



Issue Date: 28 April 2017

**BALCA Case Nos.: 2017-TLN-00039
2017-TLN-00040
2017-TLN-00041
2017-TLN-00042
2017-TLN-00043
2017-TLN-00044
2017-TLN-00045**

In the Matter of:

**THREE SEASONS LANDSCAPE
CONTRACTING SERVICES, INC.,**

Employer.

**DECISION AND ORDER AFFIRMING CERTIFYING OFFICER'S
DENIAL OF CERTIFICATION**

On April 4, 2017, the Board of Alien Labor Certification Appeals (“BALCA”) received requests for administrative review of the Certifying Officer’s (“CO”) Final Determinations in the above-captioned H-2B temporary labor certification matters.¹ By Order dated April 10, 2017, the undersigned consolidated all seven above-captioned claims for purposes of adjudication.

The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”). 8 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification.

¹ On April 29, 2015, the Department of Labor (the “Department”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). The IFR applies to these cases.

² 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). The definition of temporary need is now governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113) § 113 (Dec. 18, 2015).

If the CO denies certification, an employer may seek administrative review before BALCA. 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

On January 2, 2017, Three Seasons Landscape Contracting Services, Inc. (the “Employer”) filed with the CO seven Applications for Temporary Employment Certification, ETA Forms 9142B (“Applications”).³ The Employer requested certification for a total of fifteen Groundskeeping Workers,⁴ from April 1, 2017 until December 23, 2017, based on an alleged seasonal need for workers during that period.⁵

On February 9, 2017, the CO issued a Notice of Acceptance (“NOA”) in each of the seven cases. The CO advised the Employer of the regulatory requirements for accepting referrals and considering, interviewing, and hiring U.S. applicants. Thereafter, the Employer filed its recruitment reports with the CO, which revealed that it had scheduled interviews with fifty-six applicants, all of which were scheduled at 6:30 am, only one of whom appeared for a scheduled interview.

Thereafter, in early March, the CO sent the Employer minor deficiency emails in each of the seven cases.⁶ In each instance, the CO explained that the Employer was obligated to meet the interview requirements specified in 20 C.F.R. § 655.40(d). The CO noted that the Employer’s recruitment report indicated that the Employer instructed applicants to come to the Employer’s office for an interview at 6:30 am, and the CO concluded that the Employer “lacked a good faith effort” for recruitment by only offering a 6:30 am interview time. The CO emphasized that the regulation at C.F.R. § 655.40(d) is intended to prevent employers from giving preferential treatment to H-2B workers over U.S. workers. The CO explained that, in order to be compliant with the regulation and demonstrate that it made a good faith effort to recruit U.S. workers, the Employer needed to “allow for a reasonable interview time within normal business hours.” The CO asked the Employer to correct the deficiency described in the minor deficiency emails and submit updated recruitment reports.

In response to the CO’s minor deficiency emails, the Employer submitted revised recruitment reports stating that its normal business hours begin at 6:30 am. Moreover, in some responses, the Employer stated that “the fact that” it conducts “an early interview on a particular day” does not preclude an applicant from requesting an interview at “a time and date that works for both parties.” The Employer added that the applicants “simply” had to “pick up a phone and call,” and stated that such an option was “a reasonable alternative” available to them.

³ Although this proceeding involves seven consolidated cases, the sole issue on appeal is identical in each case.

⁴ SOC (O*Net/OES) occupation code 37-3011.00.

⁵ Appeal File (“AF”) 2017-TLN-00039 at 300; AF 2017-TLN-00040 at 417, AF 2017-TLN-00041 at 330; AF 2017-TLN-00042 at 348; AF 2017-TLN-00043 at 261; AF 2017-TLN-00044 at 268; and AF 2017-TLN- 00045 at 264.

⁶ AF 2017-TLN-00039 at 220; AF 2017-TLN-00040 at 351; AF 2017-TLN-00041 at 283; AF 2017-TLN-00042 at 296; AF 2017-TLN-00043 at 212; AF 2017-TLN-00044 at 227; and AF 2017-TLN-00045 at 223.

On March 22, 2017, the CO issued final determinations denying the Employer's request for temporary labor certification in all seven cases.⁷ The CO reiterated that the Employer was required to recruit U.S. workers in good faith and provide applicants a reasonable interview time within normal business hours. The CO acknowledged that while there was a "reasonable business explanation for scheduling interviews during" the Employer's hours of operation, it did "not follow that" 6:30 am "would be the *only* time offered to interested applicants interviewing for the position." The CO further stated that applicants were given neither "a reasonable window of time" nor "any choice of time" within which to select an interview. The CO concluded that the Employer's interview time was "unreasonable" and did not "demonstrate good faith recruitment efforts." Consequently, the CO denied the Employer's requests for temporary labor certification.

On April 10, 2017, the undersigned issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer ("Solicitor") to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). On April 14, 2017, BALCA received the Appeal File from the CO. Thereafter, on April 24, 2017, the Solicitor filed a brief. The Employer did not file a brief.

DISCUSSION AND APPLICABLE LAW

BALCA's standard of review in H-2B cases is limited. BALCA may only consider the Appeal Files prepared by the CO, the legal briefs submitted by the parties, and the Employer's requests for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued a final determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the cases to the CO for further action. 20 C.F.R. § 655.61(e).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed, Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer's application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

The Employer Failed to Meet the Recruitment Requirements in Good Faith

The sole issue on appeal is whether the Employer met the regulatory recruitment requirements at C.F.R. § 655.40(d) when it only offered job applicants the option to interview at 6:30 am. The regulations provide that "Employers that wish to require interviews must conduct those 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. Employers

⁷ AF 2017-TLN-00039 at 166; AF 2017-TLN-00040 at 200; AF 2017-TLN-00041 at 210; AF 2017-TLN-00042 at 168; AF 2017-TLN-00043 at 173; AF 2017-TLN-00044 at 175; and AF 2017-TLN-00045 at 165.

cannot provide potential H-2B workers with more favorable treatment with respect to the requirement for, and conduct of, interviews.” 20 C.F.R. § 655.40(d).

It is well settled that employers seeking labor certification must test the U.S. labor market and meet the regulatory recruitment requirements in good faith. *See Michelle Perez*, 2011-TLN 00017 (Apr. 29, 2011) (BALCA specified that “an employer must recruit U.S. workers in good faith.”); *see also Mountain Plains Agricultural Svcs.*, 1995-TLC-00003 (Feb. 8, 1995) (noting that the requirements of Part 655 “include the responsibility of the [e]mployer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.”); *Keller Farms, Inc.*, 2009-TLC-00008 (Nov. 21, 2008) (an Administrative Law Judge stated that “the Employer must conduct the test of U.S. worker availability and the positive recruitment requirements in good faith.”). For the reasons outlined below, I find that the Employer has failed to recruit U.S. workers in good faith.

In its requests for administrative review, the Employer alleged that applicants “were initially contacted by email and/or telephone to schedule interviews at a time convenient to” them. However, contrary to the Employer’s assertion, the recruitment reports in all seven cases establish that the Employer *only* offered U.S. applicants one interview time, which was at 6:30 am. For example, on one occasion, the Employer wrote that a candidate “agreed to come to our office for a personal interview on Monday 2/6/17 at 6:30 am.” On another occasion, the recruitment report showed that a candidate “agreed to come to our office for a personal interview on Wednesday 2/08/17 at 6:30 am.” In another instance, the recruitment report showed that the Employer sent a letter to an applicant “instructing him to come to our office for an interview on Monday 2/27/17 at 6:30 am.” In yet another instance, the Employer sent an e-mail and a letter to an applicant “instructing him to come to our office for an interview on Wednesday 2/8/17 at 6:30 am.” Although the Employer claimed that it would have accommodated applicants if they had requested alternative interview times, the record is devoid of *any* evidence indicating that the Employer offered interviews at times that were “convenient” to the applicants. The Employer could have, for example, offered applicants interviews during normal business hours or offered them the opportunity to interview by telephone, but it did not provide those, or similar, options.

In its request for administrative review, the Employer also argued that “[i]n the landscaping business workers typically begin the day early. A 6:30 am interview is not unreasonable for those in the business.” BALCA has previously considered, and rejected, a similar argument. In *Jensen Tuna, Inc.* 2016-TLN-00064 (Aug. 26, 2016), an Administrative Law Judge held that an employer’s attempt to justify a 2:30 am interview time did not even “pass the ‘laugh test.’” *Jensen Tuna*, slip op. at 3; *see also Nitto Denko American, Inc.*, 91-INA-93 (Apr. 1, 1992) (the Employer may not discourage U.S. applicants by rigid interview schedules); *Orland Truck Stop*, 1994-INA-612 (July 23, 1996) (an employer may not discourage U.S. applicants by rigid interview schedules, confusing interview places or times, failing to interview them, and requiring additional information). Like the Employer here, the employer in *Jensen Tuna* justified its interview time by stating, “[W]e would expect applicants to be able to attend an interview during normal working hours of operation for the position.” In rejecting the Employer’s argument, the Administrative Law Judge in *Jensen Tuna* wrote, “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.” (*Id.*) The same reasoning applies in the present cases. That the Employer’s regular working hours are from 6:30 am until 2:00 pm does not explain why an applicant should be required to appear for an interview at 6:30 am. Moreover, the Employer’s argument fails to explain why the Employer only offered applicants the opportunity to interview at 6:30 am, rather than offering them the opportunity to interview anytime between the hours of 6:30 am and 2:00 pm.

In addition to finding that the Employer failed to recruit U.S. workers in good faith, I find that the Employer’s approach is contrary to the purpose of the employer-conducted recruitment requirements. In the preamble to the IFR, the Department provided the following rationale behind 20 C.F.R. § 655.40(d):

Paragraph (d) provides that where the employer wishes to conduct interviews with U.S. workers, it must do so by telephone or at a location where workers can participate at little or no cost to the workers. This provision does not require employers to conduct employment interviews under this provision. Rather, employers are barred from offering preferential treatment to potential H-2B workers, including any requirement to interview for the job opportunity. In addition, this interim final rule ensures that employers conduct a fair labor market test by requiring employers that conduct interviews to conduct them 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. Accordingly, an employer who requires a U.S. worker to undergo an interview must provide such worker with a reasonable opportunity to meet such a requirement. The purpose of these requirements is to ensure that that the employer does not use the interview process to the disadvantage of U.S. workers.*

80 Fed. Reg. 24042, 24075-24076 (Apr. 29, 2015) (emphasis added). In defense of its position, the Employer stated that “none of the applicants called to request an alternate interview time.” The Employer’s argument misses the issue at hand. The issue is not whether any of the applicants requested alternative interview times; rather, it is whether the Employer conducted a fair test of the U.S. labor market and provided U.S. applicants with a “reasonable opportunity” to meet the interview requirements. The purpose behind requiring employers to provide applicants with a “reasonable opportunity” to undergo an interview at little or no cost is so that employers do not use the interview process to disadvantage U.S. workers. Here, the Employer’s actions were far from reasonable. Requiring applicants to appear for interviews outside of normal business hours can impose economic burdens (for example, requiring them to pay for childcare in the early hours of the morning) and logistical challenges (for example, requiring them to secure alternative transportation options if traditional public transportation options are unavailable in the early hours of the morning). The U.S. workers who applied to work for the Employer were unquestionably disadvantaged by only being given the opportunity to interview at 6:30 am. For all of the above-mentioned reasons, I find that the Employer’s recruitment efforts were precisely the type of behavior that the regulations are intended to prevent.

ORDER

In light of the foregoing, **IT IS HEREBY ORDERED** that the Certifying Officer's decision denying certification be, and hereby is, **AFFIRMED**.

For the Board:

John P. Sellers, III
Administrative Law Judge