

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 19 June 2017

BALCA Case No.: 2017-TLN-00051

ETA Case No.: H-400-17027-622529

In the Matter of:

ALPHA SERVICES, LLC,
Employer.

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: Leon R. Sequeira, Esq.
For Employer

Heather Filemyr, Esq.
Office of the Solicitor
For the Administrator

Before: PAUL C. JOHNSON, JR.
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This proceeding is before the Board of Alien Labor Certification Appeals (BALCA) pursuant to Alpha Services, LLC's request for review of the Certifying Officer's (CO) denial of temporary labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers on a temporary basis to "perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States]." 8 U.S.C. § 1101(a)(H)(ii)(b).

Employers who seek to hire foreign workers under this program must apply for and receive a "labor certification" from the U.S. Department of Labor (DOL). 8 C.F.R. § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a CO of the Office of Foreign Labor Certification (OFLC) of the Employment and Training Administration

(ETA) pursuant to the procedures and standards codified at 20 C.F.R. Part 655, Subpart A.¹ If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.61. BALCA “must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted.” § 655.61(e).

BACKGROUND

On January 27, 2017, the Employer filed an H-2B application with the ETA seeking temporary labor certification for 30 full-time workers to be employed as General Forestry Laborers for the period from April 12, 2017 through July 31, 2017. AF 41-259.² Included with the application were three Forms 9141, Request for Prevailing Wage Determination, section E.a.5 of each of which stated:

Extensive travel away from home for entire time period throughout 12 States begin in Newton County, Mississippi continue: MS-LA-AR-AL-OK-FL-VA-TX-GA-SC-NC-TN. Due to extensive travel: 18 years of age min. Transport provided from designated locale to job site by employer; Car Pool contributions up to \$35 per week.

...

Will assist workers to secure housing, will not provide/pay for housing.

AF 142, 155, 208.

On March 17, 2017, the CO issued a *Notice of Deficiency* (NOD) notifying the Employer that its application did not comply with all the requirements of the H-2B program. AF 30-39. Relevant to this appeal, the CO cited §§ 655.16 and 655.18:

In accordance with Departmental regulations at **20 CFR 655.16**, the employer must submit the job order to the SWA serving the area of intended employment at the same time it submits the Application for Temporary Employment Certification and a copy of the job order to the CNPC.

If the employer provides the worker with the option of board, lodging, or other facilities, including fringe benefits, or intends to assist workers to secure such lodging, disclose the provision and cost of the board, lodging, or other facilities, **the job order placed in connection with an Application for Temporary Employment Certification must include** such information.

¹ On April 29, 2015, the Department of Labor (DOL) and the Department of Homeland Security (DHS) jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) (“2015 IFR”). The 2015 IFR applies if an employer filed its temporary labor certification application after April 29, 2015 and requested a start date after October 1, 2015. In the present case, Employer filed its temporary labor certification application after April 29, 2015, requesting a start date of need after October 1, 2015. Thus, the 2015 IFR applies.

² Citations to the Appeal File are abbreviated as “AF” followed by the page number.

The Department's longstanding position is that deductions or costs incurred for facilities that are primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore may not be charged to the worker. *See* 29 CFR 531.3(d)(1). Thus, housing that is provided by employers with a need for a mobile workforce, such as those in the carnival or forestry industries where workers are in an area for a short period of time, need to be available to work immediately, and may not be able to procure temporary housing easily, is primarily for the employer's benefit and convenience and cannot be charged to the workers.

The employer's job order does not indicate that no cost housing is an option to workers.

The employer's application is requesting tree planters, a mobile forestry workforce performing duties for short durations at multiple worksites. Therefore, the cost incurred for the temporary housing cannot be a responsibility of its workers.

In accordance with Departmental regulations at **20 CFR 655.18**, **each job order placed in connection with an Application for Temporary Employment Certification must include the following information:**

- (1) State the employer's name and contact information;
- (2) Indicate that the job opportunity is a temporary, full-time position, including the total number of job openings the employer intends to fill;
- (3) Describe the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity;
- (4) Indicate the geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;
- (5) Specify the wage that the employer is offering, intends to offer, or will provide to H-2B workers, or, in the event that there are multiple wage offers (such as where an itinerary is authorized through special procedures for an employer), the range of wage offers, and ensure that the wage offer equals or exceeds the highest of the prevailing wage or the Federal, State, or local minimum wage;
- (6) If applicable, specify that overtime will be available to the worker and the wage offer(s) for working any overtime hours;
- (7) If applicable, state that on-the-job training will be provided to the worker;
- (8) State that the employer will use a single workweek as its standard for computing wages due;
- (9) Specify the frequency with which the worker will be paid, which must be at least every two weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent;
- (10) If the employer provides the worker with the option of board, lodging, or other facilities, including fringe benefits, or intends to assist workers to secure

such lodging, disclose the provision and cost of the board, lodging, or other facilities, including fringe benefits or assistance to be provided;

(11) State that the employer will make all deductions from the worker's paycheck required by law. Specify any deductions the employer intends to make from the worker's paycheck which are not required by law, including, if applicable, any deductions for the reasonable cost of board, lodging, or other facilities;

(12) Detail how the worker will be provided with or reimbursed for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment, if the worker completes 50 percent of the period of employment covered by the job order, consistent with 20 CFR 655.20(j)(1)(i);

(13) State that the employer will provide or pay for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer, if the worker completes the certified period of employment or is dismissed from employment for any reason by the employer before the end of the period, consistent with § 655.20(j)(1)(ii);

(14) If applicable, state that the employer will provide daily transportation to and from the worksite;

(15) State that the employer will reimburse the H-2B worker in the first workweek for all visa, visa processing, border crossing, and other related fees, including those mandated by the government, incurred by the H-2B worker (but need not include passport expenses or other charges primarily for the benefit of the worker);

(16) State that the employer will provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned, in accordance with 20 CFR 655.20(k);

(17) State the applicability of the three-fourths guarantee, offering the worker employment for a total number of work hours equal to at least three fourths of the workdays of each 12-week period, if the period of employment covered by the job order is 120 or more days, or each 6-week period, if the period of employment covered by the job order is less than 120 days, in accordance with 20 CFR 655.20(f); and

(18) Instruct applicants to inquire about the job opportunity or send applications, indications of availability, and/or resumes directly to the nearest office of the SWA in the State in which the advertisement appeared and include the SWA contact information.

Modification Required:

The employer's job order must state that optional housing is provided at no cost to the worker.

The employer's NOD response must include corrected language which remedies this deficiency so that the Chicago NPC can provide this information to the SWA.

OR

The employer may submit an already-amended job order that contains corrected language which remedies this deficiency.

*Id.*³

The Employer responded to the Notice of Deficiency on March 29, 2017, specifically addressing the CO's finding with respect to the provision of housing:

For this claimed deficiency the Certifying Officer says that "The employer's job order must state that optional housing is provided at no cost to the worker." The Department, however, does not cite to any provision in the H-2B regulations that requires such language. The only regulation cited by the Certifying Officer for this deficiency is 655.18(10) which says:

If the employer provides the worker with the option of board, lodging, or other facilities, including fringe benefits, or intends to assist workers to secure such lodging, disclose the provision and cost of the board, lodging, or other facilities, including fringe benefits or assistance to be provided;

In the application, the employer states "Will assist workers to secure housing, will not provide/pay for housing." The employer's language in the application clearly states the employer does not provide the option of board, lodging or other facilities, but that it will assist workers to secure housing. We believe that information meets the requirements of the regulatory provision. To the extent the Certifying Officer believes that information does not contain enough detail (although a lack of detail was not cited in the deficiency) to meet the regulatory requirement, we are revising the original language included in the application as follows:

We are striking the sentence "Will assist workers to secure housing, will not provide/pay for housing." We are replacing that sentence with "Crew leaders or foremen will assist crews in securing housing in local motels in proximity to each worksite. The cost at local motels varies by location, but is typically between \$55-\$100 per person per week. Employer does not provide or pay for housing." Please see the edited job order and application.

AF 24-25. The Employer stated that the job order, which was attached to its response, had been sent to "Gloria Bostic and the MN SWA." AF 24. The job order attached to the PWD request bears the letterhead of the Mississippi Department of Employment Security and includes the address of that department in the footer appearing on the second page. Additionally, the job order

³ The CO identified three other deficiencies that are not relevant to this appeal, as they were remedied by Employer.

directs applicants to contact either the Employer or the Mississippi state workforce agency, providing an address in Jackson, Mississippi.⁴

On May 10, 2017 the CO issued a Non Acceptance Denial, denying certification due to Employer's failure to remedy the deficiency. The CO repeated the portion of the Notice of Deficiency quoted *supra*, pp. 2-4, and further stated:

In response to the NOD, the employer submitted a letter of explanation and an amended job order detailing its housing requirement. The letter states that the job order and application have been updated to specify that "Crew leaders or foremen will assist crews in securing housing in local motels in proximity to each worksite. The cost at local motels varies by location, but is typically between \$55 -\$100 per person per week. Employer does not provide or pay for housing."

The Department's longstanding position is that deductions or costs incurred for facilities that are primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore may not be charged to the worker. Therefore, housing that is provided by employers with a need for a mobile workforce, such as those in the carnival or forestry industries where workers are in an area for a short period of time, need to be available to work immediately, and may not be able to procure temporary housing easily, is primarily for the employer's benefit and convenience and cannot be charged to the workers.

Additionally, the employer indicated that its job order was submitted to Gloria Bostic and the MN (Minnesota) SWA. However, the employer should have placed its job order in the State of Mississippi.

The employer failed to offer housing at no cost to workers and failed to file its job order in the state in which advertisements would appear. Therefore, the employer did not overcome the deficiency.

In accordance with Departmental regulations at 20 CFR §655.51, Subpart A., the Department of Labor has made a final determination on your *Application for Temporary Employment Certification*. Based on the foregoing, reason, the Employer's application is denied.

DISCUSSION

Under the 2015 IFR, an employer's request for administrative review must: (1) clearly identify the particular determination for which review is sought; (2) set forth the particular grounds for the request; (3) include a copy of the CO's determination; and (4) may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's

⁴ As the denial will be affirmed on the basis that the Employer failed to provide housing, I need not determine whether the reference to Gloria Bostic and MN (Minnesota) was merely a typographical error, or whether Employer in fact sent the job order there. There is nothing to indicate Ms. Bostic's role or where she works.

determination was issued. 20 C.F.R. § 655.61; *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00004/17, slip op. at 4-5 (Feb. 21, 2012). “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). The employer bears the burden of proof to establish that it has met the requirements of the H-2B program. *D&R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (*citing* 8 U.S.C. § 1361).

BALCA must uphold the CO’s determination unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Brook Ledge, Inc.*, 2016-TLN-00033 (May 10, 2016).

Granting an employer’s request for temporary labor certification for the employment of foreign workers in the H-2B nonimmigrant classification of the Immigration and Nationality Act (“INA”) reflects that the Secretary of Labor (“Secretary”) has made the following two determinations:

- (1) There are no sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to hire foreign workers, and
- (2) The employment of the H-2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.

20 C.F.R. § 655.1(a). The regulations outline the procedures that control the temporary labor certification process. 20 C.F.R. § 655.1(b). They also “establish[] obligations with respect to the terms and conditions of the temporary labor certification with which H-2B employers must comply, as well as their obligations to H-2B workers and workers in corresponding employment.” 20 C.F.R. § 655.1(b).

Pursuant to 20 C.F.R. § 655.20(a)(1), an employer’s job order must include an offered wage that equals or exceeds the highest of the prevailing wage or the Federal, State or local minimum wage. *See also* 80 Fed. Reg. at 24064-24065. “The employer must pay at least the offered wage, free and clear,” during the entire period of the application. 20 C.F.R. § 655.20(a)(1); *see also* 20 C.F.R. § 655.20(b) & (o).

If an employer provides workers with lodging, such provision must be disclosed in the job order. 20 C.F.R. §§ 655.18(b)(10) & (14). The employer must specify in the job order any deductions it intends to make from the worker’s paycheck which are not required by law, including, if applicable, any deductions for the *reasonable* cost of lodging. 20 C.F.R. § 655.18(b)(11) (*emphasis added*); *see also* 20 C.F.R. § 655.20(c) (identifying “authorized” deductions).

The preamble to the 2015 IFR, which relies on guidance under the Fair Labor Standards Act (“FLSA”) and 29 C.F.R. Part 531, provides that any deduction from wages for a cost that is primarily for the employer’s benefit is never reasonable and never permissible. 80 Fed. Reg. at 24063-64. The preamble provides examples of costs that DOL has long held to be primarily for the benefit of the employer, including housing for a mobile workforce, including forestry workers. Such lodging “is primarily for the employer’s benefit and convenience and cannot be charged to the workers.” *Id.* at 24063. Additionally, the preamble states that “there is no legal difference between deducting a cost

from a worker's wages and shifting a cost to an employee to bear directly." 80 Fed. Reg. at 24064, citing *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1236 (11th Cir. 2002). In *Arriaga*, which arose under the FLSA, the Court stated: "An employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deductions drive wages below the minimum wage. This rule cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during employment." 80 Fed. Reg. at 24064 (internal citations omitted).⁵

I conclude, therefore, that housing for forestry workers is a cost that cannot be borne by the workers themselves, as it is primarily for the benefit of the employer.

Alpha Services employs a mobile workforce; its forestry workers work at numerous work sites for short durations and need to be available to work immediately. The Employer seeks temporary workers for a 3½-month period, and the workers are intended to work in dozens of different counties across 12 states during this period. Although the duration of any specific assignment is unknown, the workers could theoretically work in a different county every day.⁶ Accordingly, I find housing in this matter is primarily for the benefit of the employer and cannot be charged to the workers.⁷ Furthermore, Alpha Services stated in the job order that it would not provide housing, but would assist the workers in finding it at a cost of \$55-100 per person per week. Requiring the workers to pay for their own housing would reduce their wages such that they would not be paid the offered or prevailing wage "free and clear."

The Employer argues that it is not a common or prevailing practice for an employer to pay for or arrange housing for their crews in the forestry industry. That argument is beside the point: the Employer must show that lodging is not primarily for its own benefit. I have found that in this case, housing is primarily for the benefit of the Employer; accordingly, the Employer cannot shift this cost to the workers.

Conclusion

For the reasons set forth above, I conclude that the CO did not act arbitrarily or capriciously, did not abuse her discretion, and did not act contrary to law. Accordingly, the denial of certification will be affirmed.

⁵ The Employer argues that the plain text of the regulations do not impose on it an obligation to provide housing for the workers, and the preamble cannot create one because a preamble cannot create law. The flaw in Employer's argument is that the regulations are not unambiguous. They require that an Employer provide the offered or prevailing wage "free and clear," but do not explain what that means. It is reasonable for the CO to interpret that requirement in light of the explanatory language in the preamble.

⁶ The period of availability is for 80 days, and there are over 400 different work sites listed on the PWD requests.

⁷ The Employer argues that the CO does not point to any regulatory definition of work of "short duration," and therefore due process is violated by the CO's finding that the work in this matter involves work of "short duration." This argument improperly relieves the Employer from its burden to show that the work is not of short duration; Employer has provided no evidence on that issue.

ORDER

The Certifying Officer's denial of certification is hereby AFFIRMED.

For the Board:

PAUL C. JOHNSON, JR.
Administrative Law Judge

PCJ, Jr./ksw
Newport News, Virginia