



**ISSUE DATE: 24 MARCH 2015**

BALCA CASE NO: 2015-TLN-00028  
ETA CASE NO: H-4300-15009-630339

*In the matter of:*

**DMP LAWCARE & LANDSCAPE, LLC**

### **Decision and Order Affirming Partial Denial**

DMP Lawncare & Landscape, LLC (DMP Lawncare) objects to the partial denial the Certifying Officer entered on its application for temporary alien labor certification—reducing the number of workers approved to 4.<sup>1</sup> It wants 20 H–2B visas. This proceeding at the Board of Alien Labor Certification Appeals (BALCA) reviews the Certifying Officer’s action;<sup>2</sup> a judge may affirm a denial; direct the Certifying Officer to grant the application; or remand the matter for more action.<sup>3</sup>

The parties see the accuracy<sup>4</sup> and justification<sup>5</sup> requirements in the H–2B program regulations differently:

- the Certifying Officer as the applicant’s opportunity to prove facts that justify the number of workers (and visas) requested;
- DMP Lawncare as its opportunity to obtain the right to bring as many as 20 workers to the St. Louis area, “to

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<sup>1</sup> 20 C.F.R. § 655.33(a) authorizing review and §655.54 (authorizing partial certifications). The request for review itself is found at Administrative Record (Admin. R.) P1 to P5. The application is at P141–P143.

<sup>2</sup> Admin. R. P246–276; 20 C.F.R. § 655.33(a) (authorizing review).

<sup>3</sup> 20 C.F.R. § 655.33(e).

<sup>4</sup> “An employer seeking H–2B labor certification must attest . . . that . . . : The dates of temporary need, reason for temporary need, and number of positions being requested for labor certification have been truly and *accurately stated on the application.*” 20 C.F.R. § 655.22(n) (emphasis added).

<sup>5</sup> The “criteria for certification . . . are whether the employer has: . . . established that the *number of worker positions being requested for certification is justified* and represent bona fide job opportunities. . . .” 20 C.F.R. § 655.23(b) (emphasis added).

meet current and potential business levels and activities”<sup>6</sup> during the application period.

Because the Secretary’s certification deals in jobs, not options,<sup>7</sup> the reduction is affirmed.

**A. Statement of the Case**

The Certifying Officer approved only 4 workers because DMP Lawncare didn’t show it needed 20. The Officer’s inquiry was prompted in part by the terse explanation the application gave to explain why it needs 20 H–2B workers, and in other part by a program audit done in 2014 by the Office of Foreign Labor Certification in the Employment and Training Administration of the 20 2013 H–2B labor certifications DMP Landscape had received.<sup>8</sup> The audit culminated in a warning to DMP Lawncare that it had violated the accuracy requirement of 20 C.F.R. § 655.22(n) in 2013, by requesting and receiving certification for more alien workers than it hired.<sup>9</sup> Twenty were regularly sought and approved, when only 2 to 4 have been hired in recent years. An audit finding told DMP Landscaping that in “future H–2B applications [it] must fully comply with all requirements” of the H–2B program.<sup>10</sup> The Certifying Officer gave DMP Lawncare the opportunity to show 20 positions were bona fide job opportunities in 2015 before he reduced them.

The administrative review DMP Lawncare has requested precludes filing new evidence here.<sup>11</sup> The Certifying Officer presented the appeal file on February 23, 2015. I was assigned to the matter the following day.

Written arguments from the attorney for DMP Lawncare and the Solicitor of Labor on behalf of the Certifying Officer were received by March 2, 2015. Disposition was delayed by an order of injunction a U.S. District Court entered.<sup>12</sup> The Chief Judge of this Office stayed

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<sup>6</sup> Admin. R. P18.

<sup>7</sup> What is proposed is analogous, but not identical to an option. In securities law, an option is a contract that gives a purchaser the right to buy or sell a security, such as stock, at a fixed price within a specific period of time. Here DMP Lawncare seeks authority, at its sole discretion, to hire up to as many as 20 non-immigrant alien workers to be admitted on H–2B visas from April 1, 2015 to December 14, 2015.

<sup>8</sup> Program audits are authorized at 8 U.S.C. 1184(c)(14)(A), (B); 8 C.F.R. § 214.2(h)(6)(ix); 20 C.F.R. § 655.24.

<sup>9</sup> Admin. R. at P112–P114.

<sup>10</sup> Admin. R. at P112.

<sup>11</sup> Review is limited to legal argument based upon “such evidence as was actually submitted” to the Certifying Officer before the decision under review was made. 20 C.F.R. § 655.33(b)(5). No new evidence was offered.

<sup>12</sup> *Perez v. Perez*, No. 14-cv-682MCR/EMT (N.D.Fla. Mar. 4, 2015), docket entries 14 & 15.

pending H–2B proceedings.<sup>13</sup> The District Court stayed its March 4th Injunction Order, “otherwise [holding] it in abeyance” until April 15, 2015.<sup>14</sup> No legal impediment to the entry of a final order remains.

## **B. Labor Certifications**

The H–2 labor program that regulates the temporary admission and employment of non-immigrant foreign workers created in the Immigration and Nationality Act of 1952<sup>15</sup> (INA), as amended, was split in 1986 into two separate programs. One covers agricultural workers, the other non-agricultural workers.<sup>16</sup>

The Secretary of Labor’s certification is a precondition for an alien worker to obtain H–2B immigration status from the Department of Homeland Security.<sup>17</sup> Section 101(a)(15)(H)(ii)(b) of the INA,<sup>18</sup> creates the H–2B visa classification for temporary workers not employed in agriculture. The visa will admit a foreign worker to the United States who has “a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other [than agricultural] temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in the country.”<sup>19</sup>

Section 214(c)(1) of the INA, as amended,<sup>20</sup> requires an employer to petition the Department of Homeland Security to determine whether to classify a prospective temporary worker as an H–2B non-immigrant. Its adjudication of that petition ultimately allows the worker to obtain an H–2B visa from the Secretary of State.

U.S. Citizenship and Immigration Services (USCIS) is the component within the Department of Homeland Security that adjudicates petitions for H–2B status.<sup>21</sup> Section 214(c)(1) of the INA<sup>22</sup> requires the Secretary of Homeland Security to consult with “appropriate agencies of the Government” in its H–2B decisions.<sup>23</sup> The Secretary of Homeland Security consults with the Secretary of Labor

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<sup>13</sup> Order Staying Administrative Proceedings, entered on March 13, 2015.

<sup>14</sup> *Perez v. Perez*, No. 14-cv-682 (N.D.Fla. Mar. 18, 2015).

<sup>15</sup> 8 U.S.C. § 1101, et seq.

<sup>16</sup> H.R. Rep. No. 99-682, pt. 1, at 80; see also Immigration Reform and Control Act of 1986, Pub. Law No. 99-603, § 301(a), 100 Stat. 3359, 3411 (codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a)).

<sup>17</sup> 8 U.S.C. § 1184(c)(1); 8 C.F.R. § 214.2(h)(6)(iii) (2009).

<sup>18</sup> Codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

<sup>19</sup> 8 U.S.C. § 1101(a)(15)(H)(ii)(b); see also 8 C.F.R. § 214.2(h)(1)(ii)(C).

<sup>20</sup> Codified as 8 U.S.C. § 1184(c)(1).

<sup>21</sup> See 8 C.F.R. § 214.2(h)(6) et seq.

<sup>22</sup> 8 U.S.C. 1184(c)(1).

<sup>23</sup> 8 U.S.C. § 1184(c).

because the Department of Labor is in the best position to advise Homeland Security on whether “unemployed persons capable of performing such service or labor cannot be found in this country.”<sup>24</sup>

The Secretary of Homeland Security and the Secretary of Labor have jointly determined<sup>25</sup> that the best way to consult is to require that, before an employer files an H–2B petition at Homeland Security, it must first obtain a temporary labor certification from the Secretary of Labor.<sup>26</sup> Certification by the Secretary of Labor shows:

1. that the employer has indeed made unsuccessful efforts to recruit a U.S. worker for the job it seeks to admit an H–2B worker to perform, and
2. each H–2B worker, and any U.S. worker the employer successfully recruits for the work, will be paid no less than the prevailing wage for that work in the geographic area of the job, a wage level the Secretary of Labor sets.<sup>27</sup>

The Secretary of Labor thereby assures USCIS that U.S. workers capable of performing the services or labor are unavailable, and admission of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers.

A Certifying Officer of the Office of Foreign Labor Certification, a part of the Employment and Training Administration of the U.S. Department of Labor, disposes of applications for temporary labor certifications on behalf of the Secretary of Labor.<sup>28</sup>

### **C. This application**

Since its founding in 2004, DMP Lawncare has applied for certification to use temporary non-immigrant H–2B workers every

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<sup>24</sup> See WAGE METHODOLOGY FOR THE TEMPORARY NON-AGRICULTURAL EMPLOYMENT H–2B PROGRAM, PART 2, published at 78 Fed. Reg. 24047, 24048 (Apr. 24, 2013), *relying on*, 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

<sup>25</sup> *See* 78 Fed.Reg. at 24048 (Apr. 24, 2013).

<sup>26</sup> 8 C.F.R. § 214.2(h)(6)(iii)(A).

<sup>27</sup> 78 Fed. Reg. 24047, 24048; 8 C.F.R. § 214.2(h)(6)(iv)(A).

<sup>28</sup> 20 C.F.R. § 655.23(c)(3) (2009). The U.S. District Court for the Northern District of Florida entered a stay on May 16, 2012 that blocked revisions the Secretary of Labor published on Feb. 21, 2012 to H–2B program regulations, which would have been codified as 20 CFR Part 655, Subpart A. *See* 77 Fed. Reg. at 10038-10109 and 10147-10169. The notice the Secretary gave that those revisions would not go into effect was published at 77 Fed. Reg. at 28764 (May 16, 2012). In *Bayou Lawn & Landscape Services v. Sec. of Labor*, 713 F3d 1080 (11th Cir. 2013), the Court of Appeals affirmed the stay. This leaves the regulations first published at 73 Fed. Reg. at 78020-78069 (Dec. 19, 2008) as the controlling regulations. All references are to the 2009 version of the Secretary’s H–2B regulations in the C.F.R., which codified the late 2008 Federal Register publication, unless stated otherwise.

year.<sup>29</sup> This application for calendar year 2015 seeks a labor certification to hire workers from Mexico<sup>30</sup> to work for it in the County and City of St. Louis, Missouri as landscapers and groundskeepers from April 1, 2015 to December 14, 2015. Landscaping is not done in winter, so the nine month period of need qualifies as seasonal.<sup>31</sup> The January 5, 2015 labor condition application explained tersely why DMP Lawncare wants 20 workers:

Due to the size and scope of DMP's business operations, there are twenty (20) positions available for the Temporary job Opportunity. Please be advised that there has been no increase or decrease in the number of H-2B positions being requested from the previous year.<sup>32</sup>

A three page "Customer Contact List"<sup>33</sup> was attached, to show the places of employment.<sup>34</sup> What more, if anything, DMP Lawncare may have expected the Certifying Officer to infer from the list went unstated.

The Certifying Officer asked DMP Lawncare to respond to a Request for Further Information described below.

**D. The application raised questions about whether 20 jobs were realistically available in 2015**

The Certifying Officer notified DMP Lawncare that on initial review, the application did not persuade him that each of the 20 positions represented a bona fide job opportunity.<sup>35</sup> He requested this additional information:

1. Summaries of monthly payroll reports for the previous three years. The summaries were to show for each month the full-time and the temporary employment in the

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<sup>29</sup> Admin. R. at P148, P246.

<sup>30</sup> The application itself doesn't state the nationalities of the workers to be admitted, but the employer asserts in its response to the Request for Information it has made unsuccessful but "vigorous efforts in Mexico to recruit and hire potential workers to fulfill all of its temporary landscaping and groundskeeping requirements," in every year from 2004 to 2014. Admin. R. at 151, and argued that there is "fierce competition to obtain the services of willing workers in Mexico to work in the United States." Admin. R. P146.

<sup>31</sup> [N]eed is considered temporary if justified . . . as: . . . a seasonal need." 20 C.F.R. § 655.6(b). In the winter months from December 15 to February 15, the company performs snow and ice removal.

<sup>32</sup> Admin. R. P266.

<sup>33</sup> Admin. R. P269-P272.

<sup>34</sup> Admin. R. P249, at box F.c.7a.

<sup>35</sup> A Request for Further Information is described at 20 C.F.R. § 655.23(c). This one, dated January 14, 2015, is found at Admin. R. P242-P245.

occupation request (landscaping and groundskeeping) the total hours worked, and the total earnings received;

2. A further explanation of how DMP Lawncare determined the number of workers it requested; and
3. A further explanation of how the documents DMP Lawncare submitted support the request for 20 non-immigrant workers.<sup>36</sup>

The employer had an opportunity, not restricted to what the to the monthly payroll reports showed, to explain why it needs 20 workers in 2015.

**E. The reply and partial certification**

The reply DMP Lawncare gave on January 16, 2015<sup>37</sup> failed to convince the Certifying Officer that labor certifications for all 20 positions were justified. He approved four.<sup>38</sup>

In the three years immediately preceding this application (2012, 2013 and 2014) DMP Lawncare requested approval for 20 workers too, but the audit response from DMP Lawncare stated that in both 2013 and 2014 the company actually hired just 4 workers on H-2B visas each year, and in 2012 only two.<sup>39</sup>

The statement DMP Lawncare made in the reply to the request for additional information complained bitterly that the Certifying Officer was requiring it to do the impossible: to predict the future. It argued that:

. . . . [T]he employer never has any way of knowing at the commencement of the Labor Certification process how many workers it will have by the time its seasonal work activities commence.

As you can see, the number of temporary employees requested by the Employer from year to year represents the optimum number of workers that the Employer would like to have in order to meet current and potential business levels and activities. As Mr. Puyear [the President of DMP Lawncare] points out, DMP has never been able to obtain the number of temporary workers that it actually needed, and it has never been able to obtain the services of these temporary workers when it actually needed them – no matter how early it filed its Labor Certification Applications and Nonimmigrant Petitions, and no matter how diligently it prosecuted its cases.<sup>40</sup>

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<sup>36</sup> Admin. R. P245.

<sup>37</sup> Admin. R. P144–P241.

<sup>38</sup> The denial appears at Admin. R. P9–P13.

<sup>39</sup> Admin. R. P156.

<sup>40</sup> Admin. R. 147.

Its admirable candor does not advance its cause. Its argument confuses efforts with results. The difference between the 20 workers the labor conditions applications historically requested and few hired in recent years may affect the volume of business it can do.<sup>41</sup> By its own argument, its lack of success in hiring foreign workers over the last three years limited growth, not the number of positions certified. It hired nowhere near the 20 approved in 2012 and 2013 or the 14 approved in 2014—2 in 2012, 4 each in 2013 and 2014. The bottleneck lies elsewhere.

Nothing in the response explains new or different efforts DMP Lawncare intends to take that would be likely to attract 20 H-2B workers were they authorized. Nor does it show why the Certifying Officer should be convinced it is more probable than not that its unstated (and unknown) efforts would succeed.

#### **F. Discussion**

DMP Lawncare makes five arguments against the reduction.

1. All its earlier application had been approved, it has a good record, and one adverse audit can't be characterized as an "audit history" of problems.
2. The brief statement of reasons the Certifying Office gave, never mentioned the explanatory letter that accompanied the payroll data. This, it says, gives "conclusive proof"<sup>42</sup> its arguments had been ignored, despite the Officer's request for them.
3. The reduction creates a conundrum. An application for alien employment certification necessarily is made before the aliens can be hired, but the Department judges the accuracy of statements found in an application retrospectively.
4. The Certifying Officer's choice to authorize only the four alien workers the company "had to settle for in the past" ignores that the shortfall was due to business, economic, and logistical conditions beyond its control. The reduction in labor available eliminates the possibility of economic growth this year.
5. The reduction is a penalty imposed without a statutory or regulatory basis.

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<sup>41</sup> This argument appears at Admin. R. P47.

<sup>42</sup> Admin. R. P3.

Several flaws doom the arguments. As the applicant, DMP Lawncare is the party with an affirmative burden to prove why it needs 20 temporary non-immigrant H–2B workers.<sup>43</sup> Parties are commonly tasked to offer proof of a future event good enough to persuade an adjudicator to make a finding about what is likely in the future, i.e., to reach a finding by a preponderance of evidence.

Requiring a party with the burden of proof to demonstrate something about the future is commonplace. A bidder on a contract for public works can be required to show it has the staff, finances and management to complete the project according to specifications and on time. In a personal injury verdict, a jury will set dollar amounts to be paid today for medical care needed years into the future. A judge may grant a worker who suffers invidious discrimination front pay<sup>44</sup> when a return to the old job would be unworkable. An estimate about the future made on the available data will do.<sup>45</sup>

A business does the same. A manager commonly and necessarily projects future income and expenses, decides whether to invest in durable equipment so it will be available in the future, determines how many employees are needed, and how much inventory to keep on hand. The quality of the projection depends on the underlying assumptions.

The estimate DMP Lawncare made that it could fill 20 H–2B positions was demonstrably wrong, based on payroll records, for the last three years running. After the recent audit showed this, the Department warned DMP Lawncare to be prepared to justify the number of workers it requested in future labor condition applications.

Yet the application didn't adjust the number of positions it could fill with laborers admitted on H-2A visas in 2015. The brief reason it offered to once more seek 20 visas, quoted above in section C, was no reason at all. The size of its operation for the last three years hadn't led it to hire anywhere near 20 H–2B workers. The Certifying Officer offered it the opportunity to show sound reasons to believe that in 2015 something(s) changed.

DMP Lawncare responded with generalities untethered to its specific situation. Of course some American citizens who are offered jobs might be no-shows, and leave the business understaffed. But were

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<sup>43</sup> “The proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d); *see also, Director, O.W.C.P v. Greenwich Collieries, Inc.*, 512 U.S. 267 (1994).

<sup>44</sup> Front pay is meant to cover the period until the wronged employee “can reasonably be expected to have moved on to similar or superior employment.” *Williams v. Pharmacia, Inc.*, 137 F3d 944, 954 (7th Cir. 1998). It encompasses predictions about the future.

<sup>45</sup> A front pay calculation is a “prediction of a series of future events .... [,] crafting a front pay award necessarily entails some degree of speculation.” *Trainor v. HEI Hospitality, LLC*, 699 F.3d 19, 31 (1st Cir. 2012) (discussing front pay calculations in a claim of age discrimination and retaliation).

that true for a significant number of positions, it could have employed all or nearly all 20 H-2B workers approved in its 2012 to 2014 labor condition applications, not two to four. The company ought to know what contracts or client base it has, and from them project labor needed in 2015. Successful marketing last year might have produced actual contracts that increase the number of employees required in 2015. Different recruitment efforts might give reason to believe Mexican nations would take 20 positions. Specific changes could have been explained. But if the book of business hasn't grown, or some other significant circumstance in its hiring program changed, to continue to ask for 20 non-immigrant temporary workers when no more than four had been hired in the last three years looks like folly.

The Certifying Officer was right, the certification was reduced "because the employer did not justify a bona fide need for the 20 workers."<sup>46</sup>

Approving just 4 workers wasn't a lawless act. Reduction in "the number of H-2B positions being requested" is specifically contemplated in the regulation.<sup>47</sup>

The denial by the Certifying Officer was correct, and is affirmed.

William Dorsey  
ADMINISTRATIVE LAW JUDGE

San Francisco, California

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<sup>46</sup> Admin. R. P6 & P141.

<sup>47</sup> 20 C.F.R. § 655.32(f).