

# U.S. Department of Labor

Board of Alien Labor Certification Appeals  
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**Ross Landscape and Paving Services, Inc.**  
*Employer.*

**Issue Date: 01 May 2017***In the Matter of:*

**BALCA No. 2017-TLN-00047**

**ETA No. H-400-17009-152445**

Amanda Butler, Esquire  
For Administrator and Department of Labor

Steven Barsamian, Esquire  
For Employer

## DECISION AND ORDER

On April 5, 2017, the Board of Alien Labor Certification Appeals (“BALCA”) received a letter from Ross Landscape and Paving Services, Inc. (the “Employer”) requesting administrative review of the Certifying Officer’s Final Determination in the above-captioned H-2B temporary labor certification matter. I held a telephone conference April 14, 2017. At that time, the parties agreed to extend the time lines and the parties were to report jointly by April 20, 2017. I was advised at that time that the parties could not agree to remand and I ordered simultaneous briefs.

The Administrator objected to Employer’s brief because it was out of time. However, I deny that motion. Both of the parties filed briefs.

### I. STATEMENT OF THE CASE H-2B Application and Notice of Deficiency

On January 9, 2017, the Certifying Officer (“CO”) received Employer’s application for temporary alien labor certification. AF 57-67. Employer had filed an H-2B Application for Temporary Employment Certification (Form ETA-9142B) seeking to certify 10 seasonal Landscaping and Groundskeeping Workers, Standard Occupational Classification (SOC) code 37-3011 (hereafter, “[worker]”), with a period of intended employment from April 1, 2017 to December 13, 2017, and with worksites in the Montgomery County-Bucks County-Chester County, PA Metropolitan Division. AF 57-60.

On February 21, 2017, the Chicago National Processing Center (Chicago “NPC”) issued a Notice of Acceptance to Employer. AF 49-55. The Notice of Acceptance included requirements for accepting referrals and considering U.S. applicants, including procedural requirements for interviews of U.S. workers, should Employer decide to conduct such pre-hire interviews. AF 53. The notice, citing 20 CFR 655.40(d), also stated that “If you wish to interview U.S. applicants, you must conduct the interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost.” AF 53 (emphasis added). On March 7, 2017, CNPC received Employer’s submission of its initial signed and dated recruitment report on March 7, 2017. AF 32-48. This initial recruitment report included copies of the advertisements that Employer had placed for landscaping positions at 40 hours per week, 7:30 a.m. – 4:30 p.m., AF 42-43, and also revealed that Employer instructed applicants who expressed interest in the position to appear at the employer’s office at 5:30 a.m. for an interview. AF 40. The recruitment report also showed that

Employer had scheduled 5:30 a.m. interviews with two applicants, one of whom failed to appear for the interview, and one of whom did appear for the interview and whom Employer intended to hire. Id.

On March 9, 2017, CNPC issued a minor deficiency email to Employer. AF 30-31. CPNC, citing 20 CFR 655.40(d), explained that it had determined that the employer's "instruct[ions for] applicants to come to the office for an interview at 5:30 am" showed that the "employer lacked a good faith effort for recruitment." AF 30. CNPC explained that section 655.40(d) was intended "to block employers from offering preferred treatment to potential H-2B workers, and [to] ensure[] that employers conduct a fair labor market test." Id. Consequently, CNPC directed that Employer "must allow for a reasonable interview time within traditional business hours" and "must provide the CNPC with an updated recruitment report which contains all of the required information included above." Id. (emphasis in original).

On March 13, 2017, Employer submitted a revised certification of recruitment, which was updated to indicate Employer's further outreach to applicants via certified letters and telephone messages. AF 26-29. The materials submitted were devoid of any direct evidence that Employer had provided potential U.S. workers with an option of interviewing within traditional business hours. See id. Instead, the signed recruitment report stated: "Regarding the time of interview at 5:30 AM, we begin work at 6 AM and employees generally report for work between 5:30 and 6 AM. We interview all applicants for employment, whether related to H-2B or not, at 5:30 AM." AF 29. The cover letter enclosing the revised recruitment report likewise asserted "all applicants for employment are typically interviewed at 5:30 AM. If an applicant cannot appear for interview at 5:30, it is unlikely they will be able to report for work at 6 AM." AF 27.

#### FINAL DETERMINATION AND APPEAL

On March 22, 2017, the CO issued a Denial of H-2B application, citing a deficiency in the employer-conducted recruitment under 20 CFR 655.40(d). AF 13-25. The CO noted the requirement, under the regulations, to extend "a good faith effort for recruitment" of U.S. workers by offering "applicants a reasonable interview time within normal business hours," and to avoid using the interview process to the detriment of U.S. workers. AF 16. The CO concluded that:

while there is a reasonable business explanation for scheduling interviews during the hours of operation, starting as early as 5:30 a.m., it does not follow that this would be the only time offered to interested applicants interviewing for the position.... The employer did not provide a window of time in which interviews could be selected by interested applicants, which is deemed unreasonable and does not demonstrate good faith recruitment efforts.... [T]he employer has failed to offer alternative interview times to applicants.

AF 17 (emphasis in original). The CO noted that "[w]hile the employer opined that any workers unable to report to an interview at 5:30am would be unlikely to report to work by 6:00am..., these individuals are not workers, they are candidates whose current schedules might differ from that of the employer." Id.

Employer argues that it is a small sole proprietorship and it has utilized the H2 B program for several years. It admits that one potential employee was unqualified but argues that denial of all 10 requested workers is unreasonable, arbitrary and capricious.

It is not within the reasonable determination made by the Chicago National Processing Center when it determines that one qualified applicant was disqualified for other than lawful job related reasons. The Certifying Officer has always reduced the number of requested workers by the number of workers improperly found unqualified and issued partial certification. Employer, Ross

Landscape and Paving Services Inc., has appealed the denial of all 10 of its workers premised on this position that at most, it should be “penalized” one worker who agreed to report for interview and did not.

See Brief.

On April 5, 2017, Employer submitted its Notice of Appeal to the BALCA, seeking administrative review of that denial. AF 1-12. In its appeal, the employer defended its selection of 5:30 a.m. as the interview time, “reason[ing] that its employees report to work between 5:30 and 6 AM... It has always conducted its interviews for all employees at that time.” AF 2. In its appeal, Employer also suggested, for the first time, that “5:30 AM was not the only time applicants could have been seen.” AF 2. The employer also contended that as only one applicant had scheduled a 5:30 a.m. job interview but failed to appear, the employer’s request for certification should be granted as to nine of the ten positions for workers that the application sought. AF 3.

## II. ISSUE

Whether the CO’s determination that the employer’s conduct of recruitment of U.S. workers failed to meet the requirements specified under 20 CFR 655.40(d) was arbitrary, capricious or otherwise not in accordance with the law?

## III. STANDARD OF REVIEW

A Certifying Officer’s denial of certification must be upheld unless shown by the employer to be arbitrary or capricious or otherwise not in compliance with law. *Brook Ledge, Inc.*, 2016-TLN-00033, \*5 (May 10, 2016) (H-2B) (“BALCA reviews [H-2B] decisions under an arbitrary and capricious standard.”); *Tarilas Corporation*, 2015-TLN-00016, at 5 (March 5, 2015) (H-2B); *J and V Farms, LLC*, 2016-TLC-00022, at 3 (March 4, 2016) (same standard of review in H-2A cases); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, at 2 (May 4, 2015) (H-2A).

## IV. ARGUMENT

It is well-settled that the employer bears the burden of establishing that it is entitled to temporary labor certification. *Putnam Brokers*, 2017-TLN-00008, at 5 (Dec. 21, 2016) (the employer carries the burden of proof to show that it has met the requirements of the H-2B program, citing 8 U.S.C. 1361); *Bassett Constr.*, 2016-TLN-00023, at 7 (Apr. 1, 2016) (citing 8 C.F.R. § 214.2(h)(6)(ii)(B)(1)). In the present case, the employer has not carried that burden. As the CO’s determination to deny certification was neither arbitrary nor capricious, the agency’s decision must be upheld. See *Three Seasons Landscaping*, 2016-TLN-00045, at 19 (June 15, 2016) (noting that BALCA “has adopted the position that review of the [CO’s] determination of H-2B applications is governed by the ‘arbitrary and capricious’ standard”).

### Employer Failed to Conduct a Good Faith Recruitment of U.S. Workers

The CO appropriately denied Employer’s request for labor certification due to the employer’s failure to demonstrate compliance with the regulatory requirement to conduct a good faith recruitment of U.S. workers. “The purpose of these [interview] requirements is to ensure that the employer does not use the interview process to the disadvantage of U.S. workers.” 80 Fed. Reg. 24042, 24076 (Apr. 29, 2015) (preamble to H-2B interim final rule). As this court has held, “Americans may not be subjected to more onerous interview requirements than foreign workers.” *Jensen Tuna*, 2016-TLC-00064, at 4 (Aug. 26, 2016). In particular, the employer cannot enforce an interview requirement on U.S. workers in manner that effectively “offer[s] preferential treatment to potential H-2B workers,” thereby favoring foreign

workers over U.S. workers. 80 Fed. Reg. at 24076. There is no evidence that Employer, in recruiting foreign workers, also required the same 5:30 a.m. interview time. See *Jensen Tuna*, 2016-TLC-00064, at 3 (criticizing an employer for only offering U.S. workers interviews at 2:30 a.m., and noting the lack of evidence that foreign workers were required to appear for interviews at the same disadvantageous time).

As the court noted in *Jensen Tuna*, “People get up at odd hours to work graveyard shifts when paid for it. Unskilled workers aren’t ordinarily told to appear for their interviews (i.e., before they are being paid) at 2:30 a.m.” 2016-TLC-00064, at 3. While 5:30 a.m. is admittedly not as extreme as 2:30 a.m., the fact remains that a requirement to interview outside of normal business hours can pose an expected impediment to unskilled workers, who must bear the financial and logistical burden of presenting themselves at an office for an interview, at an hour that may precede the opening hours of public transportation, day care centers, and other logistical necessities, without the compensation of a paycheck to cover these burdens. Interviews at odd hours do not meet the requirement of 20 CFR 655.40(d) that U.S. applicants “incur little or no cost” in interviewing.

OALJ has previously found, in the context of a petition for permanent employment certification, that an employer who only offers interview slots outside of normal business hours failed to recruit U.S. applicants in good faith. “An employer may not discourage U.S. applicants by rigid interview schedules,” such as only offering interviews before the start of shifts, even where the employer’s shifts begin before normal business hours. *JWB Constr. Servs.*, 2002-INA-143, at 8-9 (Sept. 5, 2003). In the *JWB* case, which involved a 6:00 a.m. interview time, the court affirmed a finding that the employer failed to establish good faith in conducting its recruitment, noting that “[a]lthough construction companies may typically begin business operations early in the morning, the appearance is that Employer set up these very early morning interviews knowing that the applicants might have a difficult time attending at that hour.” 2002-INA-143, at 8-9. The Administrator argues that Employer, in insisting upon a 5:30 a.m. interview time, failed to establish good faith in recruitment. The Employer argues that it could have changes the time, if requested.

To the contrary, the Administrator argues that the CO, in issuing a minor deficiency notice, provided the employer ample opportunity to cure its recruitment problems. As the CO instructed, Employer simply needed to “allow for a reasonable interview time within traditional business hours” and to “provide the CNPC with an updated recruitment report” that showed compliance with this requirement. AF 30 (emphasis in original).

Employer directs me to 20 CFR 655.54:

...the CO may issue a partial certification, reducing either the period of need or the number of H2 B workers or both for certification, based upon information the CO received during the course of processing the application for temporary employment certification, For each US worker who is qualified and who will be available at the time and place needed to perform the services or labor and who has not been rejected for lawful job-related reasons.

The Administrator argues that Employer’s response did not demonstrate compliance. Instead, while the new recruitment report indicated that messages had been left with potential U.S. workers, the recruitment report was utterly devoid of any information about the details of the interview opportunity, if any, extended to those U.S. workers. AF 28-29 (including entries indicating that on March 9, 2017, “Denise left msg.” or “sent a certified letter” regarding the laborer position). The CO, presented with an intransigent defense of the 5:30 a.m. interview time, and with no evidence demonstrating that interview opportunities had been extended during normal business hours, acted appropriately in denying Employer’s certification request. See AF 30; see also *Fremont Forest Systems, Inc.*, 2010-TLN-00038, at

3 (Mar. 11, 2010) (affirming denial of labor certification where the employer failed to comply with the recruitment requirements, despite the CO specifically identifying the changes necessary for compliance).

Employer, in its appeal, contends that “5:30 AM was not the only time applicants could have been seen.” AF 2. However, the record contains no evidence that Employer ever informed either the applicants or the CO of any flexibility on interview times. The employer’s claim of metaphysical flexibility in interview times has arisen too late. “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). “BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination.” *Putnam Brokers*, 2017-TLN-00008, at 5 (Dec. 21, 2016).

As stated above, Employer suggests that the appropriate remedy would be to certify nine of the ten positions it has requested, i.e., a partial certification with the number of positions reduced by one on account of the no-show for a 5:30 a.m. interview. See AF 3. According to the Administrator, this proposal mistakes the order of operations. In order to receive a temporary labor certification, the employer must first demonstrate compliance with the requirements to access the H-2B labor program, including the requirement to conduct a good faith recruitment of U.S. workers. Under the regulations, “[t]he criteria for certification include whether the employer... has complied with all of the requirements necessary to grant the labor certification.” 20 CFR 655.51(a) (emphasis added). Compliance with all of the requirements is a necessary prerequisite for approval of the temporary labor certification as submitted by the employer, per 20 CFR 655.52, as well as for partial certification, per 20 CFR 655.54.

Even if I accept the Employer’s argument, it did not establish that past practice permitted a change in time, or that the CO should have applied equitable distribution to permit Employer to hire some of the employees. The Employer failed to provide documentation to substantiate those allegations.

## V. CONCLUSION

The Employer bears the burden of proof. Although *Jensen Tuna* is not precedent, based on the record, after a review of the record, I find that Employer failed to set forth a basis to compromise the finding, failed to provide proof of past practice, and therefore, the CO’s determination is not arbitrary or capricious or otherwise not in compliance with law. The denial is **AFFIRMED**.

**DANIEL F. SOLOMON**  
**ADMINISTRATIVE LAW JUDGE**

