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Issue Date: 21 December 2016

BALCA Case No.: 2017-TLN-00008

ETA Case No.: H-400-16265-598910

In the Matter of:

PUTNAM BROKERS,
Employer.

Certifying Officer: William L. Carlson, Ph.D.
Chicago National Processing Center

Appearances: E. Gaither (Lay Representative)
USA Works Inc.
Valdosta, Georgia
Lay Representative for the Employer

Cleveland Fairchild, Esq.
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
Attorney for the Certifying Officer

Before: **JONATHAN C. CALIANOS**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from the Employer's request for review before the Board of Alien Labor Certification Appeals ("BALCA") of a denied *H-2B Application for Temporary Employment Certification* ("Application"). See 20 C.F.R. § 655.61 (explaining administrative review).¹ For the reasons discussed below, the CO's denial of the Employer's Application is affirmed.

¹ On April 29, 2015, the Department of Labor ("DOL") and the Department of Homeland Security ("DHS") jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A, established by the "2008 Rule" found at 73 Fed. Reg. 78020 (Dec. 19, 2008). See 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) ("2015 IFR"). Where the Employer filed its Application after April 29, 2015, and its period of need begins after October 1, 2015, the process outlined in the 2015 IFR applies. See 20 C.F.R. § 655.4(e) (explaining transition procedures).

STATEMENT OF THE CASE

On September 21, 2016, Employer Putnam Brokers (“Putnam” or “Employer”) filed an *H-2B Application for Temporary Employment Certification* (“Application”) with the DOL’s Employment and Training Administration. (AF at 92-123).² Putnam seeks temporary certification to hire thirty-five full-time seasonal “Tree Planters” at an hourly rate of \$14.04, the applicable prevailing wage, with a start date of December 5, 2016, and an end date of April 28, 2017. (AF at 92, 96).

On September 28, 2016, the CO issued a “Notice of Deficiency” (“NOD”) identifying four deficiencies with Putnam’s application. (AF 84-91). One of the deficiencies identified was that Putnam failed to submit an acceptable job order pursuant to 20 C.F.R. §§ 655.16 & 655.18. The CO stated:

If the employer provides the worker with the option of board, lodging, or other facilities, including fringe benefits, or intends to assist workers to secure such lodging . . . the job order placed in connection with an Application for Temporary Employment Certification must include such information.

The Department’s longstanding position is that deductions or costs incurred for facilities that are primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore may not be charged to the worker. *See* 29 CFR 531.3(d)(1). Thus, housing that is provided by employers with a need for a mobile workforce, such as those in the carnival or forestry industries where workers are in an area for a short period of time, need to be available to work immediately, and may not be able to procure temporary housing easily, is primarily for the employer’s benefit and convenience and cannot be charged to the workers.

The employer’s job order indicates, “No daily transportation to work but between itinerary sites Employer will pay cost of public transportation from centralized location. If commute exceeds 1 hr Employer will pay costs of lodging expense... No housing provided”.

The employer’s application is requesting tree planters, a mobile forestry workforce performing duties for short durations at multiple worksites. Therefore, the cost incurred for the temporary housing cannot be a responsibility of its

² References to the Appeal File appear as “(AF at [#]).”

workers. Additionally, the employer of a mobile forestry workforce must provide workers with transportation to any and all worksites.

(AF 88).³

In order to remedy the deficiency, Putnam was required to amend the job order to state that optional housing is provided at no cost to the worker and that transportation to any and all worksites will be provided by the Employer. (AF 90).

On September 29, 2016, Putnam filed a Response to the NOD. (AF 54-83). In response to the deficiency with the job order, Putnam stated:

The employer does not provide daily transportation to work or housing to workers but in the event a worksite exceeds 1 hr employer will pay costs of lodging expense. The workers will not be responsible for th[ese] costs if needed.

It is not a commonly accepted practice for the employer to provide daily transportation to work, and it is impractical, in some cases impossible. Workers converge on a work site from North, East, South, and West, according to the direction of their homes from that work site, or according to where they spent the preceding night. The location where worker lives or departs from work is different for each worker. We have amended the job order to clarify employer will pay costs of public transportation.

(AF 55). The Employer submitted with its Response an affidavit from Jeff Lacksen, and a letter from a “forestry consultant,” William Rocker, supporting its position that it is not the prevailing practice to provide transportation or lodging to workers. (AF 56-57, 83).

On November 8, 2016, Putnam requested a status update on its application, and stated “[t]he employer’s geographical location of the work it is not of normal practice to provide daily transportation but the employer will bare costs of public transportation if required. Most workers prefer having their own transportation at the work site so they can go and come as needed.” (AF 49). The CO responded the same date stating the case was still under review. (AF 49).

³ The NOD further stated that the job order “did not state that the employer will reimburse the H-2B worker in the first workweek for all visa, visa processing, border crossing, and other related fees, including those mandated by the government, incurred by the H-2B worker.” (AF 88). However, the CO’s appellate brief acknowledged that Putnam has since filed an amended job order curing this deficiency. CO Br. at 16 n.5.

On November 10, 2016, the CO denied the application because two deficiencies remained, including the deficiency regarding the job order.⁴ (AF 30-48). The CO stated:

In response to the NOD, the employer provided statements indicating that it is not common practice for employers in the corresponding geographical area to provide daily transportation for its workers, and has provided the CNPC with a letter in support of this contention from Mr. Rocker, an independent forestry consultant. However, this is not the test for whether an employer must provide transportation or housing to its workers. The Department's longstanding position is that deductions or costs incurred for a mobile workforce are primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore may not be incurred by the worker.

Additionally, it appears public transportation is not available to the worksite location. The employer did not amend its job order to reflect that it will provide housing and daily transportation for its workers.

(AF 38-39). The CO concluded that Putnam did not overcome the job order deficiency as it "failed to provide an amended job order or job order language with the necessary language regarding the provision of housing and daily transportation for workers of a mobile workforce." (AF 39).

On November 18, 2016, Putnam filed a Request for Expedited Administrative Review of the CO's denial of its Application. (AF at 1-3); *see also* 20 C.F.R. § 655.61(a) (discussing procedure for requesting administrative review). Putnam stated that it does not provide daily transportation to work or housing to workers but will pay for the costs of public transportation and lodging if commute exceeds 1 hour. (AF 2). Putnam argued that it included a statement in the job order "that the employer intends to assist workers with lodging in the event a worksite exceeds 1 hr employer will pay costs of lodging expense." (AF 2-3).

On November 22, 2016, this case was assigned to me for disposition. *See* 20 C.F.R. § 655.61(d) ("The Chief ALJ may designate a single member or a three member panel of the BALCA to consider a particular case."). On November 29, 2016, BALCA received the Appeal File, which was transmitted by the CO. *See* 20 C.F.R. § 655.61(b) (indicating CO has seven days to submit Appeal file upon receipt of request for review). On November 30, 2016, I held a telephonic status conference with the parties, to discuss how the case would proceed, given the

⁴ In its appellate brief, the CO indicated that it was no longer pursuing the additional deficiency cited in the denial letter, that Putnam failed to "submit valid Farm Labor Contractor Employee (FLCE) certificates to support the transporting of workers." (CO Br. 14).

expedited nature of the proceeding. 20 C.F.R. § 655.61(f) (providing BALCA must decide case within strict timeframe). That same day, I ordered the parties to submit briefs no later than 4 p.m. EST on December 9, 2016. *See* 20 C.F.R. § 655.61(c) (explaining mandatory briefing schedule). On December 9, 2016, both parties submitted briefs.⁵

DISCUSSION

BALCA's review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00004/17, slip op. at 4-5 (Feb. 21, 2012). "The scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application." 20 C.F.R. § 655.33(a), (e). The employer bears the burden of proof to establish it has met the requirements under the H-2B program. *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (*citing* 8 U.S.C. § 1361).

Putnam has not satisfied the requirements necessary to obtain temporary labor certification. Granting an employer's request for temporary labor certification for the employment of foreign workers in the H-2B nonimmigrant classification of the Immigration and Nationality Act ("INA") reflects that the Secretary of Labor ("Secretary") has made the following two determinations:

- (1) There are no sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to hire foreign workers, and that

⁵ References to the CO's brief appear as "(CO Br. at [page number])," and Putnam Broker's brief is cited as "(Empl. Br. at [page number])."

(2) The employment of the H-2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.⁶

20 C.F.R. § 655.1(a). In making the foregoing determinations, the Secretary is aided by 20 C.F.R. Part 655, Subpart A, which outlines the procedures that control the temporary labor certification process. 20 C.F.R. § 655.1(b). “It also establishes obligations with respect to the terms and conditions of the temporary labor certification with which H-2B employers must comply, as well as their obligations to H-2B workers and workers in corresponding employment.” 20 C.F.R. § 655.1(b).

Pursuant to 20 C.F.R. § 655.20(a)(1), an employer’s job order must include an offered wage that equals or exceeds the highest of the prevailing wage or the Federal, State or local minimum wage. *See also* 80 Fed. Reg. at 24064-24065. “The employer must pay at least the offered wage, free and clear,” during the entire period of the application. 20 C.F.R. § 655.20(a)(1); *see also* 20 C.F.R. § 655.20(b) & (o).

If an employer provides workers with board, lodging, or other facilities including fringe benefits, or daily transportation to and from the worksite, such provision must be disclosed in the job order. 20 C.F.R. §§ 655.18(b)(10) & (14); *see also* TEGL 27-06, Attachment A, Section III(H)(3). The employer is required to specify in the job order any deductions it intends to make from the worker’s paycheck which are not required by law, including, if applicable, any deductions for the *reasonable* cost of board, lodging or other facilities. 20 C.F.R. § 655.18(b)(11) (emphasis added); *see also* 20 C.F.R. § 655.20(c) (identifying “authorized” deductions); TEGL 27-06, Attachment A, Section III(I) (“SWAs should examine all deductions (including housing, transportation, meals, tools, safety equipment, etc.) to determine if they are allowable in accordance with the Fair Labor Standards Act.”).

⁶ A nonimmigrant foreign worker that would fall under the H-2B nonimmigrant classification of the INA is as follows:

An alien . . . having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country .

. . .

8 U.S.C. § 1101(a)(15)(H)(ii)(b). Under the INA, the DHS must confer with appropriate agencies before permitting any alien to be classified as an H-2B worker. 20 C.F.R. § 655.1; *see also* 8 U.S.C. § 1184(c)(1). DHS regulations designate the Secretary as a consultative authority responsible for issuing regulations governing the issuance of temporary labor certifications. 8 C.F.R. § 214.2(h)(6)(iii)(D); 20 C.F.R. § 655.1. Further, an employer’s petition to employ H-2B nonimmigrant workers for temporary non-agricultural work in the United States must be coupled with an approved temporary labor certification from the Secretary. 8 C.F.R. § 214.2(h)(6)(iv); 20 C.F.R. § 655.1.

The preamble to the 2015 IFR, which relies on guidance under the Fair Labor Standards Act (“FLSA”) and 29 C.F.R. Part 531, directs that any deduction from wages for a cost that is primarily for the employer’s benefit is never reasonable and never permissible. 80 Fed. Reg. at 24063-64. The preamble provides examples of costs that DOL has long held to be primarily for the benefit of the employer, including “transportation charges where such transportation is an incident of and necessary to the employment.” *Id.* at 24065; *see also* 29 C.F.R. § 531.32(c). The preamble further states that “housing that is provided by employers with a need for a mobile workforce, such as those in the carnival or forestry industries where workers are in an area for a short period of time, need to be available to work immediately, and may not be able to procure temporary housing easily, is primarily for the employer’s benefit and convenience and cannot be charged to the workers.” *Id.* at 24063.

The DOL in the preamble stressed that “there is no legal difference between deducting a cost from a worker’s wages and shifting a cost to an employee to bear directly.” 80 Fed. Reg. at 24064. The DOL cited to *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1236 (11th Cir. 2002), arising under the FLSA, which states: “An employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deductions drive wages below the minimum wage. This rule cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during employment.” 80 Fed. Reg. at 24064 (internal citations omitted).

I find Putnam employs a mobile workforce as described by the DOL, as its reforestation workers work at numerous worksites for short durations and need to be available to work immediately, and the worksites are in remote, rural areas where short term housing is not easily obtained. (*See* CO Br. at 10). Putnam seeks temporary workers for a four month period, and its itinerary shows that workers are expected to work in 13 different counties in Georgia and South Carolina during this four month period. (AF 104-05). Many of the locations on the itinerary are for stays of a week or less, and Putnam acknowledged that its itinerary may change due to weather and acts of god. (AF 57, 82, 104). Employer further acknowledges that changes in the itinerary “makes the daily commute to all locations on the itinerary impossible from any one

location.” (AF 57). Accordingly, I find housing in this matter is primarily for the benefit of the employer and cannot be charged to the workers.⁷ 80 Fed. Reg. at 24064.

I further find that transportation “is an incident of and necessary to the employment” and therefore primarily for the benefit of the Employer. 80 Fed. Reg. at 24063. Workers do not travel to a fixed work site, but rather travel to 13 different counties, across two states, and work at each remote work site for a short duration, in order for the Employer to fulfill its contractual obligations. Accordingly, as transportation is primarily for the benefit of Putnam, the workers should not bear the costs of transportation.

Putnam argues that it is not a common or prevailing practice for an employer to pay for or arrange housing or transportation for their crews in the reforestation industry. (AF 1, 49, 55, 57, 105; Empl. Br. 2, 3). However, “prevailing practice” is not the relevant test in determining whether an employee must bear the costs of housing and transportation; rather the employer must show that the transportation and lodging is primarily for the benefit of the worker, not the employer. (CO Br. at 16). As I have found that in the context of Putnam’s business, housing and transportation is primarily for the benefit of the employer, Putnam cannot shift these costs to the workers.

Employer also argued providing transportation to the worksites is impractical because: “Workers converge on a work site from North, South, East, and West, according to the direction of their homes from that work site, or according to the where they spend the preceding night. The location where a worker lives or departs from work is different for each worker. There is no centralized location workers could even meet because of this geographical certainty.” (AF 55, 106). However, this argument is not persuasive, because, as pointed out by the CO, this difficulty is Putnam’s “own creation” as it is not offering employer-provided housing. (CO Br.

⁷ Employer asserts the furthest location from its business is 2 hours and 26 minutes, and if a worker is able to return home each and every night than the workforce would not fit the criteria of mobile forestry unit. Empl. Br. 2-3. However, this is not the standard identified in the 2015 IFR for determining whether an employer’s workforce is mobile in nature; rather, the preamble relies on factors such as workers being in an area for a short period of time, the need to be available to work immediately, and difficulty procuring temporary housing. 80 Fed. Reg. at 24064. Further, Employer conceded “daily commute to all locations on the itinerary [is] impossible from any one location.” (AF 57).

at 16). Further, Employer is not required to provide the transportation, and could alternatively reimburse workers for travel expenses incurred.⁸

The Employer bears the burden of proof to establish it has met all the requirements under the H-2B program. 8 U.S.C. § 1361. Putnam has failed to prove its case on appeal. Employer's amended job order states "No daily transportation to work but Employer will pay cost of public transportation from centralized location. If commute exceeds 1 hr Employer will pay costs of lodging expense at no cost to the worker . . . No housing provided." (AF 81).

While Putnam stated in the job order that it will provide lodging if the commute is more than 1 hour, this is insufficient for Putnam to establish compliance with the H-2B regulations. (AF 2, 55, 81, 110; Empl. Br. 2). Putnam does not provide any details on what type of lodging costs it would reimburse, or whether it would provide arrangements for such lodging if required. Nor does Putnam provide a rationale for why it will only provide costs for lodging based on a seemingly arbitrary cut-off of a one hour commute. Further, Putnam has not explained how it will determine whether the commute exceeds one hour.

Similarly, while Putnam indicated in the job order that it will pay for some "public transportation" costs, this is insufficient to meet the regulatory requirements. Putnam has not provided in its job order, or elsewhere, a detailed description of how the workers will be reimbursed for transportation. Further, it is unclear exactly what transportation Employer is willing to reimbursement; in some instances it states it will only pay for travel between one site on the itinerary to another site on the itinerary, other instances it states it will pay costs for travel "between itinerary sites from a centralized location" and alternatively it simply states it will pay "costs from centralized location." (AF 1, 2, 54, 55, 57, 81, 104, 106, 110; Empl. Br. at 2). The Employer does not indicate what centralized location it is referring to, and limits reimbursement for "public transportation," specifically taxis, without any evidence of the availability of such public transportation. Nor has Putnam ever offered to provide, pay for, or reimburse the cost of daily transportation from housing to the worksites.

⁸ Employer further stated that workers prefer to make their own transportation arrangements, so that they can come and go from the worksite on their own terms if need be, and asserts that "it is for the benefit of the worker that they provide their own transportation." (AF 105; Empl. Br. at 2, 3). While it may be true that workers would prefer to have their own vehicle as opposed to relying on public transportation or employer-provided transportation, this does not explain why Putnam does not reimburse workers for the travel expenses incurred.

Because Putnam has failed to meet its burden in this case, the CO's denial based on a failure to provide transportation and lodging to the workers is affirmed. *See* 20 C.F.R. §§ 655.18(b)(10), (11), (14); 655.20(a), (b), (c) & (o).

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's determination is **AFFIRMED**.

For the Board:

JONATHAN C. CALIANOS
Administrative Law Judge