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OALJ CASE NO.: 2016-TLN-00037

ETA CASE NO.: H-400-16008-461289

In the Matter of:

EDD, LLC dba THE GREENERY, LLC,
Employer.

DECISION AND ORDER AFFIRMING DENIAL

This matter arises under the labor certification process for temporary non-agricultural employment in the U.S. under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*., and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart A.

On April 19, 2016, Employer filed a letter requesting administrative review pursuant to 20 C.F.R. § 655.61 challenging the Non-Acceptance Denial ("Denial") issued by the Employment and Training Office, Chicago National Processing Center ("ETA") on April 8, 2016. This Office received the Administrative File ("AF") on May 2, 2016. The U.S. Department of Labor, Office of the Solicitor, on behalf of the ETA Certifying Officer ("CO"), and Employer filed simultaneous closing briefs on May 5, 2016 ("CO's Brief" and "Employer's Brief").

This Decision and Order is based on the written record, which consists of the Appeals File, the request for review, and the briefs of the parties. 20 C.F.R. § 655.61(e). As explained below, this Decision and Order affirms the Denial and denies Employer's request for relief.

Factual Findings and Contentions of the Parties

On January 8, 2016, Employer filed an H-2B Application for Temporary Employment Certification ("Application"), prepared by Michael Lalich of Low Country Labor Company, seeking certification to hire 30 full-time landscape worker employees from April 1, 2016, until September 30, 2016. AF at 20, 73. The job duties for the employees included mowing, edging, pulling weeds, pruning, blowing, and planting small plants, and the employees would need to be able to operate pruning and edging machinery and 60 inch lawn mowers. AF at 75. The Application specified that experience was required of employees, but also that zero months of experience were necessary. AF at 76. In a letter dated February 22, 2016, Employer requested

emergency handling of its application pursuant to 20 C.F.R. § 655.17, which was approved by ETA on February 24, 2016. AF at 70, 72.

On February 26, 2016, the ETA Certifying Officer ("CO") sent Employer a Notice of Deficiency. AF at 63. The Notice of Deficiency identified three specific deficiencies in Employer's application: (1) the application failed to establish that the job opportunity was temporary in nature; (2) the application failed to establish the temporary need for the number of workers requested: and (3) the application did not include a complete and accurate ETA Form 9142. AF at 66-69. The Notice of Deficiency also identified specific actions which Employer was to take in order to remedy the deficiencies, including providing a description of Employer's business history and activities and a schedule of operations throughout the year, an explanation why the job reflected a temporary need and the nature of the need based on Employer's business operations, and signed monthly invoices from previous calendar years showing that work would be performed for each month during the requested period. AF at 66-67. The Notice of Deficiency also specified that Employer should provide payroll records for at least one previous calendar year which identify, on a monthly basis for both full-time permanent and temporary employees, the total number of workers employed, total hours worked, and total earnings received, and a detailed statement of temporary need explaining why the requested number of workers had increased to 30 from 20 in the H-2B certification granted to Employer the previous year. AF at 67-68. Finally, the Notice of Deficiency directed Employer to submit an amended ETA Form 9142 which accurately indicated the experience and all special requirements for the job. AF at 68-69.

Employer responded to the Notice of Deficiency on February 29, 2016. AF at 38. Employer explained that the positions were temporary in nature because they were for seasonal landscape workers to fulfill contracts between the months of April and September. *Id.* Employer provided payroll records to substantiate the increase in its labor needs from April to September, and also relied on the payroll records to show that it had a need to hire 30 workers. *Id*. Finally, Employer authorized the CO to amend ETA Form 9142 to state that experience was required for the position and explained that the job order attached to the Application specified that "[b]asic knowledge [is] required in the operation of riding mower, blower, edger, weed eater and pruner." *Id*., AF at 30.

The payroll records submitted by Employer in response to the Notice of Deficiency consisted of entries from January through December 2014 and January through December 2015. AF at 40-61. The "type" of each entry is "General Journal," and each entry consists of a date, a payroll code, a one line memo, and an amount debited or credited. *Id.* The memos for many entries singly read "Contract Labor," while other entries consist of dates or short explanations of corrections made, and the specific task to which each credit or debit is related is not clear from the memos. *Id.* Starting on January 31, 2015, some memos consist of one or more first names. AF at 48-61. The documents provide totals for 2014 and 2015. In 2014, Employer's accounts totaled $4,092,933.92. AF at 44. In 2015, they totaled $4,331,460.99. AF at 61.

The CO sent Employer the Denial which was a final determination denying the Application on April 8, 2016. AF at 17. The Denial stated that two deficiencies in the Application remained after Employer's Response to the initial Notice of Deficiency. AF at 20.

First, Employer had not provided sufficient evidence to justify the change in the number of employees sought from 20 in a certification issued for April 1 to October 15, 2015, to 30 in the current Application, as required by 20 C.F.R. § 655.11(e)(3) and (4). AF at 20. The Application was to have included attestations regarding the temporary need, including a detailed statement of temporary need and an explanation as to why the requested number of workers had increased and evidence summarizing payroll reports for at least the previous calendar year identifying "for each month and separately for full-time permanent and temporary employment . . . the total number of workers or staff employed, total hours worked, and total earnings received." AF at 21. The CO determined that the payroll information submitted by Employer was not sufficient as it consisted of general journal entries which did not specify the number of workers employed, total hours worked, or the workers' pay. AF at 21.

Second, the Denial found that Employer's ETA Form 9142 remained incomplete and did not satisfy 20 C.F.R. § 655.15(a). AF at 21-22. ETA Form 9142 Section F.b., Item 4, was corrected after the Notice of Deficiency to state that experience was required, but Employer did not amend the form to indicate how many months of experience were required. AF at 22. Additionally, the job order did not state that any experience was required. *Id*. Attached to the Denial was an amended copy of ETA Form 9142 which reflected the changes requested by Employer in its Response

On April 14, 2016, Andrew Dupps, Employer's president, AF at 81, 84, sent the ETA the following letter:

> This letter is regarding H-2B Case # H-400-16008-461289 for EDD, LLC dba The Greenery, LLC. I, Andrew Dupps, attest that the documentation my company has submitted for this case (payroll records, seasonality documentation, etc.) is valid and up-to-date as of 4/14/2016.
>
> If you have any additional questions regarding this case please do not hesitate to contact me. Thank you for time and we look forward to hearing from you soon.

AF at 1. Attached to the letter was a copy of the Denial and payroll documents which set out the number of hourly employees, the number of regular and overtime hours expended for both payroll and direct labor, the percentage of hours worked as overtime, and the average hourly rate for bi-weekly pay periods ending from January 10, 2014, until December 23, 2015. AF at 8-12.

Positions of the Parties

The CO moves for Employer's request for review to be dismissed, alleging that it does not comply with 20 C.F.R. § 655.61. CO's Br. at 1. Since the letter sent by Employer on April 14, 2016, was addressed to the ETA, does not explicitly request administrative review, and does not identify any particular grounds for review, the CO contends that the request was improperly made, and should be dismissed. *Id*. at 3-4. In the alternative, the CO argues that, even if the

request for review was properly made, the denial of Employer's application was proper because Employer did not submit a complete and accurate application. *Id*. at 4. Therefore, the CO's Denial should be affirmed. *Id*. at 5.

Employer argues that it increased its request to 30 employees rather than 20 because it had new contracts and increased revenue from the previous season. Employer's Br. at 1.[1] It claims that the increases were shown on multiple sets of payroll reports in different forms and that the submitted data distinguishes between year-round and seasonal workers, satisfying its burden. *Id*. at 1. Employer also contends that the asserted errors in its ETA Form 9142 should not bar approval, arguing variously that the CO failed to change the form to state that no experience is required, that the experience requirement was related to a prevailing wage determination, that the skills required for the position are reflected in the job order, and that Employer's ETA Form 9141 reflects the correct experience requirement. *Id*. at 1-2. Finally, Employer says that it is in need of workers to fulfill contracts made with expectation of H-2B employees and that other landscaping companies have closed due to denials and delays in the H-2B program. *Id*. at 2.

Legal Standard and Analysis

The standard of review in H-2B 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 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.

As a preliminary matter, because the payroll documents attached to Employers' request for administrative review were not part of the Application reviewed by the CO, I do not consider those documents. The documents submitted as a request for review are limited to legal arguments and "such evidence as was actually submitted to the CO before the date the CO's determination was issued." 20 C.F.R. § 655.61(a)(5). The payroll documents were not submitted to the CO either as part of the initial Application or in response to the Notice of Deficiency. Since the documents were not properly part of the request for review, and since review must be based solely on "the Appeal File, the request for review, and any legal briefs submitted," 20 C.F.R. § 655.61(e), they are excluded.[2]

CO's Request to Dismiss

The CO argues that the request for review must be dismissed because Employer's request for review does not specifically state that it seeks review, was sent to ETA, and does not provide

[1] Employer's two page Brief was submitted without page numbers. For convenience, I have numbered the pages.
[2] I note that the payroll documents appear in the Appeal File uploaded by the CO. They do so solely as part of the request for review. Since the documents were not properly part of the request for review or evidence submitted prior to the CO's Denial, I may not consider them despite their physical presence in the Appeal File.

the specific grounds in which it contends the Denial was in error. CO's Br. at 3-4. A request for review must be sent to BALCA, must clearly identify the determination for which review is sought, must set for the particular grounds for the request, must include a copy of the CO's determination, and may contain only legal arguments and such evidence as was actually submitted to the CO before the date of the determination. 20 C.F.R. § 655.61(a)(1)-(5). The letter sent by Employer in connection to this matter was addressed to ETA, but was also sent to this Office. It identified the determination by its ETA case number, and a copy of the Denial was attached. AF at 1-7. The evidence appended to the letter has previously been addressed in this Decision and Order. While it cannot be considered, the attempted submission of new evidence is not grounds for dismissing the request for review. Both the CO and this Office have treated the letter as a request for review, and the letter clearly anticipates further review of Employer's application for temporary labor certification.

Thus, Employer satisfied all of the requirements for review, with the exception of specifying the grounds for review. Employer's letter implies that it considers its application to have been complete and in compliance with the regulations, and it can be inferred that such is Employer's argument for review. The pleading standards for administrative review are generally relaxed, and do not require detailed allegations. Additionally, in cases arising under permanent labor certification regulations, BALCA has held that an Employer who fails to provide particular grounds in a request for review may cure such failure in a timely filed brief. *Malone & Assocs.*, BALCA No. 90-INA-360, slip op. at 2 (July 16, 1991) (en banc) (citing *North American Printing Ink Co.*, BALCA No. 88-INA-41 (Mar. 31, 1988) (en banc) and *The Little Mermaid Restaurant*, BALCA No. 88-INA-489 (Sept. 1, 1989)). These cases are not controlling precedent, but they are reflective of the generous pleading standards applied in this administrative context. Given that Employer advanced grounds for its request for review in a timely filed brief, and the grounds are rationally related to the content of its letter, the failure to explicitly include such grounds in the initial request for review is harmless. Therefore, the CO's motion to dismiss is denied.

Employer's Request for Review

Employer has not met its burden of showing that it is entitled to temporary labor certification for its requested 30 landscaping workers. Employer was provided with a Notice of Deficiency. In response, it submitted additional evidence and authorized the CO to take actions in order to remedy the three identified deficiencies. The CO determined that one deficiency was remedied, but that the remaining two were not cured. Reviewing the evidence considered by the CO prior to the date of the Denial, Employer did not provide the sufficient information to show its entitlement and did not properly complete its application.

First, the payroll documents submitted by Employer do not demonstrate the need for the number of employees it sought. No payroll documents were submitted with the original Application. The payroll documents submitted by Employer with its Response to the Notice of Deficiency do not identify the total numbers of workers employed or the hours worked, and do not provide separate data for temporary and full-time permanent employment as specified in the Notice of Deficiency. AF at 68. Instead, they consist of no more than dates, lump payments, and cryptic accounting codes and single line memos, though they do provide the total earnings for Employer in 2014 and 2015. AF at 40-61. This information indicates that Employer earned

$238,527.07 more in 2015 than in 2014. AF at 44, 61. This raw data does not by itself show the volume of work Employer expects to perform in 2016, or why it anticipates needing fifty percent more H-2B employees in 2016 than in 2015. In its Response to the Notice of Deficiency, Employer did not explain why it needed an additional 10 H-2B workers in 2016 compared to 2015, but instead stated only that its need "is a seasonal/peak-load need for more workers during [the months of April to September]." AF at 38. This answer is not responsive to the deficiency noted by the CO, and does not constitute adequate explanation or justification for the number of worker positions, as the same seasonal need existed during the prior year and was the basis of the certification granted for that time. AF at 67; 20 C.F.R. § 655.11(e)(3).

Employer states in its Brief that it has new contracts this season, but neglected to include any such information with its Application. Employer's Br. at 1. Information about new business would undoubtedly have been relevant to the CO's determination. Employer also says that it "never saw one H2B worker last year due to the cap being artificially met," Employer's Br. at 1, which suggests that it was able to increase its earnings last year over the prior year even without actually utilizing any H-2B workers, but does not justify an increase in workers for 2016. The evidence submitted by Employer in its Application and its Response to the Notice of Deficiency and the legal arguments advanced in its Brief do not meet Employer's burden to show entitlement to temporary labor certification.

Secondly, Employer failed to properly amend and supplement its ETA Form 9142. The initial ETA Form 9142 Employer submitted stated that prior experience was required, and also that zero months of experience were required. AF at 76. The job order also stated that zero months of experience were required. AF at 86. The Notice of Deficiency specified that ETA Form 9142 must be corrected so that Section F.b., Item 4 (which indicates whether experience is required) is marked "No," and Section F.b., Item 5 must be amended to list the specific skills of the job rather than simply reading "See attached: Job Order." AF at 69, 76. In response, Employer asked the CO to "amend the ETA Form Section F.6. Item 4 to state that experience is required for the job opportunity." AF at 38. Employer also explained that the job order included the special requirements of the job "including a statement that reads 'Basic knowledge required in the operation of riding mower, blower, edger, weed eater and pruner.'" AF at 38. The CO changed ETA Form 9142 to include the aforementioned statement. AF at 26.

Employer indicates that it has a one month experience requirement for the position because the Prevailing Wage Determination for the position was calculated with that requirement. Employer's Br. at 2. Prior to filing its Brief, Employer did not indicate to the CO that it had a one month experience requirement which should be reflected in ETA Form 9142. Employer argues that "[t]he 9141 [Application for Prevailing Wage Determination, AF 90-94] has the [experience] requirement and therefore the 9142 is to reflect the same experience." Employer's Br. at 2. Employer does not explain why the CO should have known to check ETA Form 9141 for the experience requirement, why the CO should have assumed that ETA Form 9141 was correctly filled out but ETA Form 9142 was not, or why the job order indicates that no experience is required for the position. Moreover, Employer did not offer these explanations to the CO at any point prior to the Denial.

Employer also suggests that it is possible that "digital filing has a part in there being any discrepancy of the 1 month experience requirement not being reflected through out [*sic*] the application." Employer's Br. at 2. Regardless of any complications created by digital filing, it is the responsibility of an applicant for temporary labor certification to make sure that their application is accurately filled out. This is especially true when, as here, an attorney or agent, who presumably is experienced in the temporary labor certification, has been retained to prepare the application. If there in fact was an issue caused by digitally filing the application, Employer had ample opportunity to bring such issue to the attention of the CO and to amend the error following receipt of the Notice of Deficiency, and did not do so.

Accordingly, and for the foregoing reasons, I find that the April 8, 2016, Denial issued by ETA was proper, and is hereby affirmed.

SO ORDERED.

Digitally signed by Richard M.Clark
DN: CN=Richard M.Clark,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

RICHARD M. CLARK
Administrative Law Judge

San Francisco, California