



Issue Date: 18 June 2010 BALCA Case No.: 2010-TLN-00063

ETA Case Nos.: C-10103-49863

In the Matter of:

PRO LANDSCAPE, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **ROBERT RAE**
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 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 (2009).

Statement of the Case

On April 13, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Pro Landscape, Inc., ("the Employer"), requesting certification for 22 "Landscaping and Groundskeeping Workers" from April 1, 2010, until

December 15, 2010. AF 97.¹ The Employer indicated on its application that the workers “must pass a test of physical ability to safely perform shoveling, lifting (50 lbs.) and operating a wheel barrow.” AF 100. The Employer’s recruitment report also indicated that thirteen workers failed the physical ability test while six workers refused to take the test. AF 107-112.

On April 16, 2010, the CO issued a *Request for Further Information* (“RFI”) citing multiple deficiencies, only one of which is relevant to this appeal. AF 91-96. Citing to 20 C.F.R. § 655.22(a), the CO found that the Employer failed “to offer terms and conditions normal to U.S. workers similarly employed in the area of intended employment.” AF 94. The CO further explained that the job requirements “may not be unusual for workers performing the same activity in the area of intended employment.” AF 94-95. Further, pursuant to 20 C.F.R. § 655.22(h), the job opportunities must be “consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.” AF 95. Specifically, the CO stated that the physical ability test appeared “to be restrictive to U.S. workers.” *Id.* The CO cited to concerns that the physical ability test placed a time limit on workers, which included digging a “trench 4 feet long, 18 in. wide and 18 in. deep within 5:00 minutes.” *Id.* Workers also complained that they were required to “beat the time given to them by the person showing them the agility test or they would not be hired.” AF 30. The RFI required the Employer to submit “proof that these tests are a normal requirement for the occupation of a landscape laborer.” AF 96. Additionally, the CO required the Employer to submit “[proof] that other employer’s in the same area of intended employment apply similar tests. . . .[and a] written explanation, in detail, how the pre-employment tests will be applied to foreign workers.” *Id.*”

On April 23, 2010, the Employer responded to the RFI. AF 35-89. In its response, the Employer wrote: “Physical tests are done solely to determine whether or not an individual can safely perform the work required of the job, in a timely manner. Our landscape work is often at sites that have steep hillsides, may be muddy, and are difficult. . . .This is our specialty, and it is often why we, rather than our competition, are hired for this type of work.” AF 59. The Employer also noted that the physical ability test would be given to foreign workers in their country of origin. *Id.* The Employer, however, failed to provide proof that similarly situated employers utilize comparable physical ability tests. *Id.*

¹The 120-page Appeal File will be abbreviated “AF” followed by the page number.

On May 17, 2010, the CO issued a *Final Determination* denying the Employer's application. AF 25-33. Citing to 20 C.F.R. §§ 655.20(a), 655.15(j), 655.22(a), and 655.22(h), the CO asserted that the Employer failed to submit a complete and accurate recruitment report. AF 29. Specifically, the CO stated that the State Workforce Agency ("SWA") had submitted a complaint regarding the agility tests, and indicated that only five of eighteen applicants passed the Employer's test. AF 30. Accordingly, the CO asserted that "it appears the employer is offering terms and conditions that are not normal to U.S. workers similarly employed in the area of intended employment." AF 30. The CO further noted that the job description listed on the Employer's application indicated that "no experience was required" and that the "employer would provide training," yet "it is unclear why the employer's selection process included testing with time limits for applicants for jobs requiring no experience or education and for which on-the-job training is provided." AF 32. Noting that only 30% of job applicants passed the test, the CO further concluded that given the job is a "job zone one occupation requiring little preparation, the employer's tests appear to not only have discouraged U.S. workers, but also appear to not be normal for the occupation." *Id.* The CO found that the Employer did not substantiate its claims that the tests were normal for similarly situated employer, and therefore denied certification. The Employer's appeal followed.

Discussion

Employers utilizing the H-2B program must "[offer] terms and working conditions normal to U.S. workers similarly employed in the area of intended employment, meaning that they may not be unusual for workers performing the same activity in the area of intended employment." 20 C.F.R. § 655.22(a). Additionally, the job opportunities offered by the Employer must be "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). Finally, the employer's recruitment report must "explain the lawful job-related reason for not hiring any U.S. workers who applied for the position." 20 C.F.R. § 655.15(j)(2)(iii).

The Employer, in its request for review, disputes that its physical ability test required the participants to complete the tasks in less time than the person demonstrating the task. However, this argument is of little consequence to the ultimate issue of whether the Employer can require the applicants

to undergo rigorous, physical ability testing. Ultimately, whether the Employer has the ability to test the applicants in this manner comes down to whether similarly situated employers, as a routine practice, require workers to undergo similar physical ability tests. In the RFI, the CO requested that the Employer submit proof that other landscapers required its workers to undergo similar physical ability tests. The Employer failed to provide any information regarding whether other landscapers require applicants to not only be able to lift a certain weight, but to also be able to perform a variety of tasks in a short time span without training.

The Employer's physical ability test is troubling for multiple reasons. First, nothing in the Employer's application, and thus its advertisements with the SWA and local newspapers, notified applicants that they would be required to perform such rigorous tests during the interview. Second, the Employer indicated that it would train applicants, yet the Employer is eliminating workers for failing to complete the test. While a test of strength may have been appropriate given the lifting requirement, the Employer also required the applicants to conduct specific tasks both on the spot and in a short timeframe. Many of the applicants may have had the strength and agility to perform the tests but did not have the requisite knowledge. In any event, the Employer bears the ultimate burden of proving that it is entitled to labor certification. *Cal Farms LLC and Washington Farm Labor Source LLC*, 2009-TLC-00049 (BALCA May 29, 2009). The Employer failed to prove that the physical ability tests were consistent with normal qualifications required by non-H-2B workers, and therefore, the Employer did not have a lawful, job related reason for denying employment to otherwise qualified individuals. For the foregoing reasons, the CO properly denied certification.

Order

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer's decisions are **AFFIRMED**.

For the Board:

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ROBERT RAE
Administrative Law Judge