



**Issue Date: 19 May 2014**

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BALCA Case No.: 2014 TLN 29  
ETA Case No.: H-400-12080-350900

In the Matter of:  
**BURNHAM COMPANIES**  
Employer

Certifying Officer: Charlene G. Giles  
Chicago National Processing Center

Before: Richard T. Stansell-Gamm  
Administrative Law Judge

### **DECISION AND ORDER**

This case arises from the Burnham Companies' request to the Board of Alien Labor Certification Appeals ("BALCA") for an administrative review under 20 C.F.R. § 655.33<sup>1</sup> of a United States Department of Labor Certifying Officer's ("CO") denial of its 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, non-agricultural work within the United States on a one-time, seasonal, peak load, 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).

### **Background**

#### **H2-B Application**

On March 26, 2014, Mr. Keith Burnham, president of Burnham Companies, filed an H-2B Application for Temporary Employment Certification for the job title of "landscaper." The company needed 10 seasonal workers from April 15 to November 15, 2014 in Minnesota to perform multiple landscaping tasks, which involved the use of hand tools and equipment in performing sod laying, mowing, trimming, planting, watering, fertilizing, digging, raking, installing sprinklers, and installing "mortar-less segmental concrete masonry wall units." The basic hourly rate for the 40 hour week ranged from \$14.19 to \$25.00; correspondingly, the overtime rate ranged from \$21.29 to \$37.50 per hour. The minimum experience required for the occupation of "hardscape landscaping" was 24 months. The company had filed a job order with the applicable state workforce agency ("SWA") and published advertisements for the work in a local newspaper on March 2, 2014 and March 9, 2014. In an attached recruitment report, the

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<sup>1</sup>The applicable regulations may be found at 73 Fed. Reg. 78020 (Dec. 19, 2008).

company identified three U.S. individuals who had applied for the position but were not hired because they had “no experience in doing hardscapes.” The Employer also noted that due to limited interest in the local and surrounding areas the company was experiencing difficulty finding temporary employees for “this time of year.”

### Request for Further Information

On April 2, 2014, the CO issued a Request for Further Information (“RFI”), notifying Burnham Companies that she was unable to render a final determination on its application because Burnham Companies did not comply with all requirements for the application. In order to obtain information to ensure compliance, the CO identified four areas of deficiency.

First, the company failed to comply with its obligations under 20 C.F.R. § 655.22(h) because it did not include qualifications for its job opportunity that are normal and accepted by non-H-2B employers in the same or comparable occupations. Specifically, the application included a requirement that employees have 24 months experience in hardscape landscaping, which exceeded the typical three months experience for the occupation of landscaping and groundskeeping set out in “O\*Net.” As a result, the CO indicated Burnham Companies must provide documentation that the 24 months experience requirement was a normal qualification for the designated job.

Second, the company failed to comply with its obligations under 20 C.F.R. §§ 655.15(e)(2) and (f)(3) in regards to its advertisements and job order because the CO was unable to determine whether the denied applicants had been advised of the 24 month experience requirements. Consequently, the CO requested the submission of the advertisements and job order in order to verify compliance. The CO also identified the specific, multiple regulatory requirements for the contents of advertisements under 20 C.F.R. § 655.17, which included the minimum experience requirement, “the work hours and days, expected start and end dates of employment . . . whether or not overtime will be available . . . [and] the range of applicable wage offers.” The CO further advised that in accordance with 20 C.F.R. § 655.15(a), all compliant newspaper advertisements must have occurred prior to the company’s application date of March 26, 2014. According to the CO, “subsequent advertisements that occurred after the Employer filed its H-2B application with the Chicago NPC (National Processing Center) will not cure pre-filing advertisement errors.” As a result, the CO included a suggestion that if the employer is unable to furnish compliant newspaper advertisements, the company may choose to withdraw its application and re-apply.

Third, Burnham Companies’ recruitment report failed to satisfy the requirements of 20 C.F.R. § 655.15(j) for multiple reasons. The report was not signed and dated. The report did not include documentation to justify the rejection of the three U.S. applicants on the basis of lack of experience. And, the report did not identify each recruitment source by name. To remedy these shortfalls, the employer had to provide: evidence that the recruitment report was completed, signed, and dated no fewer than two calendar days after the job order was posted and no fewer than five calendar days after the date of the last newspaper advertisement; submit the resumes and other documentation used to disqualify the U.S. applicants; and, identify each recruitment source by name.

Fourth, the Employer listed a post office box address on the ETA Form, Section C, Items 3 -7, rather than a physical address. The CO requested a physical address.

#### Employer's Response

On April 8, 2014, in response to the CO's RFI, Mr. Burnham provided multiple documents, including the three resumes of the rejected U.S. worker applicants; copies of other job recruitment sites which required 24 months experience for similar work; copies of the March 2 and March 9, 2014 newspaper ads in THE DRUMMER and the associated invoices; and a copy of the job order at MinnesotaWorks.net. Mr. Burnham also added a statement indicating that the jobs to be filled involved detailed landscape electrical, hardscape, and irrigation work which required "very strong experience." He also authorized the CO to correct his application with an identified physical address. And, finally, he submitted a signed and dated recruitment report.

#### Final Determination

On April 22, 2014, the CO issued a final determination and denied Burnham Companies' H-2B application for alien labor certification on the basis that the company failed to establish: a) there were not sufficient U.S. workers available who were capable of performing the temporary services at the time of the filing of the petition, and b) the employment of foreign workers would not adversely affect the wages and working conditions of U.S. workers similarly employed.

While noting that Burnham Companies' response had corrected two of the four deficiencies identified in the RFI, the CO denied the application due to the following "two deficiencies that remained uncorrected:" a) failure to comply with pre-filing recruitment requirements under 20 C.F.R. §§ 655.15(e)(2), (f)(3); 655.17(f) and (g); and, b) failure to comply with the requirements under 20 C.F.R. §§ 655.15(j) for the recruitment report.

Specifically, although Burnham Companies provided newspaper advertisements and job order as requested, which included the 24 month experience requirement, neither the job order nor the newspaper ads included the start and end dates of the employment needs as required by 20 C.F.R. § 655.17(f). Additionally, employer's advertisements only listed an hourly wage of \$14.19, rather than the range of wages indicated in its application of \$14.19 to \$25.00 per hour as required by 20 C.F.R. § 655.17(g).

Further, while the Employer provided a signed and dated recruitment report, as well as the requested resumes and other documentation, Burnham Companies still did not identify its recruitment sources as required by 20 C.F.R. § 655.15(j). In particular, "the recruitment report does not list the names of any newspaper advertisements or job order information that was advertised during the time of recruitment."

## Appeal

On April 24, 2014, Mr. Burnham mailed Burnham Companies' appeal. In support of the appeal, Mr. Burnham noted that he had supplied the requested information regarding the 24 month experience requirement, including other job descriptions for similar positions showing a 24 month experience requirement. While preferring to "secure local workers," Mr. Burnham asserted there were not enough qualified U.S. workers in the area who were willing to work on a temporary basis. Finally, Mr. Burnham maintained that the company had established that the local labor force did not have enough workers to support its temporary hardscaping/landscaping labor need.

## BALCA Adjudication<sup>2</sup>

On April 29, 2014, BALCA received Burnham Companies' appeal of the CO's rejection of its application. On April 30, 2014, the Associate Chief Administrative Law Judge for Black Lung assigned the case to me for adjudication on behalf of BALCA. On May 2, 2014, BALCA received CO's appeal file. On May 6, 2014, I provided the parties an opportunity to file briefs in support of their positions by fax or email no later than the fifth day after their respective receipt of the appeal.

On May 9, 2014, the Associate Solicitor for Employment Training and Employment Legal Services submitted a Statement of Position in support of the CO's final determination. Counsel asserted that the Employer's job order and newspaper advertisements failed to comply with the regulatory requirements under 20 C.F.R. §§ 655.15(e)(2), (f)(3), and 655.17(f) to state the start and end dates of the proposed job opportunity, and provide complete wage information. In light of these identified deficiencies, the Employer could not establish that a fair test of the U.S. labor market for the job opportunity has been conducted. Consequently, the CO's denial of the application was reasonable and should be affirmed.

Burnham Companies did not file a brief.

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<sup>2</sup>Under 20 C.F.R. §§ 655.33, within 10 calendar days of the adverse determination, an employer may request an administrative review of the CO's denial by BALCA. Within five business days of receipt of the employer's appeal, the CO will assemble and submit to BALCA an administrative appeal file. Within five business days of receipt of the appeal file, counsel for the CO may submit a brief in support of the CO's decision. The Chief Administrative Law Judge may designate a single member or the three member panel of BALCA to consider the case. BALCA must notify the employer, CO, and counsel for the CO of its decision within five business days of the submission of the CO's counsel's brief, or 10 days after receipt of the appeal file, whichever is earlier.

## Discussion

Under the provisions of 20 C.F.R. § 655.33(e), upon completion of my administrative review of the appeal file, the Employer's request for administrative review, and consideration of the parties' positions, I may: a) affirm the CO's denial of the temporary labor certification, b) direct the CO to grant the certification, or c) remand the appeal file to the CO for further action.

The CO may only grant an employer's application to admit non-immigrant workers on H-2B visas for temporary nonagricultural employment in the United States if there are not sufficient domestic workers in the U.S. available who are capable of performing the temporary labor at the time the employer files its application for temporary employment certification. Consequently, the CO must determine whether the Employer conducted the H-2B regulatory recruitment steps that are designed to inform U.S. workers of the job opportunity in the employer's H-2B application. Two such recruitment steps involve SWA job orders, 20 C.F.R. § 655.15(e)(2), and newspaper advertisements of the job offer, 20 C.F.R. § 655.15(f)(3). Additionally, according to 20 C.F.R. §§ 655.17(e) and (g), these advertisements must expressly include, "the job opportunity's minimum education and experience requirements . . . the expected start and end dates of employment . . . [and] the wage offer, or in the event that there are multiple wages offers, the range of applicable wage offers. . ." And, 20 C.F.R. § 655.15(j)(2) requires an employer to complete a recruitment report which identifies the name and address of each U.S. worker applicant, the disposition of each applicant, and "each recruitment source by name."

In considering the two deficiencies associated with Burnham Companies' pre-application recruitment obligations under these provisions, upon which the CO's denial of the employer's application for alien labor certification is based, I will first address the recruitment report and then discuss the advertisements.

### Recruitment Report

Both in the RFI and the final determination, the CO correctly noted that Burnham Companies' recruitment report was deficient because it did not identify each recruitment source by name as required by 20 C.F.R. 655.15(j)(2)(ii). However, in its temporary labor certification application, Section H, ETA Form 9142B, captioned "Recruitment Information," Burnham Companies specifically identified: a) MinnesotaWorks as the SWA which processed the job order (#7556112) from February 25, 2014 to March 22, 2014, and b) two job offer advertisements which were printed on March 2 (Sunday) and March 9 (Sunday), 2014 in the newspaper called THE DRUMMER. Further, in response to other issues noted in the RFI, the employer provided copies of the two Sunday ads from THE DRUMMER, its job order posting on MinnesotaWorks.net, and email job inquires from three U.S. worker applicants, two of which indicated the individual had learned of the job opportunity from the county newspaper ad.

The application and additional documentation clearly identified Burnham Companies' recruitment sources by name. Consequently, although the signed and dated recruitment report submitted as a response to the RFI remained technically non-compliant since it still did not identify the recruitment sources, the company's application and addition submission materials

effectively satisfied the purpose behind the requirement that the recruitment report identify recruitment sources by name.

Accordingly, since the CO was well aware the recruitment sources utilized by Burnham Companies to dissemination information about its job offer to the local community of U.S. workers, denial of the application on basis of technical non-compliance of its recruitment report was unreasonable, placing form over substance. Had the sole basis for the rejection of Burnham Companies' temporary labor certification application been based on failure of the recruitment report to identify recruitment sources by name, I would have directed the CO to grant the certification.

### Advertisements

As previously discussed, and the CO specifically identified to Burnham Companies in her RFI, 20 C.F.R. § 655.17 establishes several necessary components of a job opportunity advertisements, which include most relevantly to this case, "the expected start and end dates of employment" and "in the event that there are multiple wage offers, the range of applicable wage offers."<sup>3</sup> According to the Employer's temporary labor certification application, the starting date for the temporary job opportunity of landscaper was April 15, 2014. The end date was November 15, 2014. Additionally, the basic hourly rate ranged from \$14.19 to \$25.00, with the associated overtime rates ranging from \$21.29 to \$37.50 per hour.

In response to the CO's RFI regarding its advertisements, Burnham Companies submitted copies of the two newspaper ads and its job order. Captioned "Landscaper," each ad from the Wright County Journal Press newspaper, THE DRUMMER, sets out the same work as indicated in Burnham Companies' alien labor certification application, and indicates that two years of experience is necessary. The jobs are categorized as "temporary/seasonal." The hours are "6 a.m. until 9 p.m. (daylight hours), Monday through Friday, with occasional weekend work as workloads dictate." In terms of compensation, "this position pays \$14.19 and up, depending on candidates' qualification."

The MinnesotaWorks.net job order indicates that the offered salary is "minimum \$14.99 hourly." In the job description section, the employer adds, "This position pays \$14.99 and up depending on the candidate's qualifications." The required experience is 24 months. The job description and required skills are similar to the temporary labor certification application. The hours of work are "anytime from 6 a.m. until 9 p.m. (day light hours) Monday through Friday, with occasional weekend as workloads dictate."

Notably absent in these advertisements is any information concerning the start and end dates of the job opportunity. Since the actual duration of this seasonal, temporary job opportunity extended for months rather than days or weeks, the omission in the advertisements and job order of notice that the temporary work would last for seven months is certainly a significant deficiency.

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<sup>3</sup>20 C.F.R. §§ 655.17(f) and (g).

Similarly, while indicating that multiple wage rates were possible based on qualifications, the advertised wage range of “\$14.19 and up,” fails to adequately inform potential U.S. worker applicants that with sufficient qualification the top hourly wage rate for this job opportunity was \$25.00, which with the advertised work hours of 6:00 a.m. to 9:00 p.m., and occasional weekend work, would yield an overtime hourly rate of \$37.50. These top-tier basic and over-time hourly wage rates obviously would be a critical consideration for a potential U.S. worker applicant with suitable qualifications. As a result, the absence of complete wage information in Burnham Companies’ advertisements is also a significant deficiency.

I have considered Mr. Burnham’s statement about the difficulty in finding qualified U.S. workers’ in the local area who are willing to work on a temporary basis, and his assertion that through its efforts Burnham Companies has established that the local labor force did not have enough workers to support its temporary hardscaping/landscaping labor need. However, the CO has an obligation to certify that in compliance with 8 U.S.C. § 1101(a)(15)(H)(ii)(b) the employer seeking H-2B visas has demonstrated there are not enough able and qualified U.S. workers available for the position sought to be filled and that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. And, in order to demonstrate compliance with these statutory provisions, the employer must test the labor market for suitable and qualified U.S. workers through recruitment efforts, which include publicizing advertisements of the job opportunity in local U.S. labor markets which fully disclose the wages, terms, and conditions of the temporary job opportunity.<sup>4</sup>

Based on review of Burnham Companies’ supporting documentation, including advertisements for the landscaping job opportunity which did not contain significant information about the actual duration of the temporary work and the full range of the possible hourly wage rates depending on qualifications, the CO reasonably concluded on a substantive basis that Burnham Companies had failed to sufficiently substantiate fulfillment of its statutory obligations to: a) demonstrate the lack of qualified U.S. workers in the local area for the landscaping job, and b) ensure U.S. workers were not prejudiced by the employment of nonimmigrant alien workers to perform the temporary landscaping job. Burnham Companies’ failure to provide complete information about the full range of wages for, and the duration of, the landscaping job in its advertisements to U.S. workers in the local area precluded the CO’s ability to certify that Burnham Companies had complied with 8 U.S.C. § 1101(a)(15)(H)(ii)(b), and in turn required her denial of its H-2B Application for Temporary Certification.

Accordingly, affirmation of the CO’s final determination and denial of Burnham’s Companies’ H-2B Application for Temporary Certification for failure to comply with 20 C.F.R. §§ 655.15(e)(2), (f)(3); 655.17(e), and (g) is warranted.

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<sup>4</sup>See 73 Fed. Reg. 78031 (Dec. 19, 2008).

**ORDER**

Accordingly, the Certifying Officer's final determination and denial of Burnham Companies' H-2B Application for Temporary Employment Certification are AFFIRMED under 20 C.F.R. § 655.33(e)(1).

**SO ORDERED:**

Richard T. Stansell-Gamm  
Administrative Law Judge

Date Signed: May 14, 2014  
Washington, D.C.