



**Issue Date: 16 March 2011**

**BALCA Case No.: 2011-TLN-00009**

ETA Case No.: C-10361-52720

*In the Matter of:*

**AMERICAN TOURS INTERNATIONAL, LLC,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Janice K. Luo, Esquire  
Mitchell Silberberg & Knupp, LLP  
Los Angeles, California  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Clarette H. Yen, Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: **WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION AND REMANDING**  
**FOR DETERMINATION UNDER 20 C.F.R. § 655.3**

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, as defined by the Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.33(a). The 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).

As explain in the decision below, I find that the CO's denial of certification was proper because the Employer failed to satisfy the requirements of the H-2B program. However, I find that this matter must be remanded to the CO for a determination on the Employer's request for special processing under 20 C.F.R. § 655.3.

### **STATEMENT OF THE CASE**

On December 21, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary seasonal labor certification from American Tours International, LLC ("the Employer"). AF 668-819.<sup>1</sup> The Employer requested certification for 20 multilingual tour escorts from April 1, 2011 to October 30, 2011. AF 675. The Employer required the escorts to be "fluent in either English, German & Dutch; OR English, German, Dutch and/or French." AF 678.

On January 3, 2011, the CO issued a *Request for Further Information* ("RFI"), notifying the Employer that it was unable to render a final determination for the Employer's application because the Employer did not comply with four requirements of the H-2B program. AF 661-667. First, the CO found that the areas passed through and visited by the H-2B tour guides and escorts are worksites and that the worksites are not all within the same area of intended employment. AF 664-665. The CO determined that under the regulations, the Employer could not submit one application for a job opportunity that includes many work locations not within the same area of intended

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<sup>1</sup> Citations to the 819-page appeal file will be abbreviated "AF" followed by the page number.

employment, and required the Employer to provide an explanation as to the estimated amount of time, including specific dates, that its employees will perform their job duties as tour guides in Los Angeles, California, and at all other tour destinations. AF 665. Additionally, the CO required the Employer to provide a written explanation as to how each location where work will be performed falls within the area of intended employment. *Id.*

Second, the CO found that the Employer's job opportunity includes traveling to multiple geographic locations outside a single area of intended employment, and therefore, the CO required the Employer to provide a job order and newspaper advertisements identifying a single area of intended employment. AF 666. Third, the CO found that the Employer failed to accurately complete its ETA Form 9142, because it indicated in Section F.c., Item 7, that the work will not be performed at multiple worksites, but in Section F.a., Item 5, the Employer stated that the employees are required to "Conduct tours throughout the United States from April 1, 2011 to October 30, 2011." *Id.* The CO therefore required the Employer to submit a corrected ETA Form 9142, identifying the geographic places of employment within the single area of intended employment with as much specificity as possible. *Id.* The CO also required the Employer to provide an itinerary including the estimated amount of time, including specific dates, that its employees will perform their job duties as tour guides and escorts in Los Angeles, California, and at all other tour destinations, and required the Employer to provide a written explanation as to how each location where work is to be performed falls within the area of intended employment. *Id.*

Fourth, the CO required the Employer to explain why its requirement that applicants be fluent in English, German, and Dutch, or English, German, and French is essential to its business needs and why it would not be able to utilize bilingual workers instead. AF 667. Accordingly, the CO required the Employer to submit a signed, written document explaining why all 20 tour guides and escorts are required to be proficient in three languages and why the Employer believes that its terms and conditions of employment are: (1) normal to similarly employed U.S. workers in the area of intended employment, (2) not less favorable than those offered to the H-2B workers, and (3) not less than the minimum terms and conditions required by the regulation. *Id.*

The Employer responded to the RFI on January 10, 2011. AF 314-660. In its response, the Employer argued that it only has one worksite location, Los Angeles, California, and therefore only one area of intended employment. AF 314. The Employer stated that the “transient nature of these tours means that at no time does the tour guide perform services in a fixed or stationary worksite, other than the company’s headquarters in Los Angeles, California, where all the employment of all H-2B tour guides will begin and end.” AF 315. The Employer argued that the tour guide position is an itinerant job with no fixed worksites, and that to say that a U.S. worker in a particular region is denied a realistic job opportunity because a tour bus travels through his or her community and may stay a few hours or overnight defies common sense. AF 316.

In addition, the Employer notes that the H-2B regulations do not define “worksite,” and suggests that the definition of “worksite” under the Family and Medical Leave Act (“FMLA”), at 29 C.F.R. § 825.111(a)(2), ought to be applied to the H-2B regulations. This definition provides that for employees without a fixed worksite, the “worksite” is their “home base, from which their work is assigned, or to which they report.” *Id.* The Employer argues that because the tour guides will begin their training and employment in Los Angeles, California, and will end their employment in Los Angeles, California, the worksite location is in Los Angeles, California, and therefore the Employer has met the H-2B pre-filing recruitment requirements by advertising in a Los Angeles newspaper, placing a job order with the California SWA, and obtaining a prevailing wage determination from the California SWA. AF 319.

Turning to the final deficiency provided in the RFI, the Employer included a statement why English, German, and Dutch or English, German, Dutch and/or French are required for the position. AF 341-343. The Employer states that it requires German because about 55% of its target audience are German, Austrian, or Swiss, requires English because about 15% of its target audience are British or Australian, requires Dutch because about 15% of its target audience are Dutch or from Dutch-speaking parts of Belgium; and about 7% of its target audience are French. AF 341. The Employer further explained that:

The European consumers on these tours would not have bought the tour packages in the first place if they could not understand the guided tours. ATI contractually guarantees, for the benefit of its international retail

agencies, multilingual guide escort services to assure that an ATI Tour Escort, fluent in the language of every ATI traveler, is available for all tour departures. Accordingly, the multilingual tour guides are a key business necessity to our operation. It is not a matter of preference of the nationality of multilingual tour escorts, it is simply a business necessity. In fact, we currently have approximately ten (10) U.S. worker tour escorts who have the multilingual requirements of English, German, and Dutch; or English, German and Dutch and/or French fluency on our payroll throughout the year. These U.S. worker multilingual tour escorts have the same wages, terms and conditions to their employment as those offered the temporary H-2B multilingual tour escorts.

AF 343. In addition, the Employer's RFI response noted that it requested processing under the special procedures on November 29, 2010.

Finally, we would like to draw your attention to the fact that last year, the Office of Foreign Labor Certification (OFLC) asked our office to submit a letter to Dr. William Carlson, Administrator, OFLC within 60 days of March 8, 2010, requesting, in accordance with 20 CFR 655.3 special procedures for processing H-2B claims for ATI's tour guides. In accordance with the OFLC's request, our office submitted a letter to the OFLC on May 5, 2010, which demonstrates why special procedures are necessary for tour escorts, explaining ATI's business and why ATI believes it would be impossible to comply with the regulations without special procedures. We never received a response from OFLC to our letter. On November 29, 2010, we re-submitted our request for special procedures letter to Dr. Carlson. To date, we still have not received a response from Dr. Carlson or the OFLC. We have complied with OFLC's request that we submit a letter requesting and explaining why special procedures are necessary for ATI's H-2B tour escort positions. We again request that the OFLC institute special procedures for ATI's tour escort positions as requested in our letter to Dr. Carlson.

AF 319. The Employer also submitted documentation supporting its prior request for special procedures with its RFI response. The Employer included email correspondence between Julia Fuma of the Office of the Solicitor, on behalf of the CO, to the Employer's attorney on March 5, 2010. AF 494-95. The text of the email is as follows:

As I explained in our phone conversation yesterday, the Office of Foreign Labor Certification (OFLC) has agreed to certify American Tours International's (ATI) application under the H-2B temporary non-agricultural program if ATI will agree to, within 60 days of Monday, March 8, 2010, write a letter to the OFLC Administrator requesting, in accordance with 20 CFR 655.3, special procedures for processing H-2B claims for tour guides. The letter must demonstrate why special

procedures are necessary. While the regulation doesn't set out specific requirements for a letter requesting [...] special procedures, the letter should explain ATI's business and why ATI believes it would be impossible to comply with the regulations without special procedures. Specifically, ATI may want to include details such [as] how many different tour routes are available each season and in how many different cities tours begin. It may also want to give details on the working conditions of H-2B workers, including where the tour guides live while employed by ATI, how many tour itineraries a tour guide leads in a single season, and how tour guides travel from city to city between tours in order to lead tours. The letter may suggest the specific procedures ATI recommends for processing the applications of tour guides.

The letter should be sent to:

William L. Carlson  
Administrator, Office of Foreign Labor Certification  
Frances Perkins Building, C4312  
200 Constitution Ave., NW  
Washington DC 20210

Please confirm that you agree and I will call the BALCA and notify them.

AF 495. The Employer confirmed that it agreed to the terms outline by the CO, and on March 9, 2010, the CO granted certification for 25 tour guides. AF 473-482. The Employer also submitted its May 5, 2010 letter to Dr. Carlson requesting special procedures and its November 29, 2010 request for special procedures with its RFI response. AF 488-493, 496-497.

On February 15, 2011, the CO denied the Employer's application on four grounds. AF 303-313. First, the CO rejected the Employer's proffered definition of "worksite" under the FMLA "home base" approach, because under the H-2B regulations, certification of more than one position can only be requested on the application if all H-2B workers will perform the same services or labor in the same area of intended employment. AF 307. The CO explained that under Sections 655.20(d) and 655.4 of the H-2B regulations, an employer may not submit one application for a job opportunity that includes many work locations not within the same area of intended employment. The CO further explained that "employers requesting H-2B certification for temporary nonagricultural employment in the U.S. can only request certification for provision of

labor or services in one area of intended employment, except when employers can demonstrate, upon written application to the Office of Foreign Labor Certification (OFLC) Administrator, that special procedures are necessary. The occupation of Tour Guides and Escorts has not been granted authority for special procedures; and, without such authority, a certification of this application cannot be granted.” AF 308. The CO cited the special procedures regulation at Section 655.3(b) as the regulatory basis for denial. AF 307.

Second, the CO found that the Employer’s job order and newspaper advertisements did not comply with the requirements contained in 20 C.F.R. § 655.17. *Id.* Among the problems with the job order and advertisements, the CO found that they did not indicated the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants would likely have to reside to perform the services, because “on-location throughout the U.S.” does not provide applicants with enough information about other worksites. *Id.* Additionally, the CO noted that while the Employer’s application is for 20 H-2B workers, the Employer’s job order indicates that the Employer intends to fill 25 job openings. AF 309.

Third, the CO found that the Employer failed to amend its ETA Form 9142, with Sections F.c., Items 7 and 7a amended to reflect all of the anticipated worksites. AF 311. Fourth, the CO found that the Employer failed to indicate why a successful candidate for employment must be fluent in English, German, and Dutch or English, German, and French. AF 312. The CO determined that the Employer’s statement failed to establish that this requirement is normal to similarly employed U.S. workers in the area of intended employment, in violation of 20 C.F.R. § 655.22(a). AF 313. The Employer’s appeal followed.

## **DISCUSSION**

### *The Certifying Officer’s Basis for Denial*

The CO determined that the Employer failed to comply with the regulatory obligations of H-2B employers because the Employer’s workers would not work within the same area of intended employment. The regulation at 20 C.F.R. § 656.20(d) provides that “Certification of more than one position may be requested on the application as long

as all H-2B workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment.” Additionally, the H-2B regulations provide that “except where otherwise permitted under § 655.3, only one *Application for Temporary Labor Certification* may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer.” 20 C.F.R. 655.20(e).

The H-2B regulations provide the following definition of “area of intended employment”:

*Area of Intended Employment* means the geographic area within normal commuting distance of the place (worksite address) of intended employment of the job opportunity for which the certification is sought. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, quality of regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

20 C.F.R. § 655.4. Here, the parties agree that the workers will not all be working in “the same area of intended employment.” Even accepting the Employer’s argument that Los Angeles is the only “worksite,” the geographic area where the job opportunity is performed is not within commuting distance of Los Angeles. Indeed, the tour guide job opportunities will be performed all over the country, and even into Canada. The 20 H-2B workers will not all be traveling together, and could be thousands of miles away from each other at any given time as they escort separate tour groups all around the country. Even though the parties dispute whether the workers will perform work at more than one “worksite,” the parties have no disagreement that the 20 workers requested by the Employer will not all be working in the same area of intended employment, as defined by the H-2B regulations. As such, certification of more than one position cannot be

requested on a single application, unless otherwise permitted under Section 655.3. Based on the foregoing, the CO properly denied certification under 20 C.F.R. § 656.20(d).<sup>2</sup>

#### *Request for Special Procedures*

Section 655.3(d) grants the Office of Foreign Labor Certification (“OFLC”) the authority to establish or to devise, continue, review, or revoke special procedures in the form of variances for the processing of certain H-2B applicants when employers can demonstrate, upon written application to the OFLC Administrator, that special procedures are necessary. These include special procedures currently in effect for the handling of applications for tree planters and related reforestation for the handling of applications for tree planters and related reforestation workers, professional athletes, boilermakers coming to the U.S. on an emergency basis, and professional entertainers. *See also* OFLC Training and Employment Guidance Letter (“TEGL”) Nos. 27-06 (*Special Guidelines for Processing H-2B Temporary Labor Certification in Tree Planting and Related Reforestation Occupations*), 31-05 (*Procedures for Temporary Labor Certification in the Entertainment Industry*). The regulations provide that prior to making determinations under the special procedures rule, the OFLC Administrator “may consult with employer and worker representatives.” 20 C.F.R. § 655.3(b).

Tour escorts are not job opportunities contemplated by either TEGL 27-06 or 31-05. Additionally, the Frequently Asked Questions (“FAQs”) posted on the OFLC’s website related to the special procedures under the H-2B program only pertain to temporary employment of entertainers.<sup>3</sup> Nevertheless, the Employer’s application for temporary nonagricultural labor certification under the H-2B program was certified last year under the special procedure process outlined at 20 C.F.R. § 655.3(b). AF 473-482. This year, also, the Employer submitted a request for special procedures with the OFLC Administrator.

The CO’s denial letter makes no reference to the Employer’s request for special procedures with the OFLC Administrator and does not overtly deny the Employer’s

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<sup>2</sup> Because I find that the Employer has not complied with 20 C.F.R. § 656.20(d), I need not address the other three grounds for denial.

<sup>3</sup> *See* <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#special1> (last visited March 14, 2011).

request for special procedures. However, within its explanation of the first stated ground for denial, the CO noted that “the occupation of Tour Guides and Escorts has not been granted authority for special procedures; and, without such authority, a certification of this application cannot be granted” under 20 C.F.R. § 655.3(b). AF 308. Whether this sentence amounts to a determination on the Employer’s request for special procedures is far from clear. Indeed, the CO’s appellate brief describes the status of the Employer’s request for special procedures as “still pending.” CO’s Br. at 4. Furthermore, the Employer’s brief notes that it has not received a response from Dr. Carlson or the OFLC regarding its request for procedures. Emp. Br. at 3. To the extent that the CO’s February 15, 2011 denial of certification was a determination on the Employer’s request for special procedures, I find that this determination was arbitrary and capricious. *See generally Cowboy Chemical, Inc.*, 2011-TLC-211 (Feb. 10, 2011) (citing *Blondin Enterprises, Inc.*, 2009-TLC-56, slip op. at 3-4 (July 31, 2009); *Bolton Springs Farm*, 2008-TLC-28, slip op. at 6 (May 16, 2008)).

While the special procedures regulation seemingly gives the OFLC Administrator wide discretion in which to determine whether an employer’s application should be granted certification under the special procedures for the processing of H-2B applications, it is still necessary for the CO to provide some explanation why an employer does not qualify for the special procedures for processing, particularly in a situation such as this one, where the employer was certified under the special procedures regulation in the prior year for the exact same job opportunity. Given the apparent total discretion that the H-2B regulations grant the CO in determining the special procedures, I find that, at a minimum, the CO is required to explain to the Employer why its request for special procedures was approved last year but not this year. When the CO fails to provide any explanation for the basis of the denial and fails to even acknowledge the employer’s detailed request for special procedures, the CO’s denial is arbitrary and capricious.

The Employer wrote a letter to the OFLC Administrator requesting special procedures for processing H-2B claims for 20 tour guides in accordance with 20 CFR § 655.3 on November 29, 2010. AF 496-497. After not receiving a response, the Employer filed its ETA Form 9142 on December 23, 2010. AF 668-819. If the CO’s

single sentence in its denial letter indicating that the “occupation of Tour Guides and Escorts has not been granted authority for special procedures” amounts to a denial of the Employer’s request for special procedures, I find that such determination is an abuse of discretion inasmuch as no explanation was provided to the Employer why the application could be approved last year but not this year.

Accordingly, I find that the CO’s determination, if indeed there was one, as to the Employer’s request for special procedures, must be vacated, and this matter must be remanded to the CO for a determination of the Employer’s request for special procedures.

### **ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision regarding the Employer’s compliance with the requirements of the H-2B program is **AFFIRMED**. However, because the CO did not clearly make a determination on the Employer’s request for special procedures processing, this matter is **REMANDED** to the Certifying Officer for a determination on the Employer’s request under 20 C.F.R. § 655.3.

For the Board:

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**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge