



Issue Date: 08 July 2016

OALJ CASE NO.: 2016-TLN-00053

ETA CASE NO.: 16106-778259

In the Matter of:

SAIGON RESTAURANT,
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. This is commonly referred to as the H-2B Non-immigration Visa Program.

The H-2B visa classification is for a temporary worker for a non-agricultural job. Such a worker would be an alien coming to the United States only temporarily with no plans to stay permanently. The visa is granted only if it would not negatively impact American workers.¹ An employer who wants an H-2B visa must first get a "temporary labor certification" from the Department of Labor ("DOL").²

In this case, Saigon Restaurant (Employer), seeks a temporary labor certification for two full-time cooks experienced in Vietnamese and Chinese cooking to help the restaurant handle the workload during its three busiest months in the year – July, August and December. Employer filed its application on April 15, 2016. On May 4, 2016, DOL issued a "Notice of Deficiency" (NOD) rejecting the initial application because it did not provide sufficient information and evidence. On May 11, 2016, Employer provided some additional information but did not provide the kind of information and evidence DOL said it needed and did not include the specific information and evidence DOL said it required. On June 1, 2016 DOL (through the Employment and Training Office, Chicago National Processing Center ("ETA")) issued a Non-Acceptance Denial ("Denial") of the Application because Employer did not provide that information and evidence.

¹ 8 U.S.C. 1101(a)(15)(H)(ii)(b).

² 8 C.F.R. § 214.2(h)(6)(iii)(A) (2012).

On June 14, 2016, Employer filed a letter requesting administrative review pursuant to 20 C.F.R. § 655.61 challenging the Denial. This Office received the Appeal File (“AF”) on June 21, 2016. The U.S. Department of Labor, Office of the Solicitor, filed a closing brief on behalf of the ETA Certifying Officer (“CO”), on June 30, 2016 (“CO’s Brief”).

A teleconference with the parties was held on July 6, 2016 to insure the parties understood the process including the fact that a decision would be rendered based on the written record only.

This Decision and Order is based on the written record, which consists of the Appeal File and the legal arguments in Employer’s Notice of Appeal³ and CO’s Brief. 20 C.F.R. § 655.61(e).

As explained below, this Decision and Order affirms the Denial of Employer’s Application for Temporary Employment Certification.

PROCEDURAL HISTORY

Initial H-2B Application.

On April 15, 2016, Employer filed an H-2B Application for Temporary Employment Certification (“Application”), prepared by Mai Goodsell of Saigon Restaurant. In her Application she sought certification to hire two full-time cooks from June 30, 2016 until December 31, 2016.⁴ The job duties for the employees included understanding Vietnamese and Chinese cooking techniques; a working understanding of Vietnamese and Chinese seasoning, sauces, and marinades; preparing Vietnamese and Chinese traditional dishes and sauces, raw meat, fresh vegetable, and soup preparation; food and vegetable layout and assembly; and understanding of cooking multiple dishes in a timely manner.⁵ The Application specified that 24 months of experience was required of employees.⁶

Notice of Deficiency

On May 4, 2016, the ETA Certifying Officer (“CO”) sent Employer a Notice of Deficiency.⁷ The Notice of Deficiency identified four specific deficiencies in Employer’s application:

1. the application failed to establish that the job opportunity was temporary in nature;⁸

³ While legal argument in the Notice of Appeal may be considered, evidence that was not submitted to the CO in support of the application itself may not be considered. The 2015 payroll reports were first provided in the Notice of Appeal which is too late for consideration.

⁴ AF at 79.

⁵ AF at 81.

⁶ AF at 82.

⁷ AF at 72.

⁸ Herein “Deficiency 1”

2. the application failed to satisfy the obligations of H2-B employers in that it did not include qualifications for its job applicants that are normal and accepted qualifications and requirements imposed by non H-2B employers;⁹
3. the application failed to disclose whether employer would recruit foreign workers;¹⁰ and
4. the application did not include a complete and accurate ETA Form 9142.¹¹

The Notice of Deficiency also specified how Employer could remedy the deficiencies.

To cure Deficiency 1, Employer was to provide:

- a description of its business history and activities and a schedule of operations *throughout the year*,
- an explanation why the nature of the job opportunity and number of foreign workers being requested for certification reflected a *temporary* need, and
- signed *monthly* payroll reports for a minimum of one previous calendar year, showing for each month separately:
 - full-time permanent and temporary employment in the requested occupation,
 - the total number of staff employed, total hours worked, and total earnings received.¹²

The Notice of Deficiency also identified how Employer could cure Deficiency 2, 3 and 4.

Response to Notice of Deficiency

Employer responded to the Notice of Deficiency on May 12, 2016¹³ and provided sufficient information to cure Deficiency 2, 3 and 4.

To cure Deficiency 1, Employer provided an explanation, some general economic statistics, and a summary of annual salaries.¹⁴ Specifically:

- She explained that the positions were temporary in nature because the restaurant requires additional cooks only during the peak season, which she identified as the months of July, August, and December.¹⁵ She explained that because of her age

⁹ Herein “Deficiency 2”

¹⁰ Herein “Deficiency 3”

¹¹ Herein “Deficiency 4”; AF at 75-77.

¹² AF at 75-76. Emphasis added.

¹³ AF at 29.

¹⁴ In addition, there is a letter from John Thune, U.S. Senator, advising the CO that Ms. Goodsell is seeking temporary help in the restaurant’s kitchen during peak season due to her advancing age and health difficulties, but that she would continue to work at the restaurant in other capacities. See AF 1.

¹⁵ *Id.*

she could no longer keep up with the demands of the restaurant during those months; and it would not be economically feasible to hire a full time employee with the specialized cooking techniques. She stated that all four current staff are permanent employees and that this is the first year she is seeking to hire additional help during this season.

- She submitted a brochure reporting tourism sales in South Dakota by county;¹⁶ and explained that 40% of all tourism sales in the state occurred at the location of the restaurant in the Black Hills & Badland region.¹⁷
- She provided payroll records showing a summary of three employees' *annual* salaries in 2014 and four employees' *annual* salaries in 2015.

Denial

On June 1, 2016, the CO sent Employer the Denial which was a final determination denying the Application.¹⁸ The Denial stated that Employer's application was still deficient because it had not remedied Deficiency 1 and had not justified the claimed need. Employer did not provide proof that the positions were temporary.¹⁹ Employer had not provided sufficient evidence about its business and Employer had not documented how it determined a need for temporary workers during the dates of need requested.²⁰

POSITIONS OF THE PARTIES

The CO asserts that Employer failed to meet its burden of proof that it is entitled to a temporary labor certification because it failed to provide the kind of information and specific evidence described in the NOD thereby making it impossible for DOL to carry out its legal duty.

Employer asserts an equitable basis for granting a temporary labor certification.

LEGAL STANDARDS

Failure to Comply With Notice of Deficiency

An employer's failure to comply with a Notice of Deficiency, including failure to provide all required documentation, will result in a denial of the Application for Temporary Employment Certification.²¹

¹⁶ See AF at 34-67.

¹⁷ AF at 33.

¹⁸ AF at 18.

¹⁹ AF at 20.

²⁰ AF at 21.

²¹ 20 C.F.R. §655.32(a)

Burden of Proof

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.²²

Standard of Review

The standard of review in H-2B is limited. A reviewing judge may consider only “the Appeal File, the Notice of Appeal, and any legal briefs submitted.”²³ The Notice of Appeal may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination.²⁴ 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.²⁵

ANALYSIS

In the NOD, the CO clearly identified information and evidence that would provide a reasonable basis upon which to analyze the application. Employer did not comply.

The CO needed a description of Employer’s business history and activities and a schedule of operations throughout the year. Employer only provided general data about tourism activity without any analysis of monthly or seasonal shifts in the level of tourist activity, any information about increased consumer activity in Rapid City in July, August or December or increased business at the Saigon Restaurant during those months.²⁶

The CO needed an explanation why the nature of the job opportunity and number of foreign workers being requested for certification reflected a temporary need. Employer explained that because of her age, she could no longer keep up with the demands of the restaurant during peak months. Further, she did not address whether or not these full-time alien cooks would be a part of the staff during the nine non-peak months of the year.

The CO required signed monthly payroll reports for a minimum of one previous calendar year, showing the job description of each employee, hours worked, wages earned and whether they were full-time or part-time. Employer provided an annual summary with none of the details required.

Employer has not met its burden of showing that it is entitled to temporary labor certification for its requested two cooks. 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 Deficiency 2. The CO determined that three deficiencies were remedied but that

²² 8 U.S.C. § 1361.

²³ 20 C.F.R. § 655.61(e).

²⁴ 20 C.F.R. § 655.61(a)(5).

²⁵ 20 C.F.R. § 655.61(e).

²⁶ While Ms. Goodsell stated that the restaurant did 60% of its business in those three months she offered no data to support that statement.

Deficiency 1 was 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.

Accordingly, and for the foregoing reasons, I find that the June 1, 2016, Denial issued by ETA was proper. Therefore, the Denial is affirmed.

SO ORDERED.

WILLIAM KING
Administrative Law Judge

San Francisco, California