In the matter of:

OVERMAN’S WESTERN STONE,
Employer

Certifying Officer: Chicago National Processing Center

Appearances: Vincent C. Costantino, Esquire
Assistant counsel for Litigation
Washington, D.C.
For the Solicitor

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Overman’s Western Stone’s (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 December 26, 2014, the Certifying Officer (“CO”) accepted for filing the Employer’s ETA Form 9142, H-2B Application for Temporary Employment Certification for fifteen landscaping positions. The Employer required twelve months of experience in stone landscaping and advertised the positions in the Western News and with the Montana State Workforce Agency. (AF 102-12).¹

The CO sent a Request for Further Information to the Employer on January 2, 2015. Specifically, the CO requested the Employer to validate the reasons for requesting 12 months of experience for the advertised position and submit documentation showing that the Employer

¹ In this decision, AF is an abbreviation for Appeal File.
specified its experience requirement in the course of recruitment. (AF 95-101). On January 9 and January 20, 2015, the Employer responded to the Request for Further Information. The Employer submitted a printout of the job order and the invoice/receipt from the Western News. The Employer also listed four posted job opportunities listed with the “Montana Workforce agency and American job bank,” each of which required one or two years of landscaping, groundskeeping, or maintenance experience. (AF 81-94).

On January 22, 2015, the CO denied certification because the Employer failed to satisfy pre-filing recruitment regulations. The CO noted that the Employer did not submit the actual text of the advertisement placed with the Western News and that the job order did not include the beginning and ending dates of employment or the work hours and days. (AF 75-80).

The Employer requested administrative review by email on January 29, 2015. (AF 42-74). The CO received the request by mail on January 30, 2015. (AF 1-41). The Employer submitted a copy of the Western News advertisement and email correspondence with an employee of the Montana State Workforce Agency, which indicated that the job order would be modeled after the ETA Form 9142. BALCA docketed the appeal file and issued a briefing schedule. The Solicitor filed a brief on behalf of the CO on February 19, 2015. The Employer has not filed a brief.

DISCUSSION

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an Application for Temporary Employment Certification (“ETA Form 9142”) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20 (2008). After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer (“CO”), who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies

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2 The CO also requested the Employer to establish that the nature of the employment is temporary and to submit recruitment documentation. These issues were resolved.

3 The CO also denied certification because the Employer did not establish that the experience requirements are normal and accepted by non-H-2B employers in similar occupations. Because we affirm the CO’s denial on the Employer’s failure to satisfy pre-filing recruitment regulations, we need not address the remaining reason for denial.

4 All citations to 20 C.F.R. Part 655 refer to the Final Rule promulgated in 2008. Although the Department promulgated a new Final Rule in February 2012, the U.S. District Court for the Northern District of Florida has issued an order enjoining the Department from implementing or enforcing this rule. See Bayou Law & Landscape Services et al. v. Solis, Case 12-00183, Order at 8 (Apr. 26, 2012). Accordingly, the Department announced the continuing effectiveness of the 2008 H-2B Rule until further judicial or other action suspends or nullifies the district court’s order. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Guidance, 77 Fed. Reg. 28764, 28765 (May 16, 2012).
certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. See Clay Lowry Forestry, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); Hampton Inn, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); Earthworks, Inc., 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012), “[t]he scope of the Board’s review is limited 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).”

Employers must satisfy certain pre-filing recruitment steps before filing an ETA Form 9142. Specifically, the regulations require: “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). Section 655.17 lists the following requirements that employers must include in these advertisements:

(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.
In this case, the CO’s RFI requested that the Employer verify that the newspaper advertisements and job order included the experience requirement. The Employer’s response to the RFI did not include the newspaper advertisement. Upon further review of the submitted job order, the CO determined that the Employer failed to satisfy the pre-filing recruitment regulations. The posted SWA job order failed to reflect the information required by subsection (f), specifically, the beginning and ending dates of employment and the work hours and days. While the Employer submitted email correspondence with an employee of the Montana State Workforce Agency, which indicated that the job order would be modeled after the ETA Form 9142, this correspondence does not excuse the Employer’s failure to ensure that the job order meets statutory regulations. Even if it did, the Employer’s omission of the Western News advertisement in response to the RFI is detrimental to certification. See Texas General Builders, LLC, 2011-TLN-00034 (Aug. 29, 2011); Progressive Solutions, 2010-TLN-00048 (Mar. 16, 2010); Stapp Construction d/b/a Greg Stapp, 2011-TLN-00016 (Apr. 20, 2011).

BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination. Based on the information provided to the CO in response to the RFI, Employer failed to follow regulatory mandate. As such, denial of certification is proper.

**ORDER**

In light of the foregoing, it is hereby ORDERED that the Certifying Officer’s Final Determination denying the Employer’s ETA Form 9142, H-2B Application for Temporary Employment Certification for the position of Landscaping and Groundskeeping Workers is AFFIRMED.

For the Board:

LARRY W. PRICE
Administrative Law Judge