



Issue Date: 24 May 2018

BALCA CASE NO.: 2018-TLN-00131

ETA CASE NO.: H-400-17362-598567

*In the Matter of:*

IVY GREEN LAWN CARE, LLC,  
*Employer.*

Appearance: Kevin Lashus, Esquire  
FisherBroyles, LLP  
Austin, TX  
*For the Employer*

Before: Evan H. Nordby  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

This case arises from Ivy Green Lawn Care, LLC's ("Employer") request for review of the Certifying Officer's ("CO") decision to deny an application for temporary alien labor certification under the H-2B non-immigrant program. 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 United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* ("Form

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<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

<sup>2</sup> On April 29, 2015, the Department of Labor ("DOL") 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. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications "submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015." IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

## BACKGROUND

On or about January 24, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from the Employer. AF 77-92.<sup>3</sup> The Employer applied for temporary labor certification for 10 landscape laborers to work from March 28, 2018 to November 15, 2018, in Coweta County and Fayette County, GA. *Id.* These counties are in the greater Atlanta area. AF 91-92.

On March 12, 2018, the OFLC CO issued a Notice of Deficiency to the Employer, setting out six deficiencies in the Application. AF 65-75. In response, the Employer submitted a revised application dated March 13, 2018. AF 54-64. The CO requested additional information, AF 53, and the Employer, on March 28, 2018, submitted a response. AF 51-52. The CO issued a Notice of Acceptance on April 3, 2018, which in part directed that the Employer attempt to recruit U.S. workers through newspaper advertisements and job postings in accordance with the H-2B regulations. AF 41-47; *see* 20 C.F.R. §§ 655.41, .45. The Notice of Acceptance stated that the newspaper advertisements “must contain the information below.” AF 42 (emphasis in original). The Notice’s language closely tracks – indeed, largely quotes – the language of 20 C.F.R. § 655.41. *See* Discussion *infra*.

The Employer proceeded with attempting to recruit U.S. workers. AF 32-37. The Employer placed a newspaper advertisement in the Atlanta Journal-Constitution for two consecutive days, April 8-9, 2018, which read in full:

Ivy Green is now hiring 10 temporary workers from April through Nov for landscape and lawn maintenance. Pay starts at \$12 7am – 4pm. Work will be in Fayette and Coweta county. Apply for the job at your nearest SWA or apply/report at Clayton’s Career Center at 3000 corporate center Dr. Morrow, Ga 30260. Job order #1910898122

[*sic*]. AF 33-34. As there is no bargaining representative (ie., union) for the Employer’s workforce, the Employer posted the job. For its job postings, the Employer indicated on its trucks that it was “Now Hiring,” AF 36-37, and used at least one lawn sign stating “Help Wanted Lawn Maintenance” and a phone number. AF 35.

The Employer’s Application for Temporary Employment Certification was denied for failure to include all of the required information in both the newspaper advertisements and in the job postings, AF 21-22, and this appeal followed. Inexplicably, the Employer states that its appeal is based on the assertion that the OFLC “erroneously determined that Ivy Green Lawn Care, LLC, failed to establish that its peakload job opportunity is and will be temporary in nature.” AF 1.

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<sup>3</sup> References to the appeal file will be abbreviated with an “AF” followed by the page number.

## DISCUSSION

BALCA's review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO; any legal briefs submitted by the parties (none have been filed here); and the Employer's request for administrative review, which may only contain legal arguments and evidence that was actually submitted to the CO before the date the CO issued a Final Determination.<sup>4</sup> 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 case to the CO for further action. 20 C.F.R. § 655.61(e).

Review of the CO's determination of H-2B applications is governed by the "arbitrary and capricious" standard. *Three Seasons Landscape Contracting Service, Inc. DBA Three Seasons Landscape*, 2016-TLN-00045, \*19 (Jun. 15, 2016); *Brooks Ledge, Inc.*, 2016-TLN-00033, \*4-5 (May 10, 2016); *see also J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016). Under the "arbitrary and capricious" standard, the reviewing judge or panel looks to see if the initial decision maker examined "the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Three Seasons*, 2016-TLN-00045, \*19 (quoting *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted)). "If the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, then it is arbitrary and capricious." *Id.*

The Employer bears the ultimate burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, \*7 (Jan. 10, 2011); *Andy and Ed, Inc., dba Great Chow*, 2014-TLN-00040, \*2 (Sep. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, \*5 (Jul. 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).

To that end, the H-2B certification process requires that employers advertise the open positions to U.S. workers prior to receiving a labor certification, and that the advertisements include certain specified information so that the labor market is adequately tested. The

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<sup>4</sup> Under 20 C.F.R. § 655.61(a), within ten (10) business days of the CO's adverse determination, an employer may request that BALCA review the CO's denial. Within seven (7) business days of receipt of an employer's appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO's decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO's brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

advertising requirements for U.S. workers under the H-2B program are straightforward, and are as follows:

(b) All advertising must contain the following information:

(1) The employer's name and contact information;

(2) 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;

(3) A description of 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) A statement that the job opportunity is a temporary, full-time position including the total number of job openings the employer intends to fill;

(5) If applicable, a statement that overtime will be available to the worker and the wage offer(s) for working any overtime hours;

(6) If applicable, a statement indicating that on-the-job training will be provided to the worker;

(7) The wage that the employer is offering, intends to offer or will provide to the H-2B workers or, in the event that there are multiple wage offers, the range of applicable wage offers, each of which must equal or exceed the highest of the prevailing wage or the Federal, State, or local minimum wage;

(8) If applicable, any board, lodging, or other facilities the employer will offer to workers or intends to assist workers in securing;

(9) All deductions not required by law that the employer will make from the worker's paycheck, including, if applicable, reasonable deduction for board, lodging, and other facilities offered to the workers;

(10) A statement that transportation and subsistence from the place where the worker has come to work for the employer to the place of employment and return transportation and subsistence will be provided, as required by § 655.20(j)(1);

(11) If applicable, a statement that work tools, supplies, and equipment will be provided to the worker without charge;

(12) If applicable, a statement that daily transportation to and from the worksite will be provided by the employer;

(13) A statement summarizing the three-fourths guarantee as required by § 655.20(f); and

(14) A statement directing applicants to apply for the job opportunity at the nearest office of the SWA in the State in which the advertisement appeared, the SWA contact information, and, if applicable, the job order number.

20 C.F.R. § 655.41. The job postings required under 20 C.F.R. § 655.45(b) must contain the same information.

The Employer's newspaper advertisements failed to include much of this information. The advertisements did not include the days of employment, any minimum experience requirement, a statement summarizing the "three-fourths guarantee," any statement regarding transportation or subsistence, and any statement regarding wage deductions.

Moreover, the advertisements included start and end months, but not dates; and, only the most general statement of the work to be performed ("landscape and lawn maintenance"), which I find to be an insufficiently specific statement of the job "duties." Since the position sought to be filled is "landscape laborer," I find the statement of the work to be performed that the Employer provided to be simply a restatement of the position title, and not a statement of duties as required by the regulation, which might include "operate lawn mower," "hand weed garden beds," "install pavers," or similar.

The job postings omitted nearly all of the required information.

"By omitting . . . advertising components, the Employer did not conduct a proper test of the labor market to determine if labor certification was required." *Andy and Ed Inc., D/B/A Great Chow*, 2014-TLN-00040, at \*4 (quoting *Freemont Forest Systems, Inc.*, 2010-TLN-00038 (Mar. 11, 2012)).

## **ORDER**

For the foregoing reasons, the Certifying Officer's final determination was not arbitrary and capricious, and the denial of certification is **AFFIRMED**.

For the Board of Alien Labor Certification Appeals

EVAN H. NORDBY  
Administrative Law Judge