



Issue Date: 02 April 2018

BALCA Case No.: 2018-TLN-00087
ETA Case No.: H-400-17362-361863

In the Matter of:
DEV ONE NEVADA,
Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Kevin Lashus, Esq.
Austin, Texas
For the Employer

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

Before: Richard A. Morgan
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from Dev One Nevada’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny its application 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. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

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 rules provided in the IFR apply 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). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an 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).

BACKGROUND

On January 1, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 10 landscapers. (AF 5 -142).³ Employer indicated that the nature of its temporary need was “peakload.” On Employer’s application (Form ETA- 9142B), in response to its statement of temporary need, Employer stated:

This letter is submitted to support the labor certification application and I-129 petition of Dev One Nevada on behalf of ten (10) temporary foreign national workers. Our company is engaged in the landscape installation and maintenance business in the Clark County, NV area. Our services include exclusive landscape care and installation of the Torino foundation’s camp that is open to Spring, Summer, and Fall charitable camps to children with cancer and other maladies. The dates during which most of our business activity occurs, and during which we have the most need for temporary peak load workers is April 1, 2018 to December 31, 2018.

(AF 50).

Employer also attached to its application a webpage printout from the website sunshinenevada.org which specifically addresses the “Torino Ranch” and camp opportunities at Torino Ranch. (AF 59 – AF 65). Employer also included 57 pages of webpage printouts of photos of camp activities and camp participants (AF 66 – 123), as well as two photos of the Torino Ranch. (AF 124-125). Employer also attached a copy of the job order listed with the State of Nevada Department of Employment, Training and Rehabilitation and a copy of its Prevailing Wage Determination for the period 11/20/17 to 6/30/18, noting a prevailing wage of \$12.85. (AF 131 - 142).

The CO issued a notice of deficiency on January 30, 2018, listing six deficiencies in the Employer’s application. (AF 39-49). The six deficiencies involved: 1) Definition of employer; 2) Failure to establish the job opportunity as temporary in nature; 3) Failure to establish temporary need for the number of workers requested; 4) Job order assurances and contents; 5) Area of intended employment; and 6) Failure to submit a complete and accurate ETA Form 9142. In regard to the first deficiency, the definition of employer, the CO cited 20 C.F.R. § 655.5 which defines an employer as:

³ References to the appeal file will be abbreviated with an “AF” followed by the page number.

a person (including an individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that: 1) has a place of business (physical location) in the U.S. and a means by which it may be contacted; 2) Has an employer relationship with respect to an H-2B worker or a worker in corresponding employment; and 3) Possesses, for purposes of filing an application, a valid Federal Employer Identification Number (FEIN).

(AF 42).

The CO also noted that 20 C.F.R. § 655.15 (a) requires that an application for H-2 B certification be filed by an “employer.” In regard to this deficiency the CO requested further information from the Employer showing that it satisfies the regulatory definition of H-2B employer including evidence which shows the employer’s business name and that the address provided in the application is associated with Dev One Nevada. The CO further noted that such evidence may include articles of incorporation, a business license, other documentation issued by the state of Nevada which indicates the business name and address, documentation issued by the IRS which indicates the business name and address, bank account statements that list the requested information, or other official documentation which satisfies the requirement.

Employer responded to the Notice of Deficiency on February 13, 2018. (AF 29-38). Its response included a letter dated February 13, 2018, a list of its monthly permanent “man hour” needs for 2017 and 2018, as well as its projected temporary “man hour” needs for 2018. Employer states “our company is engaged in philanthropic business in the Clark [C]ounty, NV area. Our services include operating a destination non-for-profit resort/camp for children with special needs that requires the services of seasonal landscapers, landscape installers, and property maintenance. The dates during which most of our business activity occurs and during which we have the most need for temporary peak load workers is April 1, 2018 to December 31, 2018. Our company currently requires the services of laborers to perform manual labor associated with landscaping such as sod laying, planting plants and trees, watering, digging spreading dirt, raking, pruning, mulching, and loading and unloading materials.” In its letter Employer also noted “This is a new application. Since no previous supporting documentation exists to refer to from prior applications, the additional supporting documentation is attached.”

Employer’s response included an IRS document dated October 15, 2018, issued to Torino Foundation and listing an FEIN number of 26-2255050. It should be noted that this FEIN number is different than the one listed in the Employer’s application for Dev One Nevada. Employer also included a map of its property.

On February 26, 2018 the CO issued a Non-Acceptance Denial in regard to the Employer’s H-2B application for 10 landscaping and groundskeeping workers for a temporary period of need between April 1, 2018 and December 31, 2018. (AF 13-28). The CO stated four deficiencies in its final determination: 1) Definition of employer; 2) Failure to establish the job opportunity as temporary in nature; 3) Job order assurances and contents; and 4) Failure to submit a complete and accurate ETA Form 9142. The CO stated that the employer’s response to the Notice of Deficiency had failed to overcome these deficiencies and therefore had failed to

justify its need for the requested workers. Accordingly the CO denied the Employer's application. (AF 15).

In regard to the first deficiency, "definition of employer," the CO noted that the employer had provided a document from the IRS pertaining to the Torino Foundation, however the CO determined this document did not overcome the deficiency, noting that the FEIN listed for Torino Foundation was different from the one listed in the H-2B application filed by Dev One Nevada. The CO further noted that Employer had not mentioned Torino Foundation in Section C, Item 2 of its application (ETA Form 9142B), which pertains to "trade names/Doing Business As (DBA)." The CO also noted that although the Employer stated it was attaching the business licenses provided to Dev One Nevada to conduct business, no such business licenses were provided. The CO determined "since no documentation was provided establishing the employer as a business entity within the State of Nevada, it did not overcome the deficiency." (AF 15-16).

On March 9, 2018 Employer made a timely request for administrative review of the CO's determination. (AF 1-2).

The CO and the Employer were given the opportunity to file briefs in support of their positions. No brief was filed on behalf of the CO.

On March 29, 2018, Employer filed a timely brief, with attached Exhibits. As the Exhibits were not provided to the CO they will not be considered by the undersigned. *See* 20 C.F.R. §655.61(a)(5) and (e) (Administrative review by BALCA of the CO's determination is limited to the Appeal file, legal briefs, and the request for review, which may only contain legal argument and such evidence as was actually submitted to the CO, before the date the CO's determination was issued).

In its brief Employer argues two major grounds for reversal of the CO's denial. Employer argues first that the CO "failed to follow recent departmental guidance regarding the processing of renewal applications like Dev one's –guidance that strongly counseled in favor of granting Dev One's application on this record." Employer cites to Department of Labor guidance issued on September 1, 2016 regarding the processing of H-2B applications under the current regulations. *See* Employment & Training Admin., U.S. Department of Labor, Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers: Submission of Documentation Demonstrating "Temporary Need." (Sept. 1, 2016) ("9/16 Guidance").⁴ Employer asserts that said "Guidance provides that such applications can, and generally should be adjudicated on the basis of the Form ETA 9142B filing and prior certification history alone."

Any arguments made by the Employer in regard to the processing of the current H-2B application based on documents filed by the Employer in prior certifications will not be considered, because the Employer has not laid the proper foundation for this argument in the record. Employer's Response to the Notice of Deficiency specifically states, "This is a new

⁴ Employer notes in its brief that the 2016 guidance is available at : https://www.foreignlaborcert.doleta.gov/pdf/FINAL_Announcement_H-2B_Submission_of_Documentation_Temporary_Need_082016.pdf

application. Since no previous supporting documentation exists to refer to from prior applications, the additional supporting documentation is attached.” (Emphasis in original). (AF 30). As Employer has not established in the record that it has received prior H-2B certifications, Employer’s arguments in this regard, will not be addressed further in this decision.

Secondly, Employer argues that the CO’s denial in this case is “inconsistent with the record evidence of present need.” (See Employer’s brief at 6). In regard to the CO’s finding that Dev one had not provided documentation establishing that it was an “employer,” Employer argues in its brief that documentation from the Nevada Secretary of State shows that Lovell Canyon Residential LLC is an active LLC and the registered address is 4455 Wagon Trail Avenue. Employer further asserts that Dev One Nevada is an active corporation and that it handles all payroll and administration for the Lovell Canyon Residential property. Nowhere in Employer’s brief does Employer cite to the record to support that any information or documentation had been provided to the CO to establish Dev One Nevada’s status as an employer under the regulations. Accordingly Employer’s brief provides no support for its allegation that the CO’s denial is “inconsistent with the record evidence.”

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 standard⁵ 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).

⁵Similarly, 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).

ISSUE

Whether the Certifying Officer properly denied the Employer's H-2B application due to Employer's failure to cure the noted deficiencies in its application including providing proof that it was an employer as defined by the applicable regulation at 20 C.F.R. § 655.5?

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program an employer is required to establish that its need for the requested workers is "temporary." Temporary need is defined by the DHS regulation at 8 C.F.R. §214.2(h)(6)(ii).⁶ This regulation states:

(A) Definition. Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(8 C.F.R. §214.2(h)(6)(ii)(A)).

The DHS regulation further states in regard to the nature of petitioner's need:

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 peakload need, or an intermittent need.

(8 C.F.R. §214.2(h)(6)(ii)(B)).

The DOL regulation addressing temporary need in H2-B cases also states:

The 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.

(20 C.F.R. §655.6).

In this case the CO correctly noted that pursuant to 20 C.F.R. §655.15(a) an Application for Temporary Employment Certification must be filed by an "employer." The regulation at 20 C.F.R. § 655.5 defines an employer as:

⁶ 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) the definition of temporary need is governed by Department of Homeland Security (DHS) regulation, 8 C.F.R. §214.2(h)(6)(ii). See also 20 C.F.R. §655.6(b).

a person (including an individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that: 1) has a place of business (physical location) in the U.S. and a means by which it may be contacted; 2) Has an employer relationship (ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H-2B worker or a worker in corresponding employment; and 3) Possesses, for purposes of filing an application for Temporary Employment Certification, a valid Federal Employer Identification Number (FEIN).

The employer bears the burden of proof concerning its entitlement to H-2B certification. 8 U.S.C. §1361; Cajun “Contractors, 2011-TLN-00004 (Jan. 10, 2011); BMGR Harvesting, 2017-TLN-00015 (Jan. 23, 2017).

In the Notice of Deficiency the CO noted that 20 C.F.R. § 655.15 (a) requires that an application for H-2 B certification be filed by an “employer.” In regard to this deficiency the CO reasonably requested documentation from the Employer showing that it satisfies the regulatory definition of an H-2B employer including evidence which shows the employer’s business name and that the address provided in the application is associated with Dev One Nevada. The CO further noted that such evidence may include articles of incorporation, a business license, other documentation issued by the state of Nevada which indicates the business name and address, documentation issued by the IRS which indicates the business name and address, bank account statements that list the requested information, or other official documentation which satisfies the requirement.

In its response to the Notice of Deficiency Employer submitted no documentation to establish its status as an employer. Employer’s response included an IRS document dated October 15, 2018, issued to Torino Foundation and listing an FEIN number of 26-2255050. However this FEIN number is different than the one listed in the Employer’s application for Dev One Nevada. In the CO’s final determination denying Employer’s application, the CO correctly noted that although the Employer stated it was attaching the business licenses provided to Dev One Nevada to conduct business, no such business licenses were provided. The CO determined “since no documentation was provided establishing the employer as a business entity within the State of Nevada, it did not overcome the deficiency.” (AF 15-16).

With its brief Employer attempts to submit additional documents addressing its status as an employer. As the Exhibits were not provided to the CO they will not be considered by the undersigned. *See* 20 C.F.R. §655.61(a)(5) and (e) (Administrative review by BALCA of the CO’s determination is limited to the Appeal file, legal briefs, and the request for review, which may only contain legal argument and such evidence as was actually submitted to the CO, before the date the CO’s determination was issued).

Accordingly, I find the CO correctly determined that Employer failed to provide the requested documentation to establish that it met the regulatory definition of employer and therefore did not meet its burden of establishing entitlement to H-2B certification. As Employer has failed to establish itself as an employer, which is one of the most fundamental aspects of

establishing H-2B certification, it is not necessary to address the other noted deficiencies in this decision.

For the reasons stated above, the CO reasonably and properly determined that the Employer failed to meet its burden of establishing that it is an employer pursuant to the regulatory definition at 20 C.F.R. § 655.5.

CONCLUSION

Employer has failed to meet its burden of proving that it is an employer pursuant to the regulatory definition at 20 C.F.R. § 655.5. The CO's determination is neither arbitrary nor capricious. Accordingly, the CO's denial of Employer's application for temporary labor certification is affirmed.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

RICHARD A. MORGAN
Administrative Law Judge