

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 03 May 2011**

**BALCA Case No.: 2011-TLN-00019**

ETA Case No.: C-11054-54191

*In the Matter of:*

**TRANSILVANIA, INC.**  
**D/B/A**  
**TRANSYLVANIA ROMANIAN RESTAURANT,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Sorin Ardelean, Esquire  
License Lex PLLC  
Fort Lauderdale, Florida  
*For the Employer*

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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**

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).

### **STATEMENT OF THE CASE**

On February 23, 2011, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Transylvania, Inc. d/b/a Transylvania Romanian Restaurant (“the Employer”). AF 79-110.<sup>1</sup> The Employer requested certification for one chef (Romanian Ethnic Restaurant) from April 25, 2011 through January 15, 2011. AF 79. With its application, the Employer submitted a copy of its newspaper advertisements, placed on January 23 and 24, 2011 in The Miami Herald. AF 98-99. The newspaper advertisement reads: “Now Hiring Experienced Bilingual Chef for Romanian restaurant. Ethnic restaurant in Hollywood. Please see job listing at [restauranttransylvania.com](http://restauranttransylvania.com).” *Id.* The Employer also submitted a copy of newspaper advertisements placed in the Sun Sentinel on December 19 and 20, 2010, which read: “Executive Chef – in Hollywood, Transylvania Romanian Restaurant, more info at [www.restauranttransylvania.com](http://www.restauranttransylvania.com) email resume to [transylvania113@aol.com](mailto:transylvania113@aol.com).” AF 105-106.

On March 1, 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 failed to satisfy all the requirements of the H-2B program. AF 69-78. Among the eight deficiencies listed in the RFI, the CO found that the Employer’s newspaper advertisements did not comply with the H-2B pre-filing recruitment requirements. AF 71. The CO requested that the Employer submit a copy of its job order and newspaper advertisements in order to verify that the Employer complied with the pre-filing recruitment requirements. AF 71-72.

The Employer responded to the RFI on March 4, 2011 and submitted the requested documentation. AF 10-68. The CO denied certification on April 5, 2011 on two grounds, one of which was that the Employer’s newspaper advertisements did not include all of the information required by 20 C.F.R. § 655.17. AF 3-9. The Employer’s appeal followed.

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<sup>1</sup> Citations to the 110-page appeal file will be abbreviated “AF” followed by the page number.

## DISCUSSION

The CO may only grant an employer's petition to admit nonimmigrant workers on H-2B visas for temporary nonagricultural employment in the U.S. if there are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time the employer files its petition. 20 C.F.R. § 655.5(a)(1). Accordingly, the CO must determine whether an employer conducted the recruitment steps required by the H-2B regulations that are designed to apprise U.S. workers of the job opportunity that is the subject of the labor application. The H-2B regulations require an employer to conduct several recruitment steps prior to filing an application for temporary labor certification, including placing a newspaper advertisement on two separate days 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. 20 C.F.R. § 655.15(f).

The newspaper advertisements must satisfy the advertisement content requirements contained at Section 655.17. 20 C.F.R. § 655.15(f)(3). Under 20 C.F.R § 655.17, advertisements must contain terms and conditions of employment which are not less favorable than those offered to H-2B workers, and 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.

The Employer's newspaper advertisements in The Miami Herald and the Sun Sentinel did not contain the job opportunity's minimum requirements, the work hours and work days, the expected start and end dates of employment, the wage offer, and did not state that the position was temporary. The Employer's failure to include the information plainly required by Section 655.17 is fatal to its H-2B application, and the fact that it directed applicants to its website does not cure the deficiency. Regardless of how descriptive and informative the Employer's website advertisement may have been, the H-2B regulations explicitly require newspaper advertisements to contain the aforementioned information. The Employer's argument that its failure to comply with Section 655.17 is harmless is not persuasive. The Employment and Training Administration ("ETA") carefully considered the newspaper advertisement requirement, and determined that the information listed in Section 655.17 is necessary to adequately apprise U.S. applicants of the position. *See* Final Rule, *Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes*, 73 Fed. Reg. 78020, 78034 (Dec. 19, 2008). BALCA has strictly enforced the H-2B newspaper advertisement content requirements in order to protect domestic workers. *See* *Freemont Forest Systems, Inc.*, 2010-TLN-38, slip op. at 3 (March 11, 2010); *BPS Industries, Inc.*, 2010-TLN-14 and 15, slip op. at 2-3 (Nov. 24, 2009); *Quality Construction & Production LLC*, 2009-TLN-77 (Aug. 31, 2009).

Likewise, the Employer's assertion that inclusion of the information required by the regulations in the newspaper advertisement is too expensive is equally unpersuasive. In consideration of employers' concerns over the cost of newspaper advertisements, ETA determined that employers were only required to place two advertisements in newspaper of general circulation, rather than three, as originally proposed. 73 Fed. Reg. at 78034. While I recognize that it may be more costly for an employer to advertise for a position that is the subject of an application for temporary labor certification, if an employer seeks to utilize the H-2B program, it must adhere to all of the program's regulatory requirements. In the context of permanent labor certification program, BALCA has repeatedly recognized that employers seeking to hire foreign workers may have to conduct recruitment in a manner different than they would normally in order to ensure that no qualified U.S. workers are available for the position. *See* *East Tennessee State University*, 2010-PER-38 (April 18, 2011) (en banc); *Alexandria Granite & Marble*, 2009-PER-373 (May 26, 2010). The same is true for recruitment conducted in connection with an application for temporary labor certification. The statute squarely places the burden on the petitioning employer to establish eligibility for temporary labor certification. 8 U.S.C. § 1361.

As the Employer's newspaper advertisements did not include all of the information required by 20 C.F.R. § 655.17, the Employer failed to meet that burden.<sup>2</sup>

Accordingly, the CO properly denied certification.

**ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

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**WILLIAM S. COLWELL**

Associate Chief Administrative Law Judge

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<sup>2</sup> As I find that the CO properly denied certification based on the Employer's failure to comply with the newspaper advertisement requirements, I need not reach the second stated ground for denial.