



**Issue Date: 09 January 2020**

**BALCA Case No.: 2020-TLN-00018**  
ETA Case No.: H-400-19272-065132

*In the Matter of:*

**BAY AREA LANDSCAPE NURSERY, LLC,**

*Employer.*

Certifying Officer: Leslie Abella  
Chicago National Processing Center

Before: Monica Markley  
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 “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). 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 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.

**STATEMENT OF THE CASE**

On September 28, 2019, the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B or “Application”) from Bay Area Landscape Nursery, LLC (“Employer”) for 30 Installers to be employed as landscaping or groundskeeping

workers from December 12, 2019, through January 15, 2020, to meet a seasonal need related to holiday lighting work. (AF<sup>1</sup> 37-58.)

On October 7, 2019, the CO issued a *Notice of Deficiency* (AF 32-36), which Employer addressed through a response filed on October 22, 2019. (AF 19-31). The CO issued a *Notice of Acceptance* on October 29, 2019, notifying Employer that its Application had been accepted for processing and providing instructions for recruitment of U.S. workers. (AF 10-18.) The instructions required Employer to follow the recruitment steps outlined in the letter within 14 calendar days from the date of the letter, and to file a recruitment report after the employer-conducted recruitment was complete. (AF 12-17.) Regarding the recruitment report, the letter provided that Employer must “prepare, sign, date and submit a written Recruitment Report” to the OFLC by November 21, 2019, and set forth the required contents of the recruitment report. (AF 15-16).

Employer did not submit a Recruitment Report. On November 22, 2019, the CO sent a *Minor Deficiency Email*, stating that Employer’s recruitment report had not been received and directing Employer to submit the recruitment report by November 26, 2019. (AF 8-9.) The email also stated that if Employer had chosen not to pursue this labor certification, it should submit permission to withdraw the application by November 26, 2019.

Employer did not file anything in response to the *Minor Deficiency Email*. On November 27, 2019, the CO issued a *Final Determination* denying the Application. (AF 5-7.) The CO explained that the Notice of Acceptance required Employer to submit the recruitment report by November 21, 2019; Employer did not submit a report by that date; and Employer had not submitted a recruitment report in response to the CO’s November 22 email. Because Employer did not submit a recruitment report as required by 20 C.F.R. § 655.48(a), the Application was denied.

By letter received on December 12, 2019, Employer requested administrative review of the Final Determination. (AF 1-4.) Employer noted that the Application was denied for failure to submit the recruitment report, and “reserve[d] the right to fully articulate with legal authority in a brief” the reasons for its appeal of the denial. (AF 3.)

I issued a *Notice of Assignment and Expedited Briefing Schedule* on December 18, 2019. The Notice stated that the regulations require an employer to submit its argument in its request for review, and provide only for a responsive brief from the CO. Nevertheless, I permitted both Employer and the CO to file briefs within seven business days of receipt of the Appeal File. The Appeal File was submitted on December 26, 2019. Neither party submitted a brief.

## LEGAL STANDARD

The standard of review in H-2B cases is limited. A reviewing judge may consider only “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The

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<sup>1</sup> The Appeal File will be cited as “AF” followed by the relevant page number.

evidence is reviewed de novo, and a reviewing judge must affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action. 20 C.F.R. § 655.61(e). An employer seeking to hire employees under the H-2B program bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361.

## DISCUSSION

A CO may only grant an employer's H-2B application if there are not enough available domestic workers in the United States who are capable of performing the temporary labor at the time the employer files its application for certification. 8 U.S.C. § 1101(a)(15)(H)(ii)(b); *Burnham Companies*, 2014-TLN-00029 (May 19, 2014). Consequently, before a temporary labor certification may issue, employers must conduct certain recruitment steps designed to inform U.S. workers about the job opportunity.<sup>2</sup> See 20 C.F.R. § 655.40-§ 655.47. In order to show that it has complied with the regulations and conducted these affirmative recruitment efforts, an employer must file a recruitment report addressing the regulatory requirements. 20 C.F.R. § 655.48. The regulation requires that the recruitment report contain specific information detailing the employer's recruitment activity and be submitted "by a date specified by the CO in the Notice of Acceptance." 20 C.F.R. § 655.48(a). It is the employer's burden to prove its eligibility for employing foreign workers under the H-2B program, and the recruitment report assists in determining whether the employer has met its burden. See *Whittle, Inc.*, 2016-TLN-00019 (Mar. 9, 2016).

Here, Employer did not file a recruitment report. In failing to file the required recruitment report, Employer failed to comply with the regulations. Consequently, the CO properly denied the Employer's *H-2B Application for Temporary Employment Certification*.

## ORDER

It is hereby ORDERED that the Certifying Officer's denial of the Employer's September 28, 2019 Application for Temporary Employment Certification is AFFIRMED.

For the Board:

MONICA MARKLEY  
Administrative Law Judge

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<sup>2</sup> 20 C.F.R. § 655.40(a) provides: "Employers must conduct recruitment of U.S. workers 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*." The regulation further provides: "Unless otherwise instructed by the CO, 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." 20 C.F.R. § 655.40(b).