



Issue Date: 04 April 2017

**BALCA Case No.:** 2017-TLN-00028  
**ETA Case Nos.:** H-400-16319-433239

*In the Matter of:*

**TUCKER CONSTRUCTION GROUP, LLC.**

*Employer.*

Appearances: Ronald D. Richey, Esq.  
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For the Employer

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For the Certifying Officer

Before: **ALAN L. BERGSTROM**  
Administrative Law Judge

**DECISION AND ORDER - AFFIRMING**  
**DENIAL OF TEMPORARY LABOR CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s denial in the above-captioned H-2B temporary labor certification matter. The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security, “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 8 CFR §214.2(h)(1)(ii)(D); see also 8 U.S.C. §1101(a)(15)(H)(ii)(b); 8 CFR §214.2(h)(6)(ii)(B); 20 CFR §655.1(a)<sup>1</sup> Employers who seek to

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<sup>1</sup> The Interim Final Rule revising federal regulations related to the H-2B program, 20 CFR Part 655, Subpart A, was published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015) and are effective as of April 29, 2015.

hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”). 8 CFR §214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 CFR §655.50 If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 CFR §655.53 During the administrative review only the material contained within the appeal file upon which the denial determination was made may be considered as evidence while the Employer’s legal argument in its request for review and that legal argument in filed briefs may be considered as argument in the case, 20 CFR §655.61(e). Accordingly, the documents attached to Employer’s filings after the February 27, 2017, denial determination (AF<sup>2</sup> 8-15) are not considered.

### STATEMENT OF THE CASE

On December 5, 2016<sup>3</sup> the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Tucker Construction Group (“Employer”) for 50 seasonal workers as “Landscaper” to be employed from March 1, 2017 through December 15, 2017 (AF 216-221). The position is classified as O\*Net Code 37-3011, “Landscaping and Groundskeeping Workers.” No specific educational requirement was specified in Section F.b of the application. The Employer indicated that no training for the job opportunity or employment is required in Section F.b Item 3. (AF 219). The Employer retained R.D. Richey of the Law Office of Ronald D. Richey, as its attorney/agent (AF 218).

On December 14, 2016 the CO issued a “Notice of Deficiency” (AF 176, 188-215) indicating the following deficiencies:

**Deficiency 1: Failure to establish temporary need for the number of workers requested.**

The CO requested supporting evidence in three specific areas.

**Deficiency 2: Failure to submit an acceptable job order.**

The CO noted the job order submitted with the Application did not contain required information in eight specific areas. The Employer was directed to submit and amended job order with the required information to be in compliance with 20 CFR §655.18(a) and (b).

**Deficiency 3: Failure to submit a complete and accurate ETA Form 9142.**

The CO noted that the Form 9142B, Appendix B, submitted was not the proper Appendix B form required by the Interim Final Rule published on April 29, 2015. The Employer was provided a link to the proper Appendix B form on the DOLETA.gov website and requested to submit the proper Appendix B form with original signatures and the date signed.

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<sup>2</sup> “AF” refers to the Appeal File and is followed by the pertinent page number of the relevant page in the Appeal File.

<sup>3</sup> Applications filed after April 29, 2015 with an employment start date of need after October 1, 2015 are processed under the Interim Final Rule revising federal regulations related to the H-2B program published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015). 20 CFR §655.4(e)

**Deficiency 4: Failure to satisfy the obligations of H-2B employers.**

The CO noted that Section F.b, Item 5 of the Application stated that workers will be subject to drug testing but did not indicate if the drug testing was pre-employment or post-employment. The Employer was directed to file an amended Application indicating whether the drug testing was pre-hire or post-hire.

**Deficiency 5: Failure to submit a complete and accurate ETA Form 9142.**

The CO noted specific errors in Section F.c, Item 4 and Section J, Items 1-6 of the Application. The Employer was directed to file an amended Application correcting the listed errors.

On December 29, 2016 the Employer's attorney filed a response to the "Notice of Deficiency" by e-mail to "TLC, Chicago – ETA SVC" (AF 123-171). The Employer's attorney reported he addressed each deficiency and submitted documentation replying to Deficiency 1 and an amended job order, an amended Application, and "a complete ETA Form 9142B, Appendix B, which reflects the Interim Rule published April 29, 2015" to address the remaining Deficiencies.

On January 3, 2017, the CO notified the Employer's attorney by a Minor Deficiency Email that the December 29, 2016 response could not be processed because it did not include an amended job order, the Appendix B submitted was not the most current form conforming to the Final Interim Rule of April 29, 2015, and Section F.b, Item 5 of the amended Application remained unclear as to whether the drug testing was pre-hire or post-hire. Employer's attorney was again advised of the DOL/ETA website to locate the current ETA Form 9142B, Appendix B form. (AF 89-92)

On January 5, 2017 the Employer's attorney filed a response to the Minor Deficiency Email in which he submitted an amended job order, and amended Application indicating the drug testing was pre-employment, and an ETA Form 9142, Appendix B signed by Employer's attorney on December 27, 2016. (AF 62-87)

On January 24, 2017 the CO notified the Employer's attorney by a Minor Deficiency Email that the amended job order submitted was "missing two requirements: (1) describing "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 work hours and days and the anticipated start and end dates of the opportunity; and (2) indicating the geographic area of intended employment with enough specificity to appraise applicants of any travel requirements" and that the ETA Form 9142B, Appendix B form was not the current version of Appendix B. Employer's attorney was directed submit a corrected job order and appropriate version of Appendix B. He was again advised of the DOL/ETA website to locate the current ETA Form 9142B, Appendix B form and directed to not use any other version of Appendix B. (AF 28-30)

On January 25, 2017 the Employer's attorney sent an e-mail to the CO stating he had already replied to the January 5, 2017 Minor Deficiency Email. (AF 27-28) On January 31, 2017 Employer's counsel inquired about the status of the Employer's Application. (AF 25-26)

By the "Non-Acceptance Denial" issued on February 27, 2017, the CO denied the application for 50 Landscapers requested by Employer in ETA Case Number H-400-16319-433239 (AF 7-24).

The CO set forth the following reasons for the denial of the *Application for Temporary Employment Certification*:

**Deficiency 1: Failure to submit an acceptable job order.**

The CO noted, “The employer submitted a copy of its job order with its application to the CNPC. However, the job order did not include the following required information: 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” as required by 20 CFR §655.18(b)(4). The CO determined, “The employer’s response to the MDE included an amended job order that did not include the required information. The Chicago NPC provided the employer with another opportunity to resolve the deficiency through a second MDE. In response to the second MDE, the employer simply responded with, ‘On January 5, 2017, we already responded to the Minor Deficiency Email (MDE).’ The employer did not include an amended job order with its response. Therefore, the employer did not overcome the deficiency.”

**Deficiency 2: Failure to submit a complete and accurate ETA Form 9142.**

The CO noted that “The employer did not submit ETA Form 9142B, Appendix B” as “the appropriate appendices” required by 20 CFR §655.15(a). The CO determined that “In response to the NOD, the employer did not upload the appropriate version of Appendix B. The employer’s initial response to its NOD did not resolve the Appendix B deficiency. Therefore the Chicago NPC issued a MDE to afford the employer another opportunity to resolve it. The MDE specifically requested the employer to submit the appropriate version of Appendix B and provided a link where the Appendix could be found. The employer’s response to the MDE included an older version of the Appendix. The Chicago NPC provided the employer with another opportunity to resolve the deficiency through a second MDE. In response to the second MDE, the employer responded with, ‘On January 5, 2017, we already responded to the Minor Deficiency Email (MDE).’ The employer did not include an Appendix with its response. Therefore, the employer did not overcome the deficiency.”

On March 10, 2017, the Employer filed a formal request for administrative review of the denial determination with additional documentation (AF 1-5).

In response to the “Notice of Assignment & Briefing Schedule” issued on March 23, 2017, counsel for the CO and Employer’s attorney each filed a timely written brief.

**DISCUSSION**

An employer seeking certification to employ H-2B nonimmigrant workers bears the burden to establish eligibility for issuance of a requested temporary labor certification. Where an employer has submitted an application for temporary labor certification of H-2B workers and that application fails to meet all the obligations required by 20 CFR Part 655 or other requirements of the H-2B program, the CO issues an Notice of Deficiency (NOD) to the employer setting forth the deficiency in the application and permitting the employer to submit supplemental information and documentation for consideration before issuance of a final determination on the application. “The employer’s failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the *Application for Temporary Employment Certification*” pursuant to 20 CFR §655.32(a).

The CO submits, based on the information submitted by the Employer in the AF, that the job order submitted with the Application was missing information required by 20 CFR §655.18(b) and that the Employer did not file the correct version of ETA Form 9142B, Appendix B despite being given the link to the correct version on the DOL/ETA website and repeated opportunities to submit the correct version of Appendix B. She argues that the CO's actions were not arbitrary or capricious and requests that the denial of the Application be affirmed.

Employer's attorney submits "The job order specifies the job sites are in Baltimore City, Maryland; Howard County, Maryland; Prince George's County, Maryland; Anne Arundel, Maryland; Montgomery County, Maryland; Carroll County, Maryland; Harford County, Maryland; and/or Charles County, Maryland. Further, the job order states: 'Employer will provide daily transportation to and from the worksite.' Finally, it is clear from the job order, inter alia, that the job sites will vary depending on the project and that due to the nature of the business the job sites could be anywhere within the Maryland counties specified in the job order. The Employer/Applicant conducts business on behalf of utility companies, inter alia, throughout all of the above-noted counties in Maryland." He argues that "It is impossible and unrealistic to know in advance in all situations where a cable or utility line may need repair in advance. It is not logical or reasonable to expect that the Employer/Applicant would be required to list every single location or address of every single utility or cable line within the above-noted eight counties and/or city." Employer's attorney also originally argued to the CO that "we did submit to DOL, at least once if not twice, the correct version of ETA Form 9142B Appendix B. At the top of the submitted ETA Form 0142B Appendix B, which we submitted, it notes that the form's expiration is 12/31/2018." He argues "the Employer/Applicant did reasonably respond to all of the DOL's notices of deficiencies, and DOL's denial should be reversed and the Application for Temporary Employment Certification (H-2B) should be approved." Subsequently, in the argument filed with BALCA, the Employer's attorney now states that the required ETA Form 9142B Appendix B is not at the link provided by the CO and submits an undated attachment from the link indicating that the "The resource you are looking for might have been removed, had its name changed, or is temporarily unavailable."<sup>4</sup> However, such post-determination documentation may not be considered on administrative review by BALCA, 20 CFR §655.61(e).

### Job Order Deficiency

In this case the Employer has filed an Application for 50 Landscapers to perform described services and labor in Baltimore City, Maryland and eight different counties in Maryland. Federal regulations provide an employer may request more than one worker "as long as all H-2B workers will perform the same service or labor under the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment. 20 CFR §655.15(e). Employers seeking H-2B workers "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*." 20 CFR §655.16(a). "The employer's job order must meet the following requirements: ... (4) Indicate the geographic area of intended employment

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<sup>4</sup> It is noted that the ETA Form 9142B Appendix B form is readily available to the general public at the main website for foreign labor applications ( <https://www.foreignlabor.dolets.gov> ) under the forms section. Due diligence or early notice to the CO by Employer's attorney would have revealed the alternate link to the current Appendix B form – [https://www.foreignlabor.doleta.gov/pdf/ETA\\_Form\\_Appendix.pdf](https://www.foreignlabor.doleta.gov/pdf/ETA_Form_Appendix.pdf).

with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor; ..." 20 CFR §655.18(b)(4). The term "*Area of intended employment*" means the geographical area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas ... If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, anyplace within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within the normal commuting distance of a location that is inside (e.g., near the border of) the MSA." 20 CFR §655.5 It is officially noted that the MSA of Baltimore-Columbia-Towson includes Baltimore City and the counties of Baltimore, Howard, Anne Arundel, Carroll and Hartford. The MSA of Washington-Arlington-Alexandria includes the counties of Prince George's, Charles, and that of Montgomery, which is also in the metropolitan subdivision of Silver Springs-Frederick-Rockville. The Employer lists his place of business in Carlton, Anne Arundel County, Maryland and submits that travel to the various worksites will be required and transportation will be provided by the Employer.

The CO requested that the Employer amend the job order with sufficient specificity to comply with 20 CFR §655.18(b)(4). Here the Employer stated work would be available in two large MSAs without further indication of potential worksites, which Employer states cannot be forecast at the time of the Application and job order. The Employer required travel to the multiple worksites and stated it would provide such transportation, but failed to describe where workers would be expected to appear to utilize employer furnished transportation. Failure of the Employer to describe the area of intended employment with the requested specificity denies the CO the ability to determine if the Application complies with applicable regulations and was a valid test of the labor markets in the multiple MSAs involved.

After review of the AF and argument of the Parties, this Administrative Law Judge finds that the CO's determination that the Employer had failed to correct the job order deficiency was not arbitrary or capricious and was justified under the facts and circumstances of this Application and 20 CFR §655.18(b).

#### ETA Form 9142B Appendix B Deficiency

The Department of Labor Appropriations Act of 2016, Division H, Title I of Public Law 114-113<sup>5</sup> provided that DOL "may not use any funds to enforce the definition of corresponding employment found in 20 CFR 655.5 or the three-fourths guarantee rule definition found in 20 CFR 655.20, or any reference thereto." To comply with the Appropriations Act of 2016 the DOL/ETA removed reference to the three-fourths rule found in the pre-2016 ETA Form 9142B Appendix B, Part B, Employer Declaration, number 15, and renumbered the remaining employer declarations through number 26. DOL/ETA also inserted footnote 1 on page one of the revised

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<sup>5</sup> The Consolidate Appropriations Act of 2016, 129 Stat. 2242, was passed December 18, 2015 for the year ending September 30, 2016.

ETA Form 9142B Appendix B explaining the need for the change and that the Appropriations Act of 2016 did not rescind the provisions in 655.5 or 655.20.

The ETA Form 9142B Appendix B submitted by the Employer contains the defunct declaration 15 concerning the three-fourths rule and remaining declarations through declaration number 27. The Appendix B submitted by the Employer does not contain a footnote on page 1. The Employer was offered three opportunities to submit the correct version of Appendix B; in December 14, 2016 Notice of Deficiency, the January 3, 2017 Minor Deficiency Email, and the January 24, 2017 Minor Deficiency Email. The Employer failed to submit the correct Appendix B or request assistance in doing so.

After review of the AF and argument of the Parties, this Administrative Law Judge finds that the CO's determination that the Employer had failed to correct the ETA Form 9142 Appendix B deficiency was not arbitrary or capricious and was justified under the facts and circumstances of this Application and 20 CFR §655.15(a).

In view of all the foregoing, the CO properly denied the Employer's December 5, 2016, *Application for Temporary Employment Certification* pursuant to 20 CFR §655.15(b); 20 CFR §655.18(b)(4); and 20 CFR §655.32(a).

#### **ORDER**

**It is hereby ORDERED that the Certifying Officer's DENIAL of the Employer's December 5, 2016, Application for Temporary Employment Certification is AFFIRMED.**

ALAN L. BERGSTROM  
Administrative Law Judge

ALB/jcb  
Newport News, Virginia