

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 30 April 2015**

**BALCA Case No.: 2015-TLN-00040**  
ETA Case No.: H-400-15047-264155

*In the Matter of:*

**KLM SCAPE AND SNOW,**  
*Employer*

Certifying Officer: John T. Rotterman  
Chicago National Processing Center

Appearances: Daniel Law  
Clinton Township, Michigan  
*For the Employer*

Stephen R. Jones, Senior Trial Attorney  
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Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

Before: LEE J. ROMERO, JR.  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING  
DENIAL OF CERTIFICATION**

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to KLM Scape and Snow’s (“the Employer”) request for administrative review of the Certifying Officer’s (“CO”) denial of temporary labor certification under the H–2B program. For the following reasons, the Board affirms the CO’s denial of certification.

**BACKGROUND**

On February 16, 2015, Employer submitted an application for temporary employment certification through the H-2B program to fill eleven positions for “Landscaping Workers.” (AF

38-59).<sup>1</sup> On February 23, 2015, the CO issued a Request for Further Information, citing deficiencies regarding 20 C.F.R. §§ 655.17(a), 655.15(e)(2), and 655.15(f)(3).<sup>2</sup> (AF 33-37). Specifically, the CO stated Employer failed to submit newspaper advertisements which instructed applicants to send resumes directly to Employer or Employer's point of contact as identified in ETA Form 9142, Section C or Section D. Instead, Employer's advertisements directed U.S. worker applicants to email [info@dlaborsolutions.com](mailto:info@dlaborsolutions.com); whereas, Employer's attorney's email address as indicated in Section E on the ETA 9142 is [Eric@dlaborsolutions.com](mailto:Eric@dlaborsolutions.com). Thus, the CO found, the email address provided in Employer's advertisement appears to belong to Employer's attorney, and it is the only contact information found in the advertisement. (AF 35-36).

On February 27, 2015, Employer emailed a response to the Request for Further Information and included copies of its advertisements. (AF 21-32). On March 10, 2015, the CO sent Employer a Notice of Cessation of Case Processing, informing Employer of the March 4, 2015 District Court action that vacated the Department's 2008 H-2B regulations and enjoined the enforcement of the program.<sup>3</sup> (AF 20).

On March 30, 2015, the CO issued a Denial Letter, informing Employer that its application for H-2B temporary, nonagricultural employment was denied for the same reasons set forth in its Request for Further Information. Specifically, Employer failed to satisfy the advertisements required by the regulations and had not addressed the deficiencies in the Request for Information. (AF 13-19).

On April 7, 2015, Employer submitted its Request for Administrative Review. (AF 1-12). In its Request, Employer stated that Diversified Labor Solutions LLC ("DLS") has been acting on behalf of Employer in regards to its H-2B applications. Employer states that all ads placed by DLS have directed the resumes to [info@dlaborsolutions.com](mailto:info@dlaborsolutions.com), and [Eric@dlaborsolutions.com](mailto:Eric@dlaborsolutions.com) is not used in its advertising. Employer did not address the discrepancy between the email address that was published in the advertisements versus the email address that was noted on the ETA 9142 application. (AF 1).

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<sup>1</sup> In this decision, AF is an abbreviation for "Appeal File."

<sup>2</sup> All citations to 20 C.F.R. Part 655 refer to the Final Rule promulgated in 2008. The regulations found at 20 C.F.R. Part 655, Subpart A (2009), which were published in the Federal Register on December 19, 2008 ("2008 Rule"), 73 Fed. Reg. 78020, apply to this case. The Department of Labor ("DOL") indefinitely delayed implementation of the Final Rule published on February 21, 2012 ("2012 Rule"), 77 Fed. Reg. 10038, after the United States District Court for the Northern District of Florida issued a preliminary injunction enjoining DOL from implementing or enforcing it. *See* 77 Fed. Reg. 28764 (May 16, 2012) (announcing the continuing effectiveness of the 2008 Rule "until such time as further judicial or other action suspends or otherwise nullifies the order in the Bayou II litigation"); *Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183, Order at 8 (N.D. Fla. Apr. 26, 2012) (issuing order temporarily enjoining DOL from implementing or enforcing the 2012 Rule), *affirmed by* 713 F.3d 1080 (11th Cir. 2013); *see also Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183 (N.D. Fla. Dec. 18, 2014) (vacating the 2012 Rule and permanently enjoining DOL from enforcing it).

<sup>3</sup> Shortly thereafter, the District Court issued an order staying the injunction and otherwise holding the Vacatur Order in abeyance until April 15, 2015. On April 16, 2015, the stay was thereafter extended by the District Court through May 15, 2015. Accordingly, the stay regarding the present matter was lifted on April 20, 2015, and referred to an Administrative Law Judge for administrative review.

On April 8, 2015, the Board of Alien Labor Certification Appeals (“BALCA”) docketed the matter, and it was assigned to Administrative Law Judge Lee J. Romero in Covington, Louisiana, on April 21, 2015. The Certifying Officer assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services (“the Solicitor”) in accordance with 20 C.F.R. § 655.33(b) (2009) on April 21, 2015. On April 22, 2015, BALCA issued a Notice of Assignment and Expedited Briefing Schedule, setting brief due dates. On April 28, 2015, Employer submitted its brief, which was comprised of the same documentation that Employer submitted for its Request for Further Information and its Request for Administrative Review. The Solicitor submitted a brief on April 29, 2015.

## DISCUSSION

Employer has the burden in proving that it is entitled to labor certification. *Tarilas Corporation*, 2015-TLN-00016 (March 5, 2015). In the instant matter, Employer has not met that burden for the following reasons.

A CO may only grant an employer’s H-2B application if there are not enough available domestic workers in the United States who are capable of performing the temporary labor at the time the employer files its application for certification. 8 U.S.C. § 1101(a)(H)(ii)(b); *Burnham Companies*, 2014-TLN-29 (May 19, 2014). Consequently, before filing an *Application for Temporary Employment Certification*, employers must satisfy certain pre-filing recruitment steps designed to inform American workers about the job opportunity. *J & J Pine Needles, LLC*, 2015-TLN-00002 (Nov. 14, 2014). Specifically, among other things, an employer must publish two print advertisements that provide “the employer’s name and appropriate contact information for applicants to send resumes directly to the employer.” 20 C.F.R. § 655.15(d)(3); 20 C.F.R. § 655.17(a).

Moreover, in accordance with Departmental regulations at 20 C.F.R. §§ 655.15(e)(2) and 655.15(f)(3), the job order and newspaper advertisements must satisfy the requirements specified at 20 C.F.R. § 655.17. Specifically, 20 C.F.R. § 655.17(a) reads:

### § 655.17 Advertising requirements.

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 to the H-2B workers. All advertising must contain the following information:

- (a) *The employer's name and appropriate contact information for applicants to send résumés 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 (emphasis added). Thus, when conducting domestic recruitment under the H-2B program, all advertisements must contain a method of contact information for applicants to reach the employer directly.

In *Quality Construction & Production LLC*, the employer's application was properly denied because the employer's newspaper advertisements instructed those interested in the job opportunity to apply with the State Workforce Agency ("the SWA") rather than submit application materials to the employer itself. 2009-TLN-00077 (August 31, 2009). In *Masse Contracting, Inc.*, the employer's application was denied because its advertisements instructed job seekers to contact the Terrebonne Career Solutions Center in order to submit a resume or application, instead of the employer itself. 2015-TLN-26 (April 2, 2015).

Likewise, in *East Bernstadt Cooperate Inc.*, BALCA reached a similar ruling. 2010-TLN-00004 (Oct. 30, 2009). In *East Bernstadt*, an employer submitted an application for fifty production workers from October 1, 2009 – June 30, 2010. *Id.* at 1. To announce the job opportunity, the employer published a newspaper advertisement that identified the employer by name and city and told applicants to "apply at the nearest one-stop career center." *Id.* at 2. The CO denied temporary labor certification because the employer failed to demonstrate that it had provided "appropriate contact information for applicant to send resumes directly to the employer." *Id.* On appeal, BALCA found that the CO properly denied the employer's application because the employer failed to provide its contact information so that applicants could apply directly to the company rather than through a state agency or job center. *Id.* at 3-4.

In light of the foregoing BALCA decisions, I find that the CO properly denied Employer's application. The Appeal File reflects that in its ETA 9142, Employer listed [KLM@KLMLandscape.net](mailto:KLM@KLMLandscape.net) and [Eric@dlaborsolutions.com](mailto:Eric@dlaborsolutions.com) as its Employer Point of Contact Information and Attorney or Agent Information in Sections D and E, respectively. (AF 39-40). Conversely, in its job advertisements, Employer listed [info@dlaborsolutions.com](mailto:info@dlaborsolutions.com) as a point of contact with which to submit applications. (AF 52-54). Because of the discrepancy in contact information, it is unclear whether the contact information listed in the advertisements reaches

Employer directly in accordance with 20 C.F.R. § 655.17(a). Thus, the denial of Employer's H-2B certification must be **AFFIRMED**.

**ORDERED** this 30<sup>th</sup> day of April, 2015 in Covington, Louisiana.

**LEE J. ROMERO, JR.**  
Administrative Law Judge

Covington, LA