“CNPC”) sent the Administrative File, electronically, to the Board of Alien Labor Certification Appeals on or about July 15, 2014 and it was received by the undersigned administrative law judge, to act on behalf of the Board, on July 17, 2014.

A Notice of Docketing and Order, issued on July 17, 2014, directed the parties to submit any briefing within five business days of receipt of the appeal file. It also directed the CO to immediately provide the administrative file to the Employer and the Associate Solicitor for Employment and Training Legal Services, if the CO had not already done so.

The Office of the Solicitor of Labor, on behalf of the CO, timely submitted its brief by facsimile on July 24, 2014. Employer failed to submit a closing brief; however, Employer explained its arguments in its request for administrative review (AF 1-3).

### **APPLICABLE LAW**

The regulations set forth the procedures adopted by the Secretary of Labor to secure information sufficient to determine (1) whether U.S. workers are available to perform a particular job opportunity for which an employer seeks to employ a nonimmigrant foreign worker and (2) whether the employment of aliens for such temporary work would adversely affect the wages or working conditions of similarly employed U.S. workers. 20 C.F.R. § 655.0(1). “[O]nce a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level, or the level offered to the aliens, whichever is higher.” 20 C.F.R. § 655.0(2).

#### *Pre-Filing Recruitment*

The regulations require an employer seeking H-2B temporary labor certification to test the labor market *before* it files an *Application for Temporary Employment Certification* (ETA Form 9142) with the Department. Specifically, the regulations require an employer applying for H-2B temporary labor certification to first:

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<sup>5</sup> In its response to the RFI, Employer established that the nature of its need was temporary, it explained that the worker would not be working under contractor status, and it made the necessary changes to its ETA application.

- 1) obtain an individualized prevailing wage determination for the position in accordance with 20 C.F.R. § 655.10;
- 2) place an active job order with the State Workforce Agency (SWA) serving the area of intended employment;<sup>6</sup>
- 3) publish two print advertisements in a newspaper of general circulation serving the area of intended employment that has a reasonable distribution and is appropriate to the occupation and the workers likely to apply for the job opportunity;<sup>7</sup> and
- 4) contact the local union (if the employer is a party to a collective bargaining agreement).

20 C.F.R. § 655.15(d)(1)-(4). Neither the job order nor the newspaper advertisements may contain terms and conditions of employment less favorable than those offered to H-2B workers, and both 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.

20 C.F.R. § 655.17, as applied pursuant to 20 C.F.R. §§655.15(e)(2) and (f)(3).

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<sup>6</sup> The Employer must place the job order with the SWA no more than 120 calendar days before its date of need for H-2B workers and the SWA must keep the job order active for at least 10 calendar days. 20 C.F.R. § 655.15(e)(1).

<sup>7</sup> The advertisements must be placed on two separate days during the period that the SWA job order is being circulated for intrastate clearance. 20 C.F.R. § 655.15 (f)(1). One advertisement must be placed on a Sunday, unless the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, in which case the employer should place the advertisement in the regularly published daily edition with the widest circulation in the area of intended employment. 20 CFR § 655.15 (f)(1),(2).

Twenty C.F.R. § 655.22(h) requires the job opportunity that is the subject of the H-2B labor certification application to be “a bona fide, full-time temporary position, the qualifications for which are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.” 20 C.F. R. § 655.22(h). After the employer completes the pre-filing recruitment process set forth in the regulations, it may file an *Application for Temporary Employment Certification* (ETA Form 9142) with the CNPC. 20 C.F.R. § 655.20. When filing the application, the employer must provide a “recruitment report” and agree to comply with a list of conditions specified in the regulations. 20 C.F.R. § 655.22; *see generally*, 73 Fed. Reg. 78020, 78056-57 (Dec. 19, 2008).

### *Recruitment Report Requirements*

Twenty C.F.R. §§ 655.15(j), details the requirements of the pre-filing recruitment report. No fewer than two calendar days after the last date on which the job order was posted and no fewer than five calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare, sign, and date a written recruitment report; only after the report is completed may the employer submit the H-2B application. 20 C.F.R. §§ 655.15(j)(1). The recruitment report must include the following information:

- i. Identify each recruitment source by name;
- ii. 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;
- iii. If applicable, explain the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position.

20 C.F.R. §§ 655.15(j)(2). Pursuant to the recruitment report requirements:

The employer must retain résumés (if available) of, and evidence of contact with (which may be in the form of an attestation), each U.S. worker who applied or was referred to the job opportunity. Such résumés and evidence of contact must be retained along with the recruitment report for a period of no less than 3 years, and must be provided in response to an RFI or in the event of an audit or an investigation.

20 C.F.R. §§ 655.15(f)(3).

## **DISCUSSION**

The issue is whether Employer sufficiently complied with the recruitment requirements and obligations of H-2B employers, as outlined above.

First, the CO contends that the Employer failed to satisfy the requirements for pre-filing recruitment. In response to the RFI, Employer outlined its recruitment activities. Employer

published the job announcement in the San Diego Union Tribune, a print newspaper, on April 20, 2014, and the announcement was published thirty consecutive days online, from April 19, 2014 until May 18, 2014. (AF 52, 61). Employer indicated, in its response letter, that it opened the SWA job order on April 18, 2014, closed it on April, 25, 2014<sup>8</sup> and reopened it on May 15, 2014. (AF 52). Employer's original and amended ETAs listed its SWA job order running from May 16, 2014 until July 15, 2014. *Id.* at 61. The CO contends that Employer failed to publish a print advertisement for the required minimum for two days, and that on-line advertising cannot be substituted for the required newspaper advertisement. (AF 43). Furthermore, the CO argues that the advertisement was not published during the period of time the job order was being circulated. *Id.*

Based on the above, I find that Employer did not comply with the necessary pre-filing recruitment regulations, regarding the publication of print announcements, as it has conceded. As noted above, Employer argued that “[i]n today’s technological world, QCMI would like to dispute that digital job announcements would not attract qualified individuals for this position.” While this may be an accurate statement, the regulations clearly outline the publication requirements, and it is not the Board’s decision to determine the effectiveness of these requirements. Employer did not have a compliant SWA job order on April 20, 2014, and Employer did not publish a print advertisement on two separate days. As Employer failed to follow the requirements outlined in 20 C.F.R. § 655.15(f)(1), and therefore was unable to document that it did so, the CO appropriately denied the application.

Secondly, the CO listed nine deficiencies pertaining to the information contained in the advertisement and job order:

1. The job order and newspaper advertisements do not indicate an hourly salary;
2. The job order and newspaper advertisements do not indicate the dates of need for the job opportunity;
3. The newspaper advertisements do not indicate the area of the intended employment;
4. The newspaper advertisements do not indicate specific experience or education requirements;
5. The job order and advertisements indicate San Diego East County Company [] has an immediate need for their FAA Repair Station; however San Diego East County Company is not listed as the employer in Section C. on the ETA Form 9142;
6. The job order indicates a High School diploma as the minimum education requirement; however, Section F.b., item 1 has “none” selected for the education requirement;
7. The job order and newspaper advertisements indicate the job opportunity is expected to last 4 to 6 weeks; however, according to Section B., item 5 through 6 on the ETA Form 9142, the dates of need exceed 2.5 months;

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<sup>8</sup> This equates to eight calendar days, two days less than the ten calendar day requirement. *See* 20 C.F.R. § 655.15(e)(1). Recognizing the deficiency, Employer reopened the job order.

8. The job order indicates 120 months as the experience required; however, Section F.b., Item 4a of the ETA Form 9142, indicates 60 months experience requirement; and
9. The submitted job order number is 14104980; however, the job order number listed on the ETA Form 9142 in Section H., Item 2 is 14090170.

(AF 74-75). In the Final Determination, the CO indicated that Employer failed to cure all of the above deficiencies and it did not provide proof of print newspaper advertisements and a job order that complied with the regulations. (AF 47).

In response to the RFI, Employer corrected or responded to some of the listed deficiencies, but failed to completely cure all nine deficiencies. Specifically, Employer explained that company policy and the competitive nature of the aerospace industry prevents advertisements from including certain information, such as the salaries and employer name, and it had specified an email address to which the applications could be sent. (AF 53). Employer also explained that the advertisement included that: the area was listed as San Diego East County; the job duties were described as including disassembly and assembly of PT6A gearboxes; and the job duration was specified as lasting from four to six weeks. Employer further explained that exact starts dates were unknown at the time of the advertisement, and therefore were not included. *Id.* at 54. Company policy however, does not excuse an employer from complying with the requirements. In pertinent part, 20 C.F.R. § 655.17 requires the pre-filing recruitment advertisement to include, the employer's name and contact information, the expected start dates, and the wage offer. 20 C.F.R. § 655.17(a), (f)-(g).<sup>9</sup> Employer did not comply with some of the pre-filing requirements, as it did not publish all of the necessary information in its advertisement. Indeed, Employer concedes as much. Accordingly, based on the abovementioned discussion, the CO was correct in denying Employer's application.

Thirdly, the CO contends that Employer did not include qualifications for its job opportunity that are normal and accepted by non-H-2B employers in the same or comparable occupations. (AF 48). As noted above, 20 C.F.R. § 655.22(h) requires the job opportunity to be "a bona fide, full-time temporary position, the qualifications for which are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations." Here, Employer seeks to hire an FAA Repair Station Trainer with extensive experience, in order to train its employees to adequately perform the disassembly and assembly of gearboxes so that such repairs may be made in the United States (which repairs are currently being completed by Pratt & Whitney in Canada). (AF 57). The job was classified as Training and Development Manager. The CO explained that, "O\*Net indicates that more than 2 years up to and including 4 years of experience is typical for the occupation of Training and Development Managers."<sup>10</sup> (AF 48). In that regard, the SVP (Specific Vocational Preparation) range for the job opportunity involved here, Training and Development Manager, 11-3131.00, is "7.0 to < 8.0"

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<sup>9</sup> As these content requirements are mandated by the regulations, they have been strictly enforced. *See e.g., Larry's Oysters, LLC*, 2012-TLN-18 (March 2, 2012); *Sohrab Ltd.*, 2010-TLN-24 (Dec 17, 2009); *Freemont Forest Systems, Inc.*, 2010-TLN-38 (March 11, 2010); *BPS Industries, Inc.*, 2010-TLN-14 and 15 (Nov. 24, 2009); *Quality Construction & Production LLC*, 2009-TLN-77 (Aug. 31, 2009).

<sup>10</sup> O\*NET replaced the *Dictionary of Occupational Titles* ("DOT") and is available online, via a link from the OALJ website ([www.oalj.dol.gov](http://www.oalj.dol.gov)).

(which equates to from two to four years up to less than ten years).<sup>11</sup> However, as the CO noted, Employer specified 120 months of experience in the job order (as contrasted with 60 months in the application.) (AF 77-78, 86, 89, 98). Employer explained that QCFI is seeking an individual with 6 months of training, 60 months of experience as an Aviation Repairman/Inspector, and 60 months of Training and Development experience, a total of 126 months (10.5 years). (AF 55). While the CO did not include the O\*NET-determined standard for an Aviation Inspector, that job (53-6051.01) has an SVP of from 6 to less than 7, which amounts to from one to two years up to less than four years. O\*NET job classifications are probative evidence regarding whether an occupational requirement is normal and accepted. *See, e.g., Earthworks, Inc.*, 2012-TLN-17 (Feb. 21, 2012), *citing Strathmeyer Forests, Inc.*, 1999-TLC-6 (Aug. 30, 1999) (relating to DOT). The O\*NET does not contemplate adding the experience requirements under the SVPs for these job opportunities together, along with an additional amount for training, as it is clear from the job description for Training and Development Manager that the vocational preparation includes education, training, and subject matter experience.<sup>12</sup> However, even if that were done, the total would amount to less than the 10 or more years sought by Employer. It is Employer's burden to provide proof of normal and accepted qualifications particularly where, as here, they exceed the O\*NET requirements. Employer failed to provide documentation in its response that would demonstrate the normal and accepted qualifications required for non-H-2B employers in the same or comparable occupations.

The last basis for denial concerns Employer's recruitment report. The CO contends that Employer listed three applicants that were disqualified based on experience requirements; however, Employer failed to offer documentation explaining how their lack of qualification was determined or indicate whether they had been interviewed. (AF 49, 68-69, 94-95). Employer indicated in its recruitment report that three people applied "by way of the San Diego Union Tribune," all of which Employer determined to have 0 months of experience as a repairman on gearboxes.<sup>13</sup> (AF 68-69). Employer did not receive applicants from the SWA job order or the online publications. Under the regulations, the employer must retain résumés (if available) and evidence of contact (which may be in the form of an attestation) for each U.S. worker who applied or was referred to the job opportunity. 20 C.F.R. §§ 655.15(f)(3). While providing the names of the three applicants and some information about why they did not qualify for the position, Employer failed to provide the source of the information or any supporting documentation. Accordingly, I agree with the CO's contention that Employer did not sufficiently comply with the requirements, and failed to provide documentation that was used to determine the applicant's experience level, as requested in the RFI.

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<sup>11</sup> According to O\*NET Online Help, the Specific Vocational Preparation (SVP) requirements are derived from Appendix C of the *Dictionary of Occupational Titles*, which provides the following levels of vocational preparation for each SVP level: 1 – short demonstration only; 2 – anything beyond short demonstration up to and including 1 month; 3 – over 1 month up to and including 3 months; 4 – over 3 months up to and including 6 months; 5 – over 6 months up to and including 1 year; 6 – over 1 year up to and including 2 years; 7 – over 2 years up to and including 4 years; 8 – over 4 years up to and including 10 years; and 9 – over 10 years.

<sup>12</sup> See, for example, under Job Training: "Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training." O\*NET 11-3131.00 – Training and Development Managers, Summary Report, page 5.

<sup>13</sup> Employer indicated that the first applicant is an experienced caregiver, housekeeper, and clerk; the second applicant is experienced in electronic and mechanical assembly; and the last applicant is experienced in medical and pharmaceutical manufacturing. (AF 69).

In view of the above, based upon the record before me, I find that the application was properly denied.

### **CONCLUSION**

Based on the abovementioned discussion, I find that Employer failed to comply with the pre-filing obligations required to apply for H-2B workers. Nonetheless, nothing in this Order shall prevent the Employer from reapplying *after* full completion of the appropriate pre-filing requirements.

### **ORDER**

**IT IS HEREBY ORDERED** that the Certifying Officer's Decision is **AFFIRMED**.

For the Board:

PAMELA J. LAKES  
Administrative Law Judge