



Issue Date: 16 February 2017

BALCA Case No.: 2017-TLN-00021
ETA Case No.: H-400-16352-783784

In the Matter of:

JEFFERSON SENIOR CARE, LLC,
Employer.

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: Roda Diaz Delos Santos Administrator
Jefferson Senior Care, LLC
Yuba City, California
For the Employer

Vincent C. Costantino, *Esq.*
Jeffrey L. Nesvet, *Esq.*
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: PETER B. SILVAIN, JR.
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Jefferson Senior Care, LCC’s (“the Employer”) request for review of the Certifying Officer’s (“the CO”) Non Acceptance Denial in the above-captioned H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States on a one-time, seasonal, peakload, or intermittent basis.² 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”).³ A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews

¹ 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). These rules apply to this case.

² 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 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).

³ 8 C.F.R. § 214.2(h)(6)(iii).

applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.⁴

STATEMENT OF THE CASE

The Employer is a residential care facility that provides personal care for elderly residents via personal care aides. (AF 70).⁵ It is located in Yuba City, California. (AF 70). On December 17, 2016, the Employer filed the following documents with the CO: (1) ETA Form 9142B, *Application for Temporary Employment Certification* (“Application”); (2) Appendix B to ETA Form 9142B; (3) State of California License; (4) Leave of Absence Forms; (5) State Workforce Agency (“SWA”) Job Order; (6) Classified Advertisements; (7) Advertising Receipts; (8) Indeed.com Advertisement; (9) Copy of Job Advertisement; (19) Residential Care Facilities Regulations; (10) Recruitment Report; (11) Attestation Regarding Employment Applications dated December 17, 2016; (12) Applicant Resumes; (13) Organizational Environment Chart; (14) Workers’ Leave of Absence Chart; (15) Job Description; (16) Business License; (17) Articles of Organization; (18) Employer Identification Number; (19) Wells Fargo Bank Statement; (20) Energy Statement; (21) Attestation Regarding No Use of Foreign Recruiter; (22) Temporary Need Statement; and (23) Prevailing Wage Number. (AF 70-144). The Employer requested certification for three “live-in caregivers” from February 1, 2017, to January 31, 2018, based on a one-time occurrence. (AF 70).

On December 23, 2016, the CO issued a Notice of Deficiency, which outlined four deficiencies in the Application. (AF 61-69). Specifically, the CO determined that the Employer failed to: (1) submit an acceptable job order; (2) satisfy application filing requirements; (3) establish that its job opportunity was temporary in nature; and (4) submit Job Order assurances and contents. (AF 64-69).

As to the third deficiency, which is the sole remaining issue on appeal, the CO explained, “[t]he employer’s need is considered temporary if justified to the CO as one of the following: [a] one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.” (AF 67). The CO determined that the Employer “did not sufficiently demonstrate the requested standard of temporary need. (*Id.*). Specifically, the CO provided: “[i]n order to establish a one-time occurrence, the [E]mployer must demonstrate that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.” (*Id.*). However, upon review of the Employer’s application history, the CO found that the Employer previously applied for and received certification in order to substitute for two different employees who took a leave of absence on the basis of a one-time occurrence for the position of Personal Care Aides in the same area of intended employment from July 25, 2016, to July 24, 2017. (AF 67-68). As a result, the CO determined that “the statement of temporary need for the current application did not adequately explain how the current request for temporary labor certification meets the regulatory standard of a one-time occurrence need as defined by 8 CFR 214.2(h)(6)(ii)(B), which states that the employer must establish that it has not employed

⁴ 20 C.F.R. § 655.61(a).

⁵ In this Decision and Order, “AF” refers to the Appeal File.

workers to perform the services or the labor in the past and that it will not need workers to perform the services or labor in the future.” (AF 68).

The CO advised that in order to establish that it has a temporary need, the Employer needed to submit an updated temporary need statement containing an explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need. (*Id.*). Additionally, the CO requested that the Employer submit summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. (*Id.*). The CO specified that such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system. (*Id.*). Alternatively, the CO stated that the Employer could submit any other evidence and documentation that “similarly serves to justify the requested dates of need.” (*Id.*).

Thereafter, on December 25, 2016, the Employer filed a response to the CO’s Notice of Deficiency. (AF 50-60). With its response, the Employer submitted the following documentation: (1) Letter of Explanation dated December 24, 2016; (2) SWA Job Order; (3) Emergency Request Letter dated December 24, 2016; (4) Sworn Statement dated December 24, 2016; (5) U.S. Citizenship and Immigration Services Letter dated September 30, 2016; and (6) Permission and Authorization Letter. (*Id.*).

On January 13, 2017, the CO issued a Non Acceptance Denial. (AF 37-43). Although the Employer cured three of the four deficiencies outlined in the Notice of Deficiency, the CO concluded that the Employer still failed to establish that its job opportunity was temporary in nature. (AF 40-43). Specifically, the CO provided the following:

The [E]mployer did not provide sufficient explanation and documentation to support its one time need for three Personal Care Aides (Live in Caregivers) from February 1, 2017 to January 31, 2018.

In response to the NOD, the [E]mployer stated, that its current one time need arises from the following:

The two (2) caregivers (Emma Abundo and Emmerson Abundo, mother and son) requested for a vacation leave to help the family in the Philippines to fix their house and crops which was damaged by the typhoon Haima that hit their place in the Visayas region. They said that they are also afraid that typhoon Nina will add to their problems.

The other caregiver also requested for a vacation leave to attend to her daughter who is schedule to give birth on the first week of February and to attend to her three year old granddaughter. The husband of her daughter who is presently in Saudi Arabia cannot

come home because of his contract with his employer. She is the only one in the family that can help her.

The [E]mployer further stated in its submitted sworn statement, that it[s] previously certified case (H-400-16125-909421) was returned by USCIS due to the H-2B cap being met for the second half of the Fiscal Year (FY) 2016 and it did not receive its workers.

The [E]mployer's explanation points to a reoccurring employment situation, and not a one-time occurrence. Specifically, in its previous case (H-40016125-909421) which was certified with dates of need from July 25, 2016 to July 24, 2017, the [E]mployer indicated that its need arose because two different employees (Sheila D. Carlile and Natalie E. Cuveas) requested leaves of absence. Therefore, it appears to the Department that the [E]mployer's need is based on a worker shortage due to absences from permanent employees. The [E]mployer has not explained how it will not have a need for temporary workers in the future if additional employees also request leaves of absence.

The [E]mployer further stated in its sworn statement that [it] has no monthly payroll reports for a minimum of one previous calendar year because it did not employ full time temporary workers. However, the [E]mployer was requested to submit payroll for both permanent and temporary workers, and as a part of the current application, the [E]mployer submitted a staffing chart which identified a total of seven permanent Caregivers.

The [E]mployer has demonstrated that it has employed workers to perform the services or labor in the past and that its need for workers is reoccurring and not a one-time need. Therefore, the [E]mployer did not overcome the deficiency.

(AF 42-43).

On January 20, 2017, the Employer requested administrative review of the CO's Non Acceptance Denial, as permitted by 20 C.F.R. § 655.61. (AF 1-36).⁶ With its request, the Employer submitted the following documentation: (1) Appeal Request Letter dated January 18, 2017; (2) NOD Response Letter; (3) Copy of Final Determination Letter dated January 13, 2017; (4) Employee Earnings Summary; (5) 2016 Payroll Summary; (6) Workers Leave of Absence

⁶ Pursuant to 20 C.F.R. § 655.61(a), within ten (10) business days of the CO's adverse determination, an employer may request that BALCA review the CO's denial. Within seven (7) business days of receipt of an employer's appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO's decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO's brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery

Chart; and (7) FedEx Mailing Receipt. (*Id.*)⁷ On January 26, 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.⁸ On January 27, 2017, BALCA received the Appeal File from the CO. The Employer filed its brief on January 31, 2017. The Solicitor filed its brief on behalf of the CO on February 7, 2017.

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 a final determination.⁹ 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.¹⁰

The Employer bears the burden of proving that it is entitled to temporary labor certification.¹¹ 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.¹²

Failure to Establish a One-Time Occurrence for Workers

The sole issue on appeal is whether the Employer has established a temporary need for workers. 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.¹³ 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.”

Pursuant to § 113 of the Department of Labor Appropriations Act, 2016, “for the purpose of regulating admission of temporary workers under the H-2B program, the definition of

⁷ With its appeal, the Employer appears to have included additional documentation for review that was not previously submitted to the CO. BALCA’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. § 655.61(a), (e). Consequently, I have not considered this additional material in the rendering of this Decision and Order.

⁸ 20 C.F.R. § 655.61(c).

⁹ 20 C.F.R. § 655.61.

¹⁰ 20 C.F.R. § 655.61(e).

¹¹ 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).

¹² 20 C.F.R. § 655.6(a); 20 C.F.R. § 655.1(a).

¹³ 20 C.F.R. § 655.6(b); 20 C.F.R. § 655.11(a)(3).

temporary need shall be that provided in 8 CFR 214.2(h)(6)(ii)(B).”¹⁴ Accordingly, 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner’s need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

In this case, the Employer alleged that it has a temporary need for three Personal Care Aides (live-in caregivers) on a one-time occurrence, from February 1, 2017, to January 31, 2018. (AF 44, 70). To establish a one-time occurrence, an employer must show that “it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.”¹⁵ Accordingly, the regulations provide for two prongs under which an employer may establish that its need qualifies as a one-time occurrence. As discussed below, the Employer has not made the requisite showing under either prong of the test.

No Past or Future Employment

The Employer argues that it has satisfied the one-time occurrence standard because it “has not employed workers to perform the services of labor in the past.” (AF 52). The Employer argues that “[t]here is no reoccurring employment situation since the previous requested two (2) temporary caregivers were not received due to the H2B cap being met by the USCIS. The certification sought did not materialize.” (Employer’s Brief “EB” at 5). Finally, the Employer states that the time period for which it is requesting workers has a fixed completion date of January 31, 2018, after which it will no longer have a need for the temporary workers in question because its three permanent workers will have returned. (*Id.*)¹⁶

The CO asserts that the Employer has not proven that it has not employed workers to perform these services in the past. (Certifying Officer’s Brief “CB” at 6). Specifically, the CO provides that the Employer filed an application for temporary workers to substitute for permanent employees on leaves of absence in the past, just as it has in the instant matter for which it seeks workers. (*Id.*). The CO also asserts that the Employer cannot establish that it will not need workers to perform these services in the future as “this situation has happened before and could possibly occur again in the future.” (*Id.*). Moreover, the CO argues that “based on the recent past history for this new business, it is more probable than not that it will reoccur in the near future since this business has been in existence for only approximately a year since

¹⁴ 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).

¹⁵ 8. C.F.R. § 214.2(h)(6)(ii)(B)(1).

¹⁶ The Employer appears to have inadvertently provided “July 2017” as the “end date” for its current need, rather than the January 31, 2018, date provided on its application.

January 15, 2016, and yet has sought two previous workers on a one-time basis and is now seeking three more workers on a one-time occurrence theory.” (*Id.*).

Here, the Employer’s focus on the fact that its previous certification did not “materialize” is insufficient to establish a one-time need for workers. While the Employer may have not “received” or employed the temporary workers for which it was previously certified, it is evident that the Employer’s need for workers to perform the same services of labor in the past remains, given its previous application and certification. Whether the actual workers “materialized” is irrelevant as to the nature of the Employer’s need for temporary workers in the instant case.

Moreover, the Employer argues that that it will have no need for workers to provide these services in the future, as its need will end on January 31, 2018, one day prior to the return of its three permanent workers. (EB at 5). However, this is the second time that the Employer has sought multiple temporary workers to substitute for permanent employees on extended leaves of absence in less than one years’ time. (AF 41, 58-59, 68). As pointed out by the CO, given that the Employer appears to have only been in operation for approximately one year, and has sought two previous workers on a one-time basis and is now seeking three more workers on a one-time occurrence theory, I am not persuaded that the Employer will not have need for workers to provide these services in the future. The record demonstrates that the Employer’s need is reoccurring despite its prior certification as a one-time occurrence and the Employer has provided no evidence to demonstrate otherwise.

The record reveals that the Employer has now filed two applications for temporary Personal Care Aide workers in less than one years’ time. Consequently, the record shows that substitute workers appear to be needed by the Employer on a regular basis and not a one-time occurrence. The Employer has failed to provide sufficient evidence or argument to show that its current need for these workers materially differs from its need in its prior applications. Furthermore, the Employer has not explained how it will not have a need for temporary workers in the future if additional employees also request leaves of absence. The record fails to demonstrate that the Employer has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future. Thus, the Employer has not established a one-time occurrence to satisfy the first portion of the test.

No Temporary Event of Short Duration

The Employer also argues that is has a temporary need of short duration because it “has no intention to hire new permanent caregivers” as its need will end when its three permanent workers return from their leaves of absence on February 1, 2018. (EB at 5, AF 138). The CO argues that the Employer’s need for workers stems from “the nature of the [E]mployer’s business” and a shortage of workers rather than any temporary need. (CB at 6). The CO contends that “the [E]mployer has not given, and perhaps is not able to clarify, the limited duration of its need here.” (*Id.*).

Given the circumstances surrounding the requested leaves of absence, each individual leave of absence might fulfill the definition of a temporary event of short duration. However, at some point, the combination of temporary leaves of absence creates a permanent need for the

Employer.¹⁷ Thus, the mere fact that five of the Employer's seven permanent employees have taken extended leaves of absence in less than one year's time shows that the Employer's need for workers is indeed *not* temporary, as the combination of these absences creates a permanent need.

Moreover, the applicable regulations provide that the employer's need is considered temporary when the employer needs a worker for a limited period of time and can establish that the need for the employee will end in the near, definable future.¹⁸ Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to three years.¹⁹ Nevertheless, based on the Employer's limited period of operation and past history requiring temporary workers, I am not convinced that the Employer's need is of short duration despite its purported end date of January 31, 2018. The Employer has provided no indication that its need for Personal Care Aides will not continue past January 31, 2018, as it remains possible that its permanent employees could request extensions or additional leaves of absence. Thus, the Employer cannot show that its need for such workers will be of a short duration.

In sum, the Employer has not demonstrated a temporary event of short duration. The combination of leaves of absence in the Employer's recent history tends to show a permanent need, rather than a temporary one. Even more, the purported end date of need is insufficient to demonstrate that the Employer's need for workers will be of a short duration. The Employer is in the business of providing live-in personal care for elderly clients and has not demonstrated that its overall need for such workers is a temporary need that will end in the near, definable future. Therefore, the Employer has not established a need of short duration to satisfy the second portion of the test.

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:

Peter B. Silvain, Jr.
Administrative Law Judge

¹⁷ *Cajun Constructors, Inc.* 2010-TLN-00079, PDF at 5 (BALCA Oct. 5, 2010) (rejecting the employer's argument that every contract was a temporary event of short duration which created a discrete temporary need, instead holding that "[e]very project cannot possibly be a temporary event; at some point, the combination of 'temporary' projects create[s] a permanent need for the Employer)."

¹⁸ 8 C.F.R. § 214.2(h)(6)(ii)(B).

¹⁹ 8 C.F.R. § 214.2(h)(6)(ii)(B).