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Issue Date: 05 January 2017

BALCA Case No.: 2017-TLN-00014
ETA Case No.: H-400-16326-870385

In the Matter of:

Clifton Country Inn,

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Francois Bladt, General Manager - Clifton Inn
For the Employer

Jeffrey L. Nesvett, Assistant Solicitor and
Heather Filemyr, Attorney
U.S. Dept. of Labor, Office of the Solicitor, Division of Employment and
Training Legal Services
For the Certifying Officer

Before: Richard A. Morgan
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF EMERGENCY WAIVER
REQUEST**

This case arises from Clifton Country Inn’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny its request for waiver of the time periods for filing an H-2B Registration and/or an Application for Temporary Employment Certification 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 United States Department of Homeland Security,¹ “if unemployed persons capable of performing such service or labor cannot be found in [the United States].” *See* 8 U.S.C. §

¹ The definition of temporary need is governed by Department of Homeland Security (DHS) regulation, 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 (Dec. 18, 2015). *See* also 20 C.F.R. §655.6(b).

1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655.² Employers seeking to utilize this program must apply for and receive labor certification from the U.S. Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”).

Except for employers that qualify for emergency procedures at § 655.17, the applicable regulations provide that a completed application for temporary employment certification must be filed “no more than 90 calendar days and no less than 75 calendar days before the employer’s date of need.” 20 C.F.R. § 655.15 (b). The regulations provide for a waiver of this time period in “Emergency Situations” under §655.17, if an employer can provide “good and substantial cause” for the waiver and the “CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination as required by § 655.50.” 20 C.F.R. § 655.17. A Certifying Officer (CO) in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification and requests for emergency waiver of the filing time period. If the CO denies the request for emergency waiver or the application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

H-2B Application and Request for Emergency Waiver of Filing Time Period

On November 23, 2016, Clifton Country Inn (“Employer”) filed an H-2B Application (Form ETA 9142B) for Temporary Employment Certification for the job title of “Food and Beverage Manager” including an Emergency Waiver Request letter dated November 23, 2016. (AF 17-37).³ Employer requested one full time worker from December 15, 2016 to December 31, 2018, and indicated that the nature of its temporary need is “one time occurrence.”

In support of its request for Emergency waiver of the filing time period Employer stated:

Requesting an Emergency Filing for the Labor Certification and H-2B visa as the position has been open for nearly 2 months without success in finding a qualified candidate. Our H-2 B beneficiary has the qualifications needed for the position and due to the B2 VISA Status ending January 4, 2017 which they are currently under, we petition for the Emergency Filing Waiver.

² On April 29, 2015, the Department of Labor (“DOL”) 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. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The IFR applies to applications “submitted on or after April 29, 2015, and that have a start date of need after October 1, 2015.” IFR, 20 C.F.R. §655.4(e). As the application in this case meets these conditions, the IFR applies to this case. All citations to 20 C.F.R. Part 655 in this order are to the IFR.

³For purposes of this opinion, “AF” refers to “Appeal File.”

(AF 39).

Employer's H-2B application and request for Emergency Waiver also included a job order concurrently filed with the state of Virginia SWA posted on November 23, 2016 on Virginia Workforce Connection. (AF 32-36).

Final Determination Denying Emergency Waiver Request

By letter dated December 5, 2016, the Certifying Officer ("CO") issued a Final Determination on Emergency Waiver Request denying the request for waiver of the time period for filing an H-2B registration and/or an H-2B Application for Temporary Employment Certification. (AF 13-16).

The CO noted that the employer's application was filed outside the accepted time frame for filing an application which is "no more than 90 calendar days, and no less than 75 calendar days before the employer's date of need," as stated in the regulations at 20 C.F.R. § 655.15(b). The regulations provide that the CO may waive the time period "for employers that have good and substantial cause, provided that the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination as required by 20 C.F.R. § 655.50." The CO noted that the employer stated the following reason for seeking a request for a waiver of the time period: "because the position has been open for nearly two months without success in finding a qualified candidate and the individual currently filling this position has an H-2B visa that is due to expire on January 4, 2017." The CO determined that the reasons cited by the employer did not constitute good and substantial cause to waive the filing timeframe requirements. The CO stated that it was unclear how employer defined "emergency" situation in light of the fact that "it was aware of its temporary need and inability to find a U.S. worker to fill the positions months ago." Therefore the CO denied the employer's request for a waiver of the applicable filing period.

The CO notified the Employer of its right to request administrative review of the denial of the request for emergency processing. The CO also informed the Employer that its application for H-2B labor certification was being returned without review because employer did not include a valid Prevailing Wage Determination (PWD) which is required to be submitted at the time of filing in cases where employers do not qualify for emergency procedures under § 655.17. *See* 20 C.F.R. 655.15. Employer was also notified that a new application meeting all requirements and including a Prevailing Wage Determination would need to be submitted for further consideration of its application for temporary labor certification.

Administrative Review

By letter dated December 8, 2016 (received on December 14, 2016), Employer submitted a request for Administrative Review of the CO's December 5, 2016 Final Determination denying Employer's request for an Emergency Waiver of the time period for filing its H-2B Application for Temporary Employment Certification. (AF 1-11). Employer asserted that its original waiver request may have portrayed an unclear or incorrect description of the Employer's situation. Employer explained that it was introduced to a candidate for the open position in November of

2016 who is currently on a B-2 Tourist visa which would expire on January 4, 2017. Employer asserted that it is requesting the Emergency Filing Waiver while the candidate simultaneously filed an Application to extend or change his Nonimmigrant Status Form I-539. Employer indicated its intent to convert the applicant's current tourist visa to an H-2B temporary work visa so that Employer could hire the candidate prior to the expiration of his tourist visa.

This matter was assigned to the undersigned Administrative Law Judge for decision. The Appeal File was received on December 22, 2016 and on that date an Order was issued allowing the parties until January 4, 2017 to file briefs in regard to this matter.

Attorney Heather Filemyr of the Office of the U.S. Department of Labor Associate Solicitor for Employment and Training Legal Services ("Solicitor") filed a brief in this matter on January 4, 2017, on behalf of the Certifying Officer. The Solicitor argues that the CO's denial of the Employer's request for emergency processing of its application for temporary labor certification should be affirmed because the CO's determination that employer failed to demonstrate "good and substantial cause" to waive the required time period was not arbitrary, capricious or contrary to law. The CO's brief points out that illustrative examples listed in the regulation at 20 C.F.R. §655.17(b) as qualifying emergency situations, include "the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside of the employer's control, unforeseeable changes in market conditions, or pandemic health issues." The Solicitor asserts that all of the listed examples share the common trait of being "outside the control of the employer." The Solicitor cites the preamble to the regulation, for its assertion that the burden of proof is on the employer to demonstrate the unforeseeability leading to its request for emergency processing. See 80 Fed. Reg. at 24061-62 (April 29, 2015).

The Solicitor argues that the CO acted correctly in finding that Clifton failed to provide "good and substantial cause" to justify its need for emergency processing. Clifton's stated reasons of difficulty in finding an applicant to fill the position, and the expiration of the visa of the intended H-2B beneficiary, do not provide "good and substantial cause" to justify the need for emergency processing. The Solicitor further asserts that Employer has failed to demonstrate the type of catastrophic event or occurrence contemplated by the regulations, citing *Ungale, LLC*, 2016-TLN-00025 (April 5, 2016) (finding that employer's struggles to form a business, including waiting for its EIN number and closing on property, are not unforeseeable catastrophic events contemplated by 20 C.F.R. § 655.17).

For these reasons the Solicitor argues that the CO's determination denying the Employer's request for an emergency waiver of the time period for filing its H-2B application be affirmed.

SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer's request for review, which may contain only legal argument 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). After considering this evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO's determination; or
- (2) Reverse or modify the CO's determination; or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.61(e).

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge's review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard⁴ to its review of the CO's determination in H-2B temporary labor certification cases. *See Brook Ledge Inc.*, 2016 TLN 00033 at 5 (May 10, 2016); *see also J and V Farms, LLC*, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).

ISSUE

Whether the Certifying Officer properly denied the Employer's request for a waiver of the applicable time period for filing its H-2B application for temporary labor certification due to Employer's failure to prove grounds for a waiver under the provisions of "Emergency Situations" under 20 C.F.R. § 655.17.

DISCUSSION

Except for employers that qualify for emergency procedures at § 655.17, the regulations pertaining to H-2B temporary labor certification provide that a completed application for temporary employment certification must be filed "no more than 90 calendar days and no less than 75 calendar days before the employer's date of need." 20 C.F.R. §655.15 (b). The regulations also provide for a waiver of this time period in "Emergency Situations" under §655.17 if an employer can provide "good and substantial cause" for the waiver and the "CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination as required by § 655.50." 20 C.F.R. § 655.17. A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification and requests for emergency waiver of the filing time period. If the CO denies the request for emergency waiver or the application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.61(a).

In this case the Employer listed its date of need on its application as December 15, 2016 through December 31, 2018. (AF 17). As Employer submitted its application on November 23, 2016 (approximately three weeks prior to its date of need) it is clearly outside of the standard timeframe of 75-90 days prior to the date of need that is specified in the regulations at 20 C.F.R. § 655.15(b). The regulation at §655.17 provides that the

⁴Similarly, judicial review under the Administrative Procedure Act provides that an agency's actions, findings and conclusions shall be set aside that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C § 706(2).

CO may waive the time period(s) for filing an H-2B Registration and /or an application for Temporary Employment Certification for employers that have good and substantial cause provided that the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination as required by § 655.50.

(20 C.F.R. § 655.17(a)).

The regulations further provide that the employer's waiver request must include detailed information describing the good and substantial cause that has necessitated the waiver request. In regard to the type of situation considered an "Emergency Situation," the regulation provides:

Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside of the employer's control, unforeseeable changes in market conditions, or pandemic health issues.

(20 C.F.R. § 655.17(b)).

The plain meaning of the regulation would appear to contemplate not only an unforeseeable event, but also one of an extreme nature causing a substantial loss of U.S. workers due to an Act of God or a similar unforeseeable man-made catastrophic event, which would affect an employer's ability to find a U.S. worker to fill its open position.

In this case the Employer's stated reason for its emergency waiver request is that the job opening for the Food and Beverage Manager had been open for nearly 2 months and the H-2B beneficiary that the Employer wished to hire had a "B2 visa status ending January 4, 2007." (AF 37). The CO determined that the Employer's stated reason did not constitute good and substantial cause to waive the regulatory timeframe. The CO further stated that the employer "was aware of its temporary need and inability to find a U.S. worker to fill the positions months ago."

The primary basis for the employer's emergency request, i.e. that the potential applicant had a visa which was due to expire, does not fall within the type of emergency situation contemplated by the regulations. The emergency time waiver in the regulations addresses unforeseeable events causing catastrophic situations which detrimentally affect the number of available U.S. workers to potentially fill an open position. The type of situation facing the employer, i.e. the expiration of a foreign worker's visa, is a common situation which many H-2B employers face, and would not be considered an "unforeseeable" event within the intended meaning of the regulations. Further, the expiration of a visa would not qualify as the type of catastrophic event which could affect the availability of U.S. workers who could potentially fill the open position. The Solicitor correctly points out in her brief that the preamble to the regulation pertaining to emergency time waiver states that "[t]he burden of proof is on the employer to demonstrate the unforeseeability leading to a request for a filing on an emergency basis." 80 Fed. Reg. at 24061-62 (April 29, 2015). In this case Employer has failed to meet its

burden. Accordingly, I find that the CO did not abuse her discretion in finding that the Employer had not shown good and substantial cause for an emergency waiver of the filing time period under the requirements of 20 C.F.R. § 655.17(b).

In further support of the CO's denial of the emergency waiver, the three week time period, between the Employer's H-2B application and its stated date of need, would appear on its face to be too brief to allow the CO "sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination" pursuant to the applicable regulations, with the typical timeframe for filing an application being 70 to 90 days prior to the date of need. *See* 20 C.F.R. § 655.17(a); 20 C.F.R. § 655.15(b).

CONCLUSION

For the reasons stated above, Employer has failed to meet its burden of showing good and substantial cause for a waiver of the filing time period due to an "Emergency situation" under 20 C.F.R. §655.17. Accordingly, the CO's denial of Employer's request for an emergency waiver of the filing time periods for its H-2B Application for Temporary Employment Certification is affirmed.

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's Decision is **AFFIRMED**.

For the Board of Alien Labor Certification Appeals:

RICHARD A. MORGAN
Administrative Law Judge