

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 10 May 2018**

**BALCA Case No.:** 2018-TLN-00114  
**ETA Case No.:** H-400-17361-005307

*In the Matter of:*

**BRIGHTVIEW LANDSCAPES LLC - INDIANAPOLIS,**

*Employer.*

Appearance: Elizabeth D. Whitley  
Charlottesville, VA 22911<sup>1</sup>  
*For the Employer*

Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*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” or “Board”) pursuant to the Employer’s request for review of the Certifying Officer’s (“CO”) 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.” 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). 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”) using an ETA Form 9142B, *Application for Temporary*

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<sup>1</sup> Non-attorney representative Whitley has indicated a physical address at 675 Peter Jefferson Parkway, Suite 350, Charlottesville, VA 22911 and a mailing address of MAS H2B, LLC, PO Box 507, Lovington, VA 22949.

*Employment Certification* (“Form 9142”). 8 CFR § 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”). 20 C.F.R. § 655.50. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.53(b); 20 C.F.R. § 655.61(a). During the administrative review only the material contained within the appeal file (“AF”)<sup>2</sup> 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 C.F.R. § 655.61(e).

### STATEMENT OF THE CASE

On January 3, 2018,<sup>3</sup> the Employer filed an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Brightview Landscapes LLC – Indianapolis for 58 “Landscape Laborer” as a seasonal need for employment from April 1, 2018 to November 12 2018 (AF 38-79), with attachments in support of the application (AF 674-79). The position was listed by the Employer as O\*Net Code 37-3011, “Landscaping and Groundskeeping Workers” in Section B.2 and B.3 of the filed ETA Form 9142B (AF 38) and is to be performed in Marion County, Indianapolis. (AF 41). No minimum educational, training, or experience requirement is specified in Section F.b of the application, though the Employer listed special requirements of –

“must lift/carry 50lbs., when necessary. Saturday work when required, when necessary. Employer-paid drug testing required of foreign or domestic workers prior to commencing.”

(AF 41). Job duties under Section F.a Item 5 requiring –

“Mow, cut, water, edge lawns; drive crew vehicles; rake and blow leaves; dig holes for bushes and planting; pull/chop weeds; prune/haul topsoil/mulch. Entry level; requires supervision.”

(AF 40). The Employer retained Elizabeth D. Whitley, Esq., as its non-attorney representative. (AF 40).

On February 27, 2018 the CO issued a “Notice of Acceptance” (“NOA”) indicating the application had been reviewed and accepted for processing. (AF 31-37). The NOA specifically stated, in pertinent part:

“... Before the Department of Labor can issue a final determination on its *Application for Temporary Employment Certification*, the employer must comply with the requirements listed below.

#### **EMPLOYER REQUIREMENTS**

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

<sup>3</sup> January 3, 2018 filing date identified at AF 12. 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). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR

The employer must conduct recruitment of U.S. workers and prepare and submit a recruitment report in accordance with 20 CFR 655.40-655.48 and the instructions provided below. All recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter. The employer's recruitment report may not be submitted until the employer-conducted recruitment is complete, including the notice of job opportunity, which must be posted for 15 consecutive business days, if applicable (see section further below) ...

**I. Instructions for Recruiting U.S. Workers:**

**Note: Employers must proceed with advertising in the time specified in this letter, even if the SWA has not provided the employer with a job order number.**

- A. Newspaper Advertisements – Where to Place (20 CFR 655.42)** The employer must place a newspaper advertisement on two separate days, which may be consecutive, one of which must be a Sunday, in a newspaper of general circulation serving the area of intended employment and appropriate to the occupation and workers likely to apply for the job opportunity.

If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the employer may contact the Department by sending an email to [tlc.chicago@dol.gov](mailto:tlc.chicago@dol.gov), describing the advertising options available in the area of intended employment, suggesting alternative publications that serve the local area, and requesting assistance in identifying an alternative publication. Upon receipt of the employer's request, the Certifying Officer (CO) may direct the employer to advertise in a regularly published daily edition of a local newspaper with the widest circulation in the area of intended employment.

- B. What to Include in the Newspaper Advertisement (20 CFR 655.41) ...**

**Note: Employers must proceed with advertising in the time specified in this letter, even if the SWA has not provided the employer with a job order number.**

...

- C. Contacting Former U.S. Employees (20 CFR 655.20(w), 655.43) ...**  
**D. Contacting the Bargaining Representative/Posting the Job Opportunity/Contacting Community Based Organizations (20 CFR 655.45) ...**

**II. Requirements for Accepting Referrals and Considering U.S. Applicants**

- A. Mandatory Referral Period (20 CFR 655.40(c)): ...**  
**B. Interviewing U.S. Workers (20 CFR 655.40(d)): ...**  
**C. Considering and Hiring U.S. Workers (20 CFR 655.40(e)) ...**

**III. Recruitment Report Requirements**

- A. Submission Date and Method (20 CFR 655.48).** In order for the OFLC CO to make a final determination on the employer's H-2B application, the employer must prepare, sign, date and submit a written Recruitment Report to our office by **March 23, 2018** by email to [tlc.chicago@dol.gov](mailto:tlc.chicago@dol.gov) with the subject "ATTN: H-2B: [H-400-17361-005307] Recruitment Report." If the employer does not have Internet access it may submit the Recruitment Report with the same caption by facsimile to (312) 886-1688 or mail to the following address:

U.S. Department of Labor  
Employment and Training Administration  
Office of Foreign Labor Certification

Chicago National Processing Center  
11 West Quincy Court  
Chicago, IL 60604-2105  
H-400-17361-005307

In order to assist with timely processing of the application, the Recruitment Report should be received by 3:00 pm Central Time on the date it is due. ...

**B. Recruitment Report Contents (20 CFR 655.48).** The Recruitment Report must contain the following information:

1. The name of each recruitment activity or source ...
2. The name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker's application ...
3. Confirmation that former U.S. employees were contacted, if applicable, and by what means;
4. Confirmation that the bargaining representative was contacted, if applicable, and by what means, or that the employer posted the availability of the job opportunity to all employees in the job classification ...
5. If applicable, confirmation that the community-based organization designated by the CO was contacted;
6. If applicable, confirmation that additional recruitment was conducted as directed by the CO; and
7. If applicable, for each U.S. worker who applied for the position but was not hired, the lawful job-related reason(s) for not hiring the U.S. worker.

**C. Duty to Update the Recruitment Report.** ...

**IV. Recruitment Documentation Retention Requirements:** ...

Please direct any inquiries regarding this case to the Chicago National Processing Center (Chicago NPC) at [tlc.chicago@dol.gov](mailto:tlc.chicago@dol.gov) or by phone to (312) 886-8000. **Any correspondence sent to the Chicago NPC must include the employer's case number to prevent delays in the processing.**

At 12:04 pm, March 26, 2018, the CO sent the Employer's representative a "Post NOA MDE – Intent to Respond" by email stating:

"The Chicago NPC is in receipt of the H-2B application for BrightView Landscapes, LLC – Indianapolis H-400-17361-005307. A Notice of Acceptance (NOA) was issued to the employer via email on February 27, 2018, and the Recruitment Report was due by March 23, 2018. As of today, no response has been received. In order for the Chicago NPC to continue processing the employer's application, please provide the Recruitment Report within one business day of receipt of this notice.

Please note that we may only correspond specifically on the above-mentioned case and more specifically, on the above-mentioned deficiencies. If you have any questions or concerns please direct them to [TLC.Chicago@dol.gov](mailto:TLC.Chicago@dol.gov). Please be sure to include your case number in all correspondence to the CNPC. Thank you."

(AF 28-30). On March 27, 2018, the Employer submitted a one page "Final Recruitment Report" signed by the Employer's HR Compliance Specialist. (AF 27).

On April 5, 2018 the CO issued a “Final Determination” denying the Employer’s January 3, 2018, *Application for Temporary Employment Certification*. (AF 12-26). The CO set forth the following reason for the denial of the application (AF 15):

**“Deficiency 1: Employer-conducted recruitment**

**Applicable Regulatory Citations: 20 CFR 655.40**

**Discussion**

The employer listed newspaper advertisements that did not comply with Departmental regulations at 20 CFR 655.40(b).

In accordance with Departmental regulations at 20 CFR 655.40(b), the employer must conduct the recruitment described in §§ 655.42 through 655.46 within 14 calendar days from the date the Notice of Acceptance is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.48.

On February 27, 2018, the Chicago NPC issued a Notice of Acceptance to the employer. The employer provided its recruitment report on March 27, 2018. The employer indicates in its recruitment report that its newspaper advertisements were placed on March 11, 2018 and March 14, 2018. The newspaper advertisement placed on March 14, 2018, falls outside of the required timeframe.

The regulations clearly state the employer must conduct the recruitment described in section 655.42 through 655.46 within 14 calendar days from the date that the Notice of Acceptance is issued. By not having both advertisements published within 14 days from the Notice of Acceptance, the employer did not comply with these regulations. Therefore, for this reason the application is denied.”

On April 17, 2018, the Employer filed a Request for Review by BALCA. (AF 2-11). The Employer submits that “On March 6, 2018, [it] was able to finalize arrangements with *The Indianapolis Star* and scheduled the required newspaper advertisements to run on [Sunday] March 11, 2018 and [Wednesday] March 14, 2018, the earliest available publication dates.” The Employer argues that it complied with the regulations by arranging for the newspaper advertising placement on March 6, 2018, “only five business days after the NOA was issued” and by completing “its employer-conducted recruitment” prior to submission of the recruitment report. The Employer submits that the regulations do not require that all advertising be completed within 14 calendar days of the NOA, just finalizing the placement of the advertisement by the Employer, as is similar to posting a notice of the job opportunity for 15 consecutive business days, a period of time that cannot be a completed period within 14 calendar days of the NOA. The Employer also argues that it must comply with the provisions at § 655.40(b) “unless otherwise directed by the CO” and “the NOA states that that ‘all recruitment steps requiring action from the employer must be conducted within 14 calendar days from the date of this letter.” (AF 6)(emphasis in original). The Employer argues it completed its required action of placing the advertising with *The Indianapolis Star* on March 6, 2018 and the physical publication of the advertisements does not constitute a step “requiring action by the employer.” The Employer asserts the CO denial determination “was incorrect and should be reversed.”

On April 24, 2018, BALCA issued a Notice of Assignment and Briefing Schedule directing the CO to assemble and transmit the AF to BALCA and granting leave to the Employer and Solicitor to file briefs on the denial issue involved in this case. On May 7, 2018, the Employer filed a brief in which it argued (1) the regulations do not support the CO's assertion that recruitment activities must be completed within 14 calendar days; (2) the CO's actions are inconsistent with OFLC's published guidelines and violate the Administrative Procedures Act; (3) Brightview dutifully complied with the CO's instructions to conduct all recruitment steps requiring action from the employer; and (4) the CO's conclusion is inconsistent with the Department's statutory and regulatory mandate to determine the availability of U.S. workers.

## DISCUSSION

The interim final rule controlling the Employer's *Application for Temporary Employment Certification*, 20 C.F.R. Part 655, "requires that the employer conduct recruitment of U.S. workers after its *Application for Temporary Employment Certification* is accepted for processing by the CO ... [in order] to ensure that there are not qualified U.S. workers who will be available for the positions listed in the *Application for Temporary Employment Certification* ... This general requirement to test the U.S. labor market is needed to ensure that the importation of foreign workers will not have an adverse effect on U.S. workers." *Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 82 Fed. Reg. 24042, 24075 (Apr. 29, 2015); 20 CFR § 655.40.

Under 20 C.F.R. Part 655, the CO, the State Workforce Agency (SWA) and the Employer conduct certain activities after the Employer's application is accepted by the CO in order to identify U.S. workers who are potentially qualified, able and willing to perform the identified job opportunity. Examples of such activity include, but are not limited to –

1. CO-conducted recruitment activity includes sending a copy of the Notice of Acceptance to the SWA as set forth in § 655.33; placing and keeping a copy of the job order on the Departmental electronic job registry for public examination during the recruitment period as set forth in § 655.36; and, submitting to the SWA approved changes in the job order as set forth in §§ 655.35.
2. SWA-conducted recruitment activity includes placing a job order into intra- and interstate clearance as set forth in § 655.16(c); apprise individuals who apply for the job opportunity of all the material terms and conditions of the employment opportunity as set forth in § 655.47; refer to the employer all individuals who apply for the job opportunity or on whose behalf a job application is made who are qualified and will be available for employment as set forth in §§ 655.16(d) and 655.47; and keep the job order on its active file until the end of the recruitment period as set forth in §655.16(d).
3. Employer-conducted recruitment activity includes conducting the recruitment steps described in § 655.42 through 655.46 within 14 calendar days from the date of the Notice of Acceptance unless otherwise directed by the CO as set forth in § 655.40(b); create specific advertising that complies with the requirements as set forth in §§ 655.41(b) and 655.42(c); ensure placement of such advertisement in a newspaper of general circulation

serving the area of intended and appropriate to the occupation and the workers likely to apply for the job opportunity includes placement on a Sunday edition and one additional day, which may be consecutive days, unless otherwise directed by the CO as set forth in § 655.42(a) and (b); maintain copies of the newspaper advertising pages/tear sheets in which the advertisements appeared, or other proof of publication date and content furnished by the newspaper as set forth in § 655.42(d); contact and disclose the terms of the job order to its former U.S. workers employed in the occupation at the intended place of employment during the previous year and solicit their return to the job, unless they were dismissed for cause or abandoned the job, as set forth in § 655.43; maintain documentation sufficient to document the steps taken to contact and disclose the terms of the job order to its former U.S. workers employed in the occupation at the intended place of employment during the previous year and solicit their return to the job as set forth in §§ 655.43 and 655.56; provide a copy of the application and job order to appropriate bargaining unit representatives, if any, as set forth in § 655.44(a); maintain documentation sufficient to document provide a copy of the application and job order was provided to appropriate bargaining unit representatives as set forth in § 655.44(a); if there is no bargaining unit representative, post a notice advertising the availability of the job opportunity for 15 consecutive business days either electronically on an employer maintained internal/external website maintained and used by the employer for notices to employees about terms and condition of employment, or at 2 conspicuous locations at the place of intended employment as set forth in § 655.44(b); maintain and identify a copy of the posted notice advertising the availability of the job opportunity for 15 consecutive business days and where and when it was posted, if required to so post as set forth in § 655.44(b); conduct such other additional and reasonable recruitment activity required by the CO as set forth in § 655.46; maintain documentation of such other additional and reasonable recruitment activity required by the CO as set forth in §§ 655.46 and 655.56; accept referrals and application from all U.S. applicants interested in the position until 21 days before the date of need as set forth in § 655.40(c); if desired, interview U.S. workers by telephone or at little cost in the location where the worker is being recruited as set forth in § 655.40(d); consider all U.S. applicants for the job opportunity as set forth in § 655.40(e); complete all employer-conducted recruitment before submitting a recruitment report as set forth in § 655.40(b); prepare, sign, and date a comprehensive recruitment report as set forth in §§ 655.40(f), 655.48(a), 655.44(a), and 655.44(c); submit to the CO an initial recruitment report by the required date as set forth in § 655.40(b); prepare, sign, and date an updated recruitment report reflecting the name and conduct information of each U.S. worker who applied or was referred to the job opportunity after the initial recruitment report was prepared along with the disposition of such applications and whether such U.S. workers were offered and accepted/declined the job opportunity or the lawful job-related reason such U.S. workers were not hired as set forth in § 655.48(a); and, retain updated recruitment report(s) in order to be available in the event of a post-certification audit as set forth in § 655.48(b).

Here the Employer reported that it placed the newspaper advertisements required by §§ 655.41 and 655.42 with *The Indianapolis Star* and that the advertisement appeared in the Sunday, March 11, 2018 and Wednesday, March 14, 2018 editions. The February 27, 2018 NOA directed the Employer to place the required newspaper advertisements within 14 calendar

days of the date of the NOA. This 14-day period expired on March 13, 2018.<sup>4</sup> While the CO has discretion to extend the 14 day period under § 655.40(b), there is no evidence that the Employer requested an extension in time or an accommodation because *The Indianapolis Star* was not a Sunday or daily publication. *see Shore Lodge Whitetail, LLC*, 2018-TLN-00067 (Mar. 5, 2018)[After NOA issued CO approved advertising in local paper which published only on Thursdays which resulted in second Thursday advertisement being on the 15<sup>th</sup> day after the NOA; however, CO had “directed otherwise” with knowledge that the approved local newspaper only published on Thursdays, such that the second advertisement not being within 14 days of the NOA was excused].

The Employer states that it completed arrangement with *The Indianapolis Star* on March 6, 2018 to have the advertisements published on Sunday March 11, 2018 and Wednesday March 14, 2018. However, the Employer provided no documentation explaining the actions taken or not taken during the period from the NOA to March 6, 2018 were excused by other CO direction or the impossibility to ensure the required timely advertising. *See LL Alvarez, LLC*, 2017-TLN-00052 (Jun. 21, 2017)[ Cost of Sunday advertising did not excuse failure of Employer to place a Sunday advertisement or second advertisement within required 14 day period].

The Employer argues that the second advertisement was placed within the 15 business-day period for posting the Notice of the job opportunity such that it was in substantial compliance with the 14 calendar-day requirement for newspaper advertisements. However, such delay in posting the second advertisement is not excused. *See Whittle, Inc.*, 2016-TLN-00019 (Mar. 9, 2016)[BALCA has strictly enforced the H-2B newspaper advertisement requirements in order to protect domestic workers such that “substantial compliance” with the requirements does not overcome 14 calendar-day requirement for two specific advertisement placements]; *A New Image Landscape, Inc.*, 2017-TLN-00046 (May 5, 2017)[failure to place job advertisements within required 14 calendar-day period is not excused even though placed within 15 business-day period for posting Notice of the job opportunity]; *M.A.G. Irrigation, Inc.*, 2017-TLN-00033 (Apr. 25, 2017)[even a minor delay of one day in placing job advertisements constitutes non-compliance with the requirements].

Certification by the CO may only be granted if the employer has met all the “Post-Acceptance Requirements” subpart, §§ 655.40 through 655.51, thus demonstrating that there is an insufficient number of U.S. workers who are qualified and who will be available for the job opportunity for which certification is sought, and that, the employment of the H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. 20 C.F.R. § 655.50(b). Here the Employer failed to comply with the requirement to place a Sunday newspaper advertisement and a second newspaper advertisement with 14 calendar days of the NOA in violation of 20 C.F.R. § 655.40(b).

After deliberation on the AF and arguments presented, this presiding Judge finds that the CO properly denied the Employer’s January 3, 2018, *Application for Temporary Employment Certification* for 58 H-2B Landscape Laborers for the period of need from April 1, 2018 through November 12, 2018, pursuant to 20 C.F.R. § 655.40 and § 655.50(b).

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<sup>4</sup> February 2018 contained 28 days.

**ORDER**

**It is hereby ORDERED** that the Certifying Officer's **DENIAL** of the Employer's January 3, 2018, *Application for Temporary Employment Certification* is **AFFIRMED**.

**SO ORDERED.**

For the Board:

ALAN L. BERGSTROM  
Administrative Law Judge

ALB/jcb  
Newport News, Virginia