



**Issue Date: 18 March 2011**

**BALCA Case No.: 2011-TLN-00011**

ETA Case No.: C-11042-53984

*In the Matter of:*

**VALLEYCREST LANDSCAPE MAINTENANCE  
D/B/A  
WAVERLY LANDSCAPE ASSOCIATES,  
*Employer***

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Mary Ellen Ryan, Esquire  
Law Offices of Brian T. O'Neill, P.C.  
Boston, Massachusetts  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Stephen R. Jones, 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

**ORDER OF REMAND**  
**FOR CONSIDERATION OF EVIDENCE SUBMITTED**  
**WITH REQUEST FOR REVIEW**

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).

### **STATEMENT OF THE CASE**

On February 10, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary seasonal labor certification from Valleycrest Landscape Maintenance d/b/a Waverly Landscape Associates ("the Employer"). AF 640-663.<sup>1</sup> The Employer requested certification for 45 landscape laborers from April 1, 2011 to November 30, 2011. AF 639. The Employer also submitted its recruitment report with its application, as required by the H-2B pre-filing requirements. The Employer's recruitment report noted that it received five inquiries as a result of its advertisements on JobQuest and in The Boston Herald. AF 656-660. Of those five, the Employer indicated that it hired one applicant. AF 656-657. Additionally, the CO noted that it "'laid off' its temporary [domestic] workers at the end of November and informed the workers of the new temporary positions available from April 1, 2011 through November 30, 2011," and provided the names, addresses, and telephone numbers for the 34 temporary workers that it rehired. AF 657-660. The Employer added that 37 temporary workers on H-2B visas returned to their home countries at the end of November 2010. AF 659.

On February 17, 2011, the CO partially certified the Employer's application for 10 landscape laborers. AF 636-638. The CO reduced the number of temporary nonagricultural workers certified by 35 workers because the Employer's recruitment report indicated that the Employer had successfully recruited and hired 35 U.S. workers for the positions. *Id.* On February 25, 2011, the Employer appealed the determination, arguing that the CO's determination that the Employer recruited and hired 35 new

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<sup>1</sup> Citations to the 663-page appeal file will be abbreviated "AF" followed by the page number.

workers was incorrect. The Employer states that it currently has 40 full-time workers, but during its peak season, it needs approximately 175 full-time workers, of which it had been able to rehire 34 seasonal workers from last season, plus one new temporary domestic hire. The Employer argues that it needs the 45 total H-2B workers so that it can bring back the 37 H-2B workers from last season, plus eight more H-2B workers. Therefore, the Employer requests BALCA to order the CO to certify the additional 35 temporary foreign workers for a total of 45 temporary foreign workers. With its request for review, the Employer submitted payroll records and other documentation.

### **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, an employer is required to engage in several pre-filing recruitment steps and submit a recruitment report to the CO with its H-2B application for temporary labor certification. 20 C.F.R. § 655.15(j)(1). The applicable regulation at Section 655.15(f)(2) provides that the recruitment report must:

- (i) Identify each recruitment source by name;
- (ii) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker, including any applicable laid-off workers;
- (iii) If applicable, explain the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position.

Additionally, the H-2B regulations require that if there has been a layoff of U.S. workers by the employer in the occupation in the area of intended employment within 120 days of the first date on which an H-2B worker is needed, the employer must document that the employer has notified or will notify each laid-off worker of the job opportunity involved in the application and has considered or will consider each laid-off worker who expresses interest in the opportunity, and the result of the notification and consideration. 20 C.F.R. § 655.15(h).

The regulations permit the CO to issue a partial certification, reducing either the period of need, the number of H-2B positions being requested, or both, based upon information the CO receives in the course of processing the temporary labor certification application, a Request for Further Information (“RFI”), or otherwise. 20 C.F.R. § 655.32(f).<sup>2</sup>

In this case, the CO determined that the Employer’s request for 45 foreign workers reflected the total number of temporary workers that the Employer needs for its upcoming landscaping season. Based on the information contained in the Employer’s recruitment report and ETA Form 9142, the CO determined that because the Employer was able to hire 35 domestic temporary workers, the Employer’s application should only be certified for ten workers. The Employer argues, on the other hand, that it needs 45 temporary workers *in addition to* the 35 temporary domestic workers that it was able to hire.

In its brief, the CO cites two H-2A cases to support the proposition that the CO’s assumption that the Employer only needs 45 total temporary workers was reasonable because the Employer’s application requests 45 foreign workers and the Employer’s recruitment report indicates that the Employer hired 35 temporary domestic workers. Accordingly, the CO argues that the reduction of workers by 35 was proper.

First, I note that while the Employer did not state in its recruitment report how many total temporary workers it needs for the season, its recruitment report contains all of the information required by Section 655.15(f)(2). Additionally, I disagree with the CO’s argument that the H-2A cases are persuasive in this particular context. An employer filing for temporary agricultural labor certification under the H-2A program files its recruitment report with the CO *after* it has already filed its application with the CO and its application has been accepted by the CO. 20 C.F.R. §§ 655.143, 655.156. An employer filing for temporary nonagricultural labor certification under the H-2B program, in contrast, must file its recruitment report at the same time that it files its application with the CO. 20 C.F.R. § 655.15(j)(1). It is reasonable for the CO to

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<sup>2</sup> While the CO failed to cite these regulations in its determination, as required by 20 C.F.R. § 655.32(e)(1), I find this error to be harmless because the Employer was notified of the basis for denial and there is no indication of any resulting prejudice.

consider the number of foreign workers requested in an employer's H-2A application to reflect the total number of temporary workers needed, because the employer has not completed its domestic recruitment when it files its application. However, this reasoning does not translate to H-2B applications. When an employer files its H-2B application, it has already completed its domestic recruitment and submitted its recruitment report. Therefore, an employer filing its H-2B application knows the exact number of temporary foreign workers that it needs because it has been unable to fill those positions with temporary domestic workers. The CO reduced the number of foreign workers certified based on the presumption that the Employer only needs a total of 45 temporary workers. As explained above, the logic of this presumption is unsound.

On appeal, the Employer argues that it needs 135 total temporary workers during its season, and in support of its argument, submitted payroll records, informational material, invoices from various projects, service contracts, and two bar graphs, one depicting the number of hours that the Employer's employees worked each month from 2008-2010, and the other depicting the Employer's monthly revenue from 2008-2010. AF 39-634.

The H-2B regulations limit the scope of the Board's review 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).

Neither the H-2B regulations, nor the ETA Form 9142 require an employer to indicate the total number of temporary workers that it needs. Therefore, the Employer was in full compliance with the regulations when it did not include this information in its recruitment report. Rather than requesting more information in order to discern the total number of temporary workers needed for the season, the CO denied the Employer's application based on an unwarranted assumption that the number of temporary foreign workers requested corresponds to the total number of temporary workers needed. As a consequence, a strict application of the scope of review regulation would deny the Employer its only opportunity to argue and present evidence demonstrating the total number of temporary workers that it needs for its season. Procedural due process

requires that an employer be permitted to respond to the basis for denial where the employer did not previously have the opportunity to establish the relevant facts.

Accordingly, in a case such as this, where the CO based the denial of 35 temporary foreign workers on an unfounded assumption that the Employer only needs 45 temporary workers, fundamental fairness requires this case to be remanded to allow the CO to consider the evidence that the Employer submitted with its request for review.<sup>3</sup>

### **ORDER**

In light of the foregoing, it is hereby **ORDERED** that this matter is **REMANDED** to the Certifying Officer for consideration of the evidence submitted on appeal.

For the Board:

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

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<sup>3</sup> In order to ensure that procedural due process had been satisfied in this case, the CO could have issued a Request for Further Information in order to determine the total number of temporary workers needed for this season. *See* 20 C.F.R. § 655.23(b), (c).