



**Issue Date: 08 June 2012**

**BALCA Case No.: 2012-TLN-00035**

ETA Case No.: C-12083-58796

*In the Matter of:*

**MARIAN B. CLARK,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Marian B. Clark  
*Pro Se for the Employer*

Gary M. Buff, Associate Solicitor  
Harry S. Sheinfeld, Counsel for Litigation  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: **PAUL C. JOHNSON, JR.**  
Associate Chief Administrative Law Judge

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

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the CO") denial of 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 Department of Homeland Security. *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). Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.33(a). 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 Employer's request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the Employer's application. 20 C.F.R. § 655.33(a), (e).

### **STATEMENT OF THE CASE**

On March 23, 2012, the United States Department of Labor (the "Department"), Employment and Training Administration ("ETA"), received an ETA Form 9142 *Application for Temporary Labor Certification* ("Application") from Ms. Marian B. Clark, a ninety year old woman who resides in Houston, Texas. AF 9-12, 102-109.<sup>1</sup> In this Application, Ms. Clark requested H-2B labor certification for one "Personal Care Aide" from April 1, 2012 to February 31, 2013. Ms. Clark neglected to select a standard under "Nature of Temporary Need" (Section B, Item 8 of ETA Form 9142), but provided the following explanation under "Statement of Temporary Need" (Section B, Item 9 of ETA Form 9142):

I am 90 years old, not in good health; somewhat unsteady on my feet and I have a tendency to fall. I want to live in my home as long as I am able; but I need help now as I cannot completely care for myself. Up until now my daughter has been able to help me but her situation has changed & one daughter is all the family I have. . . . Please note used 10 months for the reason temporary is 10 months – if I live longer, which of course I hope to do; I will see what I can do to extend the 10 mo.

AF 103.

On March 29, 2012, the CO issued a *Request for Further Information* ("RFI"), notifying Ms. Clark that the Department was unable to render a final determination for her application because she failed to satisfy all requirements of the H-2B program. One of the four deficiencies identified in the RFI was Ms. Clark's failure to submit a complete and accurate ETA Form 9142, as required by 20 C.F.R. § 655.20(a). The CO specifically identified the following issues:

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<sup>1</sup> Citations to the 111-page appeal file will be abbreviated "AF" followed by the page number.

1. The employer indicates that its end date of need is February 31, 2013 in ETA Form 9142, Section B., Item 6.; however, February 31, 2013 is not a valid date;
2. The employer failed to complete ETA Form 9142, Section B., Item 8., indicating its requested standard of need; and
3. The employer failed to complete ETA Form 9142, Section D, Items 1-14, and Section H., Item 2., which are required fields on the application.

AF 101. In order to remedy this deficiency, the CO instructed Ms. Clark to submit a corrected ETA Form 9142 with the above items properly and fully completed.

The CO additionally found that Ms. Clark failed to establish that the nature of her need is temporary, as required by 20 C.F.R. § 655.21(a). AF 98. In particular, the CO found that Ms. Clark provided “no evidence or documentation . . . justifying a temporary need for one Personal Care Aid for the months of April 2012 through February 2013.” According to the CO, it was “unclear if [Ms. Clark] has a temporary need, or if the need is permanent in nature.” *Id.* To remedy this deficiency, the CO instructed Ms. Clark to amend her ETA Form 9142 to include attestations regarding temporary need in the appropriate sections, and provide a detailed statement of temporary need containing the following:

1. A description of the employer’s business history and activities (*i.e.*, primary products or services) and schedule of operations through the year;
2. An explanation regarding why the nature of the employer’s job opportunity and number of foreign workers being requested for certification reflect a temporary need; and
3. An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need.

AF 99. The CO further instructed Ms. Clark to “submit supporting evidence and documentation that justifies [her] chosen standard of temporary need,” including a doctor’s note. *Id.*<sup>2</sup>

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<sup>2</sup> The CO identified two additional deficiencies in the RFI, specifically Ms. Clark’s failure to comply with the pre-filing recruitment obligations at 20 C.F.R. § 655.15(f)(i), and Ms. Clark’s failure to submit a complete and accurate recruitment report, as required by 20 C.F.R. §§ 655.20(a) and 655.15(j). Only one of these deficiencies, Ms. Clark’s failure to submit a complete and accurate recruitment report, was offered as a ground for denial in the CO’s Final Determination. Because I have upheld the CO’s first stated basis of

Ms. Clark responded to the RFI by fax on April 6, 2012 and April 9, 2012. AF 68-94. Ms. Clark's response included an amended ETA Form 9142 and documentation including, *inter alia*, a letter from a physician and a letter from her daughter. *Id.* On her amended ETA Form 9142, Ms. Clark changed the "Period of Intended Employment" to February 1, 2012 through November 30, 2012. In addition, she checked the box for "Intermittent or Other Temporary Need" under Section B, Item 8 ("Nature of Temporary Need"), and revised her "Statement of Temporary Need" under Section B, Item 9 to state:

I am 90 years old, somewhat unsteady on my feet, but in fair condition for my age. Right now I have a temporary problem with my left knee and need someone to help me for a short time while it is healing. See Doctor's letter enclosed.

AF 76. The enclosed doctor's letter, which was signed by Sandeep K Agarwal, MD, stated:

Mrs. Marian Clark is a 90[-year-old] female under my care for management of osteoarthritis and baker's cyst, left knee. She needs temporary assistance in the home with a personel [sic] care aid to prevent falls and assist with activities of daily living. Please contact my office if any questions.

AF 69. Ms. Clark also enclosed a letter from her daughter. It stated:

My mother has been treated for over 30 years by two notable doctors. Both Dr. Willerson, her heart doctor at St. Luke's Hospital and her gastroenterologist, Dr. Stroehlein, have supported the plan to do what we can to enable my mother to stay in her own home as long as she can do so, reasonably and safely.

In addition to my mother's temporary care for her knee under Dr. Arguwald [sic], my mother is currently following through on a referral to Dr. Karen Downing of Houston for chiropractic treatments of her knee and possibly some occupational therapy for lymphoma support of the knee. This treatment for her knee will likely span to 8-10 months.

In addition, this temporary time frame will coincide with the time when I will become available to help my mother with any necessary changes in her living situation. At that time my daughter will have graduated from high school in Dallas where we live and will have begun her first year in college.

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denial—Ms. Clark's failure to establish that the nature of her need is temporary, as required by 20 C.F.R. § 655.21(a)—I need not discuss Ms. Clark's failure to submit a complete and accurate recruitment report.

It is the temporary condition of her knee and its prescribed treatment and therapy and the commitment that I still have in my home in Dallas that justifies the temporary need for a personal aide in her home.

AF 93.

On May 4, 2012, the CO issued a Final Determination denying Ms. Clark's Application. AF 27-33. The denial was based, in part, on the CO's determination that Ms. Clark failed to establish that "the nature of [her] need is temporary," as required by 20 C.F.R. § 655.21(a). In particular, the CO found that Ms. Clark failed to provide sufficient attestations to justify the standard of temporary need that she selected in her amended ETA Form 9142. AF 29. Specifically, the CO explained:

The employer has not provided any evidence or documentation justifying an intermittent need, which requires that an employer must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

The employer's statement that she will need a "personal care aide to prevent falls and assist with activities of daily living" indicates that her need may last far longer than her requested dates, as she will require the worker for daily living. The employer's statement does not justify an intermittent need. An intermittent need would require that the requested Personal Care Aide only work or perform services or labor occasionally or intermittently for short periods of time. Therefore, the employer's statement does not meet the definition of an intermittent standard of need.

In addition, the employer's original application requested dates of need for April 1, 2012 through February 31, 2013, but has now changed its requested dates of need to February 1, 2012 through November 30, 2012. The employer has also not provided any explanation as to why her dates of need have changed, or how she has determined the amended dates. The Department cannot determine the employer's actual need as the requested dates are inconsistent.

AF 31. Considering Ms. Clark's fluctuating dates of need and inadequate supporting documentation, the CO found that Ms. Clark "failed to adequately respond to the RFI and failed to provide sufficient documentation to overcome the deficiency . . ." *Id.* As a result, the CO denied Ms. Clark's application for H-2B labor certification.<sup>3</sup>

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<sup>3</sup> As discussed in footnote 2, the CO's denial was also based on Ms. Clark's failure to submit a complete and accurate recruitment report; however, because I find that Ms. Clark did not establish a temporary need, as required by 20 C.F.R. § 655.21(a), I need not reach this other ground for denial.

By letter dated May 15, 2012, Ms. Clark requested review of the CO's denial. AF 1-25. In this letter, Ms. Clark defended her response to the RFI, explaining that her understanding and view of her condition underwent a change during the application process as she and her daughter applied a sharper focus to recent changes in her condition. AF 10. Ms. Clark maintained that responding to the RIF, in particular, resulted in her "more accurately pinpointing the more recent decline in [her] general mobility and strength . . . and attributing [her] temporary condition more accurately to the recent development of the problem with [her] knee." *Id.* She expressed concern that, in finding her Application failed to justify the nature of her temporary need, the CO may have overlooked the letter that she enclosed from her daughter. *Id.* In Ms. Clark's view, her daughter's letter "carried weight" in justifying the nature of her temporary need because:

[I]n it my daughter states that the "requested dates of need" (February 1, 2012 to November 30, 2012, amended dates of need as corrected in the RFI) corresponded with the time period she would be tied up at her home in Dallas with her daughter finishing her last semester of high school and getting settled in her first few months in college. The letter also listed the additional medical support she was being advised on regarding my recent knee condition. In the letter she also affirmed that after the "requested dates of need," she would be available to undertake for me.

*Id.*

Counsel for the CO filed a brief on May 30, 2012; however, this brief merely "request[s] that this denial be affirmed for the reasons ably set forth by the Certifying Officer (CO) in his denial letter," without further explanation. The Employer did not file a brief with the Board.

## **DISCUSSION**

The Department's H-2B regulations require Applications for Temporary Employment Certification to "include attestations regarding temporary need in the appropriate sections." 20 C.F.R. § 655.21(a). Section 655.21(a) specifically instructs employers to include a detailed statement of temporary need containing: (1) a description of the employer's business history and activities (*i.e.*, primary products or services) and schedule of operations throughout the year; (2) an explanation regarding why the nature

of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need; and (3) an explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need, as defined by DHS under 8 C.F.R. 214.2(h)(6)(ii)(B).

Ms. Clark's initial ETA Form 9142 failed to include all of the necessary attestations regarding temporary need. However, the CO issued a RFI providing Ms. Clark the opportunity to amend her application and correct this deficiency. The RFI specifically instructed Ms. Clark to "submit supporting evidence and documentation that justifies the chosen standard of temporary need," including "other evidence and documentation that similarly serves to justify the chosen standard of temporary need, including a doctor's note." AF 99.

On her amended ETA Form 9142, Ms. Clark chose the standard for "Intermittent or Other Temporary Need." However, in her request for BALCA review, Ms. Clark admits:

After reviewing the explanations in the Final Determination and in the General Instructions for the ETA 9142 regarding the specific classification of "Intermittent" which I assigned to my temporary need in Part B, 8 of the original ETA 9142 and in the new ETA 9142[b], I have determined that the "One-Time Occurrence" choice is the appropriate classification of my temporary need. As a sole proprietor, I have not employed a worker in the past to perform the services I am requesting, and I will not need the services in the future. I did not have this temporary physical condition to contend with in the past, and I will have my daughter available to help if needed after the requested dates of service.

AF 10. Based on her new understanding, Ms. Clark requests permission to amend her ETA Form 9142 to select the "One-Time Occurrence" standard, rather than an "Intermittent or Other Temporary Need" standard. However, 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 Employer's request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the Employer's application. 20 C.F.R. § 655.33(a), (e). Accordingly, I cannot grant Ms. Clark's request to amend her application, and must consider the standard of temporary need that she selected in the ETA Form 9142 submitted before the CO.

The attestations and documentation Ms. Clark submitted before the CO do not establish that she has an “intermittent need” for a Personal Care Aide, as that term is defined in 8 C.F.R. § 214.2(h)(6)(ii)(B)(4). In order to establish an “intermittent need,” under 8 C.F.R. § 214.2(h)(6)(ii)(B)(4), an employer must demonstrate “that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.” In her response to the RFI, Ms. Clark simply stated that she has a “temporary problem” with her left knee and needs someone to help her “for a short time while it is healing.” She submitted a letter from her physician, Dr. Sandeep K Agarwal, as well as a letter from her daughter, Ms. Kathy Mays. Neither document assists Ms. Clark in establishing an occasional or intermittent need for a Personal Care Aide to “perform services or labor for short periods.” Dr. Agarwal’s letter merely indicates that Ms. Clark “needs temporary assistance in the home with a person[a]l care aid to prevent falls and assist with activities of daily living”; it not indicate how long Ms. Clark’s need for assistance would span, or suggest that Ms. Clark would only “occasionally or intermittently” require the assistance of a Personal Care Aide for “short periods.” The same is true of Ms. Mays’ letter.<sup>4</sup> While the standard that Ms. Clark selected additionally includes an “Other Temporary Need,” Ms. Clark has not asserted that her response justifies any “Other Temporary Need.”

The regulations explicitly state that “[c]ompliance with an RFI does not guarantee that the employer’s application will be certified . . . . The employer’s documentation must justify its chosen standard of temporary need or otherwise overcome the stated deficiency in the application.” 20 C.F.R. § 655.23(c)(4). Indeed, as discussed above, the RFI specifically instructed Ms. Clark to “evidence and documentation . . . to justify the chosen standard of temporary need, including a doctor’s note.” AF 99. Although Ms. Clark provided an explanation and supporting documentation in response to the RFI, I

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<sup>4</sup> I agree with Ms. Clark’s concern that the CO may have overlooked Ms. Mays’ letter, and note that the contents of this letter may have aided Ms. Clark in establishing temporary need under the standard for “One-Time Occurrence”; however, as discussed above, this decision must be based on the “intermittent need” standard that Ms. Clark submitted to the CO. Moreover, while Ms. Mays’ letter suggests that she will be available to assist Ms. Clark with her living situation after November 2012, I note that Ms. Mays lives in a different city over 200 miles away from Ms. Clark, and never explicitly stated that she would move to Houston and take over the duties of Ms. Clark’s “Personal Care Aide,” if necessary.

agree with the CO that her response did not sufficiently justify her chosen standard of temporary need. Accordingly, I find that the CO properly denied certification.

**ORDER**

Accordingly, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

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**PAUL C. JOHNSON, JR.**  
Associate Chief Administrative Law Judge