



**Issue Date: 04 October 2017**

**BALCA Case No:** 2017-TLN-00062  
**ETA Case No.:** H-400-17182-385564

*In the Matter of:*

**9TH PARALLEL HEALTHCARE, INC.,**

*Employer.*

**DECISION AND ORDER AFFIRMING  
CERTIFYING OFFICER'S DENIAL OF CERTIFICATION**

On September 6, 2017, the Board of Alien Labor Certification Appeals ("BALCA") received a request for administrative review of the Certifying Officer's 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.<sup>2</sup> Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor ("Department"). 8 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA. 20 C.F.R. § 655.61(a).

**STATEMENT OF THE CASE**

On July 3, 2017, 9th Parallel Healthcare, Inc. (the "Employer") filed with the CO an Application for Temporary Employment Certification, ETA Form 9142B ("Application"). The

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<sup>1</sup> On April 29, 2015, the Department of Labor (the "Department") and the Department of Homeland Security jointly published an Interim Final Rule ("IFR") amending the standards and procedures that govern the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). The IFR applies to this case.

<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). The definition of temporary need is now governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113) § 113 (Dec. 18, 2015).

Employer requested certification for seven personal care aides,<sup>3</sup> from October 1, 2017 until May 31, 2018, based on an alleged seasonal need for workers during that period. (AF 79-94.)<sup>4</sup>

On July 10, 2017, the CO issued a Notice of Deficiency (“NOD”), which outlined five deficiencies in the Employer’s Application. (AF 69-78.) The CO gave the Employer the opportunity to submit a modified Application and supporting documentation within ten days of the date of the NOD. (AF 69.) The Employer responded to the NOD on July 16, 2017. (AF 57-68.)

On August 21, 2017, the CO issued a Final Determination denying the Employer’s request for temporary labor certification. (AF 37-54.) In support of its denial, the CO concluded that the Employer did not meet the requirements of 20 C.F.R. § 655.6(a) and (b) because it failed to: (1) establish that it has a seasonal need for workers; (2) show that its job opportunity is temporary in nature; and (3) submit sufficient information to justify the dates of need requested. (AF 39-43.) Moreover, the CO concluded that the Employer failed to submit an acceptable job order, as required by 20 C.F.R. § 655.16 and 20 C.F.R. § 655.18. (AF 44-46.)

By letter dated August 31, 2017, the Employer requested administrative review of the CO’s Final Determination. (AF 1-36.) On September 8, 2017, the undersigned issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). On September 14, 2017, BALCA received the Appeal File from the CO. Thereafter, on September 25, 2017, the Solicitor filed a brief. The Employer did not file a brief, and the record is now closed.

### DISCUSSION AND APPLICABLE LAW

BALCA’s standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued the Final Determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA must: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba 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). 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 to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

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<sup>3</sup> SOC (O\*Net/OES) occupation code 39-9021.

<sup>4</sup> “AF” refers to the Appeal File.

THE EMPLOYER FAILED TO ESTABLISH A SEASONAL NEED FOR SEVEN H-2B WORKERS AND  
FAILED TO JUSTIFY ITS DATES OF PURPORTED NEED

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. 20 C.F.R. § 655.6(b); 20 C.F.R. §655.11(a)(3). The Employer “must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” 20 C.F.R. § 655.6(a).

In this case, the Employer alleged that it has a seasonal need for seven personal care aides from October 1, 2017 until May 31, 2018. In order to establish a seasonal need, the Employer “must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature.” 8 C.F.R. § 214.2(i)(F)(2)(ii)(B)(2). Moreover, the Employer must “specify the period(s) of time during each year in which it does not need the services or labor.” (*Id.*) Under the regulations, the “employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner’s permanent employees.” (*Id.*) Therefore, in order to show that its need for personal care aides is seasonal, the Employer must establish when the season occurs and how its need for labor during that time of year differs from other times of the year.

In response to the CO’s NOD, the Employer provided the following justification for its alleged seasonal need for workers:

During the winter months in South Florida, many ‘snowbirds’ arrive for the season. These snowbirds are generally from the Northeast and are the target customers of my business. Since this is a fairly new business, there is not adequate staffing for this temporary influx in the Florida population. The personal care aide is in particular need for the winter months in Florida. These foreign workers will staff that need for the winter months.

(AF 66.)

Other than alleging that “snowbirds” travel to Florida during the “winter months,” the Employer did not produce evidence showing that its need for workers from October 1, 2017 until May 31, 2018 differs from other times of the year. When asked to justify its alleged dates of increased need, Employer argued that its “need for personal care aides is evident and needed based on numerous firm verbal and written commitments to the business for the upcoming season from customers.” (AF 53.) In response to the NOD, the Employer included a list of ten names, some with corresponding telephone numbers and e-mail addresses, which it described as “firm commitments from clients.” (AF 66-67.) Even though the Employer stated that it had “written commitments” and “firm commitments” for business, it failed to produce any evidence of those written commitments. Even if the Employer did not have summarized payroll information detailing the number of fulltime and temporary workers it historically employed as personal aides, the Employer failed to submit other documentation that would similarly serve to justify its

need for seven H-2B workers. *See Carolina Contracting and Management, LLC*, 2017-TLN-00026, slip op. at 6, (April 4, 2017).

In further support of its position, the Employer alleged that since it is “a fairly new business, historical payroll is not available.” (AF 66.) In contrast to its allegation that it is a new business without any prior payroll data, the CO highlighted that information from the Florida Secretary of State demonstrates that the Employer started operating in April 2016. (AF 42.) Moreover, records from the Department of Labor indicate that the Employer filed an application for temporary labor certification in 2016. Thus, the Employer could have, but did not, produce payroll records, contracts, or other evidence from its operations in 2016 and early 2017.

Although, in its response to the NOD, the Employer submitted an article from the Palm Beach Post highlighting the increase in the population of Palm Beach during “the winter months,” the article does not specifically demonstrate the Employer’s need for temporary workers during its claimed period of need. (AF 66.) *See Erickson Construction, dba Erickson Framing AZ LLC*, 2016-TLN-00060, slip op. at 5 (Aug. 19, 2016) (BALCA held that while U.S. Census data demonstrated an increase in building permits during the employer’s purported period of need, the data fell short of specifically demonstrating the employer’s need for temporary workers).

In addition to failing to provide evidence of a seasonal need, the Employer seems to have conceded that its end date of supposed need is arbitrary. It stated that it was “impossible to determine” when its “clients will conclude their Florida stay,” but argued that they “generally start returning in late April and May” and they “always stay longer than 6 months to keep their Florida residency for income tax purposes.” (AF 67.) In its request for administrative review, the Employer explained it was “given” its dates of need “by customers expressing interest and commitment in” the business. (AF 2.) Once again, the Employer did not provide any contracts or comparable documentation to show that it has an increased need for workers until May 31, 2018.

Moreover, it bears noting that the Employer’s need for seven workers appears to be entirely subjective. The Employer did not offer evidence of its business needs or demand for services to explain why it needs seven additional workers or how it arrived at that number. *See e.g. Magnum Builders of NM, Inc.*, 2016-TLN-00020, slip op. at 6 (Mar. 29, 2016) (employer “subjectively projected” a need for forty H-2B workers); *Guro Energy, LLC*, 2016-TLN-00048, slip op. at 8 (June 24, 2016) (“Employer’s declaration to have a temporary need for seventy-five works appears to be based merely on its own subjective estimate to achieve unsupported sales goals.”).

Finally, I note that the Employer’s overall argument is internally inconsistent. It argued that it needs personal care aides in the “winter months,” yet requested workers from the fall (October) until the spring (May). Thus, the Employer’s purported season of need, winter, does not even correspond to the months it says it needs temporary workers.

Based on the foregoing, I find that the CO properly concluded that the Employer failed to establish a temporary need for seven personal care aides.

THE EMPLOYER FAILED TO SUBMIT AN ACCEPTABLE JOB ORDER

Pursuant to 20 C.F.R. § 655.16 and 20 C.F.R. § 655.18, every employer must submit a job order to the State Workforce Agency at the same time that it submits an application for temporary labor certification. The job order must contain certain contents and assurances, including the total number of job openings the employer intends to fill. 20 C.F.R. § 655.18(b)(2).

In this case, the Employer did not submit a copy of its job order with its Application. (AF 75.) In response to the CO's NOD, the Employer submitted a job order stating that it was seeking to fill five positions. In contrast, in its Application, the Employer requested certification for seven H-2B workers. (AF 59.) Furthermore, the CO found that the Employer failed to include the correct minimum and maximum amounts for daily travel subsistence. (AF 45.) Because the Employer's job order did not meet the requirements of the regulations, the CO properly denied certification.

**ORDER**

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

For the Board:

John P. Sellers, III  
Administrative Law Judge