



**Issue Date: 21 May 2015**

OALJ Case No.: 2015-TLN-00047  
ETA Case No.: H-400-15063-485599

In the Matter of:

**POTOMAC HOME HEALTH CARE,**  
Employer.

Certifying Officer: Charlene G. Giles  
Chicago National Processing Center

Appearances:

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*For the Employer*

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Washington, D.C. 20210  
*For the Certifying Officer*

Before: Peter B. Silvain, Jr.  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Potomac Home Health Care’s request for review of the Certifying Officer’s (“CO”) final determination in the above-captioned H-2B temporary labor certification matter.<sup>1</sup> The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security.<sup>2</sup> Employers who seek to hire foreign workers

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<sup>1</sup> On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule amending the standards and procedures that govern the H-2B temporary labor certification program. *See* 80 Fed. Reg. 24042 (Apr. 29, 2015). Pursuant to this rule, DOL will “continue to process an *Application for Temporary Employment Certification* submitted prior to April 29, 2015 in accordance with 20 C.F.R. Part 655, Subpart A, revised as of April 1, 2009.” *See id.* at 24109 (to be codified at 20 C.F.R. § 655.4). The Employer filed an *Application for Temporary Employment Certification* on March 4, 2015. Accordingly, I will decide this case under the regulations at 20 C.F.R. Part 655, Subpart A (2009).

<sup>2</sup> *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).

under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).<sup>3</sup> A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification.<sup>4</sup> If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA.<sup>5</sup>

## STATEMENT OF THE CASE

### H-2B Application

Potomac Home Health Care (the “Employer”) is a non-profit venture, associated with two Johns Hopkins Medicine hospitals, which places certified nurse assistants, licensed practical nurses, and home health aides in several locations in metropolitan Maryland and Washington, DC. AF 195, 206.<sup>6</sup> On March 4, 2015, the Employer filed an ETA Form 9142, *Application for Temporary Employment Certification* (“Application”), an ETA Form 9141, *Application for Prevailing Wage Determination*, and supporting documentation. AF 195-350. The Employer requested certification for ten “Home Health Aides”<sup>7</sup> from April 1, 2015 until January 1, 2016, based on an alleged peakload need during that period. AF 195.

### CO’s Request for Further Information

On March 25, 2015, the CO sent the Employer a Request for Further Information (“RFI”) after determining that the Employer failed to satisfy all of the requirements of the H-2B program. AF 186-194. The CO described three deficiencies in the Employer’s Application, and notified the Employer that it had seven calendar days from the date of the RFI to submit additional information and documentation to remedy the deficiencies. AF 187.

As to the Employer’s deficiencies, the CO first stated the Employer failed to establish that the nature of its need for H-2B workers was temporary, as required by 20 C.F.R. §§ 655.6 and 655.21(a). AF 190-193. The CO noted that according to 20 C.F.R. §§ 655.6(b), which cites 8 C.F.R. § 214.2(h)(6)(ii)(B), the Employer’s need “is considered temporary if justified to the Secretary as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security.” AF 190. The CO specified that the Employer “did not include adequate attestations to demonstrate the requested standard of temporary need.” *Id.* The CO asked the Employer to submit an updated temporary need statement that: (1) describes the Employer’s business history, activities, and schedule of operations throughout the year; (2) explains why the job opportunity for which the Employer is seeking labor certification is temporary; and (3) explains how the Employer determined its dates of temporary need. AF 191. Furthermore, the CO asked the Employer to submit documentation justifying a peakload need for workers. AF 192. The CO asked the Employer to include in its response: (1) signed work contracts and/or monthly invoices from the prior calendar year

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<sup>3</sup> 8 C.F.R. §214.2(h)(6)(iii).

<sup>4</sup> 20 C.F.R. §655.23.

<sup>5</sup> 20 C.F.R. §655.33(a).

<sup>6</sup> In this Decision and Order, “AF” refers to the Appeal File.

<sup>7</sup> SOC (O\*Net/OES) occupation code 31-1011. AF 195.

demonstrating the work to be completed during the requested period of need; (2) annualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of service and showing the work to be performed for each month during the requested period of need; or (3) summarized monthly payroll reports for a minimum of one prior calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. *Id.*

Second, the CO determined the Employer failed to establish a temporary need for the number of workers it requested. AF 192-193. The CO explained that, pursuant to 20 C.F.R. § 655.23(b), it assesses whether the number of workers the Employer is requesting is justified and whether the positions represent bona fide job opportunities. AF 192. The CO stated that, in accordance with 20 C.F.R. § 655.22(n), the Employer must attest on its Application that it accurately reported the number of workers it needs and the dates and reasons it needs workers. *Id.* Specifically, the CO noted that in the Employer's previous Application, the Employer requested seven H-2B workers from December 1, 2014 until September 1, 2015. AF 193. The CO requested that the Employer submit additional documentation to demonstrate its need for ten H-2B workers. *Id.*

Regarding the final deficiency, the CO found the Employer failed to submit a complete and accurate recruitment report with its Application, as required by 20 C.F.R. §§ 655.20(a) and 655.15(j). AF 194. The CO informed the Employer that it must have prepared, signed, and dated a written recruitment report no fewer than two calendar days after the last date on which the job order was posted, and no fewer than five calendar days after the date on which the last newspaper or journal advertisement appeared. *Id.* The CO informed the Employer that it needed to submit a recruitment report that meets the requirements outlined in 20 C.F.R. § 655.15(j). *Id.*

#### Employer's Response

On April 1, 2015, the Employer responded to the CO's RFI via facsimile and e-mail. AF 67-185. The Employer included the following information in its response:<sup>8</sup>

- 1) A revised Statement of Temporary Need, Application section B.9. (AF 70, 142);
- 2) An addendum to Application section B.9., entitled "Additional Notes Regarding Statement for Temporary Need" (AF 71-72, 143-144);
- 3) A letter from the Employer's Director of Human Resources, dated March 30, 2015, and Recruitment Tracking Worksheets from 2014 (AF 73-75, 123-125);
- 4) Resumes from three job applicants (AF 76-82, 126-131);
- 5) A copy of the CO's March 25, 2015 RFI (AF 83-90, 133-140);
- 6) A copy of the Employer's fiscal year 2015 budget (AF 91-93, 145-147);

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<sup>8</sup> The Employer's response to the CO's RFI contains documents that belong to another case, H-400-15084-105065. AF 148-150. It appears these documents were inadvertently included in the Appeal File. Because they are irrelevant to the Employer's case, I have not considered them.

- 7) The Employer's Executive Summaries from April, May, and June 2014, admission statistics from 2014, and visit and episode statistics from 2012, 2013, and 2014 (AF 94-102,163,165-172);
- 8) The Employer's recruitment report, dated February 22, 2015 (AF 103-108, 153-158);
- 9) Health insurance claim forms (AF 109-120, 162, 174-185); and
- 10) A copy of Maryland Job Order number 370239 (AF 159-160).

### CO's Final Determination

On April 24, 2015, the CO issued a Final Determination denying the Employer's Application. AF 59-66. The CO determined the Employer: (1) failed to establish that its need for nonagricultural services is temporary in nature; and (2) failed to satisfy all of the requirements of the H-2B program. AF 59. Because the Employer submitted a recruitment report in response to the RFI, the CO determined the Employer cured the third deficiency. AF 61. However, the Employer failed to cure the first two deficiencies. AF 61-66. Specifically, the Employer did not establish that it has a peakload need for workers from April 1, 2015 through January 1, 2016. AF 62. Based on the Employer's business operations, the CO stated that "it appears the [E]mployer has a permanent year[-]round need" for workers. *Id.* The CO reminded the Employer that "a labor shortage, no matter how severe[,] does not establish a temporary need." AF 63. Furthermore, the Employer failed to submit documentation establishing why it needs ten temporary Home Health Aides. AF 64-65. Thus, because the Employer did not submit documentation adequate to establish that it has a peakload need for ten temporary workers from April 1, 2015 through January 1, 2016, the CO denied the Employer's Application. AF 59-66.

### Employer's Appeal

On May 7, 2015, the Employer requested administrative review of the CO's Final Determination, pursuant to 20 C.F.R. § 655.33.<sup>9</sup> AF 1-58. In its request for administrative review, the Employer summarized its position and attached the documents it submitted to the CO in response to the RFI. On May 8, 2015, I issued a Notice of Docketing and Expedited Briefing Schedule permitting the Employer and Solicitor to file briefs within five business days of receiving the Appeal File. On May 13, 2015, BALCA received the Appeal File from the CO. The Solicitor filed a Statement of Position on behalf of the CO on May 20, 2015, urging BALCA to affirm the CO's decision to deny certification. The Employer did not file a brief.

## **DISCUSSION AND APPLICABLE LAW**

BALCA's standard of review in H-2B cases is limited. Specifically, 20 C.F.R. § 655.33 provides that BALCA may only consider the Appeal File prepared by the CO, the legal briefs

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<sup>9</sup> Under 20 C.F.R. § 655.33, within ten (10) calendar days of the CO's adverse determination, an employer may request that BALCA review the CO's denial. Within five (5) business days of receipt of the employer's appeal, the CO shall assemble and submit to BALCA an administrative appeal file. Within five (5) business days of receipt of the appeal file, counsel for the CO may submit a brief in support of the CO's decision. The Chief Administrative Law Judge may designate a single member or the three member panel of BALCA to consider the case. BALCA must notify the employer, CO, and counsel for the CO of its decision within five (5) business days of the submission of the CO's brief, or ten (10) days after receipt of the appeal file, whichever is earlier, using means that ensure same day or overnight delivery.

submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence that was actually submitted to the CO in support of the Employer's Application. After considering the evidence of record, BALCA must: (1) affirm the CO's decision to deny temporary labor certification; (2) direct the CO to grant certification; or (3) remand the case to the CO for further action.<sup>10</sup>

The Employer bears the ultimate burden of proving that it is entitled to labor certification.<sup>11</sup> 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 for the job opportunity for which it is seeking certification; and (2) employing H-2B workers will not adversely affect the benefits, wages, and working conditions of similarly employed U.S. workers.<sup>12</sup>

### Temporary Need for Workers

To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent.<sup>13</sup> In this case, the Employer alleged it has a peakload need for workers from April 1, 2015 through January 1, 2016. AF 195. The Employer bears the burden of establishing its peakload need.<sup>14</sup> To establish a peakload need, the Employer must demonstrate:

[T]hat it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.<sup>15</sup>

In explaining its reasons for denying certification, the CO stated it could not decipher how the Employer determined the dates of peakload need or whether the Employer actually had a peakload need. AF 61-64. In its response to the RFI, the Employer amended its Statement of Temporary Need and explained that it operates year-round, from January through December. AF 70. However, it also stated:

Employer's temporary need for HHA is based on the peak need of the business from April through January of the following calendar year. The position of HHA is a permanent fixture of PHHC, which if not filled would affect the entire business agenda of the agency. HHA is one of the core services of PHHC, a position that is not temporary or seasonal, but permanent. However, PHHC's need

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<sup>10</sup> 20 C.F.R. § 655.33(e).

<sup>11</sup> 8 U.S.C. § 1361; see also *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., d/b/a Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009).

<sup>12</sup> 20 C.F.R. § 655.32(b).

<sup>13</sup> 20 C.F.R. § 655.6(b).

<sup>14</sup> *BMC West Corporation d/b/a Select Build Nevada, Inc.* 2015-TLN-00042 (May 4, 2015).

<sup>15</sup> 8 C.F.R. § 214.2(h)(6)(ii)(B).

from April 1, 2015 through January 1, 2016 is temporary, to fill merely the peak need of the agency brought about by the influx of patients referred to by Johns Hopkins Medicine. *Id.*

Moreover, in the addendum to its Statement of Temporary Need, section B.9 of its Application, the Employer explained that it hopes to have a roster of full-time Home Health Aides by the second quarter of 2016, but until then it plans to “supplant” its staff through other viable means, including participation in the H-2B program. AF 71. The Employer’s Director of Human Resources, who authored the addendum, stated admission statistics from April, May, and June 2014 reflect “a peak and high demand on these specific months.” *Id.* He reiterated that the Employer’s request for ten Home Health Aides to work temporarily from April 1, 2015 through January 1, 2016 “is purely based on” the peakload nature of its need for workers during that time. *Id.* Furthermore, in its request for administrative review, counsel for the Employer stated:

Although PHHC operates year-round and its clients have [a] year-round, permanent need for homecare services, February and March are slow and therefore the need is not too high. The very basis for this request for labor certification is the PEAK NEED of the organization during stated months, which is merely temporary covering the 2015 calendar year.<sup>16</sup>

Counsel for the Employer also noted that the peak season will no longer be in effect after January 1, 2016, because at that time the Employer will “be able to acquire ten (10) Home Health Aide[s] from other sources/staffing agenc[ies].”<sup>17</sup>

After completely reviewing the record and the parties’ legal arguments, I concur with the CO that the Employer failed to establish it has a temporary peakload need for H-2B workers from April 1, 2015 through January 1, 2016. Although the Employer has demonstrated that it regularly employs Home Health Aides, for the reasons stated below, I find it has not shown that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand.

The Employer repeatedly asserts that its busiest months are in the spring, summer, and fall, which causes its need for H-2B workers from April 1, 2015 through January 1, 2016. AF 70, 71, 195. However, data from past years, which the Employer submitted in response to the RFI, does not corroborate the Employer’s allegations.

First, the Employer’s admission statistics from 2014 fail to demonstrate that the Employer’s busiest periods are between April 1 and January 1. AF 101. In response to the RFI, the Employer submitted hospital admission statistics that show the total number of admissions for each month in 2014. *Id.* Total admissions ranged from a low of 289 in June 2014, to a high of 369 in October 2014. *Id.* Thus, although the Employer alleged its “peak and high demand” is in April, May, and June, the admission statistics demonstrate the Employer actually had its lowest number of admissions in June 2014. AF 71, 101.

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<sup>16</sup> Employer’s Appeal at 1.

<sup>17</sup> *Id.* at 2.

Furthermore, the Employer had an average of 327 admissions per month in 2014. AF 101. In January, February and March 2014, the Employer admitted 334, 335, and 348 individuals for treatment, respectively. *Id.* Thus, admissions in each January, February, and March 2014 were actually higher than the average number of monthly admissions in 2014. *Id.* Furthermore, in July, September, November, December, April, May, and June, the Employer admitted *fewer* patients than it did in January, February, or March 2014. *Id.* Thus, although the Employer alleged its busiest season would be from April 1, 2015 through January 1, 2016, its admission statistics from 2014 demonstrate that it was actually busier in January, February, and March than it was in many other months of the year. An increase in need during an off-peak month substantially undermines an employer's purported peakload dates of need.<sup>18</sup> Based on its admission statistics, the Employer has not established that it has an "influx" of patients during the period in which it is seeking temporary labor certification.

The Employer's visit statistics also fail to support a finding that its busiest time of year is between April 1 and January 1. In its response to the RFI, the Employer submitted visit and episode statistics from fiscal years 2012, 2013, and 2014. AF 102. Visits in 2012 ranged from a high of 4,499 in May, to a low of 3,603 in July. *Id.* Visits in 2013 ranged from a high of 4,733 in May, to a low of 3,455 in September. *Id.* Visits in 2014 ranged from a high of 4,562 in October, to a low of 3,644 in June. *Id.* The Employer argued it has a peakload need between April 1, 2015 and January 1, 2016. However, in 2012, 2013, and 2014 the Employer had its lowest number of visits during one of the months in which it alleged it experiences an influx of visits.

Furthermore, visits in many months during the period in which the Employer is seeking temporary labor certification were actually lower than the average number of monthly visits. The Employer had an average of 4,086.91 visits per month in 2012. AF 102. The Employer had fewer than 4,087 visits in each of the following months in 2012: July, September, November, December, April, and June. *Id.* The Employer had an average of 4,068.08 visits per month in 2013. *Id.* The Employer had fewer than 4,068 visits in each of the following months in 2013: September, October, November, December, January, and June. *Id.* Finally, the Employer had an average of 4,082.75 visits per month in 2014. *Id.* The Employer had fewer than 4,083 visits in each of the following months in 2014: August, December, January, February, March, and June. Although the Employer had fewer than average visits in January, February, and March 2014, it also had fewer than average visits in three months that it alleged are its peak months: August, December, and June. The visit statistics establish that the Employer does not have a peakload need for workers from April 1 through January 1; the actual visit statistics from 2012 through 2014 show that many of the months during the period in which the Employer is seeking temporary labor certification are historically *less* busy than January, February, or March. Although the Employer alleged, "February and March are slow and therefore the need is not too high," the statistics it submitted show otherwise. I find the Employer has failed to demonstrate it has an increase in visits during the period in which it is seeking temporary labor certification.

In its RFI, the CO asked the Employer to submit additional information to demonstrate its peakload need for workers, including the total number of workers the Employer employed in

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<sup>18</sup> See *Top Flight Entertainment, Ltd.*, 2011-TLN-37, slip op. at 8 (Sept. 22, 2011); *Stadium Club, LLC d/b/a Stadium Club, D.C.*, 2012-TLN-00002, slip op. at 10 (Nov. 21, 2011).

prior years, and work contracts, invoices, and payroll reports outlining the work the Employer must complete from April 1, 2015 through January 1, 2016. AF 192. As previously discussed, the admission and visit statistics from 2012, 2013, and 2014 establish that the Employer does not historically have a peakload need between April 1 and January 1. Moreover, in its response to the RFI, the Employer did not submit any additional information establishing that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand between April 1, 2015 and January 1, 2016. Accordingly, under 20 C.F.R. §§ 655.6 and 655.21(a), the Employer failed to establish that the nature of its need is temporary.

Also at issue on appeal is the number of H-2B workers for which the Employer is seeking temporary labor certification. Prior to certifying an application, the CO must confirm that the employer has, *inter alia*, “established that the number of worker positions being requested for certification is justified and represent bona fide job opportunities.”<sup>19</sup> The CO concluded the Employer did not explain its need for ten H-2B workers. AF 64-65. Specifically, the CO noted that the Employer previously submitted an Application for seven H-2B workers from December 1, 2014 through September 1, 2015. AF 64. In its response to the RFI, the Employer explained that it originally requested seven workers because it had already hired three qualified workers; however, when all three workers failed to report for work, the Employer changed its request from seven to ten workers when it filed the Application at issue in this appeal. AF 73. Although the Employer explained why it requested ten workers, as opposed to seven, it still failed to justify its need for ten workers. Furthermore, even if the Employer were able to establish its need for ten workers, because it failed to establish that its need for workers is temporary in nature, its Application would still fail.

I find the Employer has failed to establish that it has a temporary, peakload need for ten Home Health Aides from April 1, 2015 through January 1, 2016. Thus, the CO properly denied certification pursuant to 20 C.F.R. §§ 655.6(b), 655.21(a), 655.23(b), and 655.22(n).

### **ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision denying certification be, and hereby is, **AFFIRMED**.

For the Board:

PETER B. SILVAIN, JR.  
Administrative Law Judge

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<sup>19</sup> 20 C.F.R. § 655.23(b).