



**Issue Date: 29 January 2018**

**BALCA Case No.: 2018-TLN-00046**  
ETA Case No.: H-400-17306-087961

*In the Matter of:*

**SILVER LAKE CONSTRUCTION COMPANY,**  
*Employer.*

Certifying Officer: Chicago National Processing Center  
11 West Quincy Court  
Chicago, Illinois

Appearances: Kevin Lashus, Esq.  
Fisher Broyles, LLP  
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: Joseph E. Kane  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Silver Lake Construction Company’s (“Employer”) request for review of the Certifying Officer’s (“CO”) 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,

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<sup>1</sup> On April 29, 2015, the Department of Labor 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. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24042 (Apr. 29, 2015) (to be codified at 20 C.F.R. Part 655). Pursuant to this rule, the Department will process an *Application for Temporary Employment Certification* filed on or after April 29, 2015, with a start date of need after October 1, 2015, in accordance with all application filing requirements under the IFR. *Id.* at 24110. The Employer filed an *Application for Temporary Employment Certification* after April 29, 2015, with

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”).<sup>3</sup> 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.<sup>4</sup>

### **STATEMENT OF THE CASE**

The Employer is a construction company that pours concrete foundations for residential developments in Las Vegas, Nevada. (Administrative file “AF” 41) On November 2, 2017, the Employer filed with the CO an *Application for Temporary Employment Certification* (“Application”), ETA Form 9142. (AF 15, 23). The Employer requested certification for forty four temporary workers to work as construction helpers between January 15, 2018 and October 15, 2018. (AF 25). The Employer listed its temporary need as follows:

The helpers will move the machines from trailers as necessary, fill them with gasoline if necessary, and prepare the worksite for the laborer. The helper will not operate any machinery.

Control traffic passing near, in, or around work zones; clean or prepare construction sites to eliminate possible hazards; signal equipment operators to facilitate alignment, movement, or adjustment of machinery, equipment, or materials; load and unload items from machines and conveyances; assist machine operators; place products in equipment or on work surfaces for further construction, inspecting, or wrapping; examine products to verify [conformity]

(AF 25).

The CO issued a Notice of Deficiency (“NOD”) on November 9, 2017, noting among other things, the Employer failed to establish the job opportunity was temporary in nature, failed to establish temporary need for the number of workers requested, and failed to submit a complete and accurate ETA Form 9142, as the job code on the prevailing wage determination (“PWD”) failed to match the job code listed on the ETA Form 9142. (AF 52-58). The NOD requested supporting documentation to illustrate a temporary need and the need for the number of workers requested. The CO also requested that the Employer correct Section B of the ETA Form 9142 to show the same SOC code and occupational title specified in the PWD.

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a start date of need after October 1, 2015. Therefore, the IFR applies to this case. All citations to 20 C.F.R. Part 655 refer to the IFR.

<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).

<sup>3</sup> 8 C.F.R. § 214.2(h)(6)(iii).

<sup>4</sup> 20 C.F.R. § 655.61(a).

The Employer timely responded to the NOD. (AF 30-51). The Employer provided payroll records between 2015 and 2017, letters of intent from developers stating their intention to use the Employer's services in 2018, sales reports from the prior years, and a new PWD using the code "helpers, production workers." (AF 30-51).

On December 18, 2017, the CO issued a Final Determination denying the Employer's application. The CO determined that the Employer failed to cure the defects listed in the NOD. The Employer did not establish that the job opportunity was temporary in nature, the need for forty-four workers, and failed to submit a complete and accurate ETA Form 9142. (AF 13-21). The CO explained that while the Employer submitted additional documentation, the Employer failed to explain exactly how the additional documents supported the request. (AF 17). The CO reasoned that the submitted payroll reports failed to substantiate the requested dates and the need for the additional workers. The letters submitted by the Employer failed to show the cause of the peak and that the services were needed outside of the requested dates. The Employer also failed to submit documentation showing a "winter-related slowdown in residential building in Nevada." (AF 18). The CO noted that none of the documents substantiated a need for the requested forty-four temporary workers during the requested time period. (AF 20). Furthermore, instead of correcting the ETA Form 9142, the Employer submitted an entirely new PWD. The job code on the ETA Form 9142 and the PWD still do not match. The regulations require the Employer to submit a valid PWD at the time of the initial application. (AF 22).

Thereafter, the Employer requested administrative review of the CO's Final Determination, as permitted by 20 C.F.R. § 655.61.<sup>5</sup> (AF 1-12). On January 2, 2018, I 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.<sup>6</sup> BALCA received the Appeal File from the CO on January 11, 2018. The Solicitor filed a brief on January 19, 2018, urging BALCA to affirm the CO's decision to deny temporary labor certification. The Employer filed a brief on January 23, 2018, urging BALCA to reverse the CO's decision. The matter is now ripe for decision.

## **DISCUSSION AND APPLICABLE LAW**

BALCA's standard of review in H-2B cases is limited. BALCA may consider only 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.<sup>7</sup>

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<sup>5</sup> Under 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.

<sup>6</sup> See 20 C.F.R. § 655.61(c).

<sup>7</sup> 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.<sup>8</sup> The Employer bears the burden of proving that it is entitled to temporary labor certification.<sup>9</sup> The regulations do not specify a standard of review for BALCA, but the Board has adopted the arbitrary and capricious standard.<sup>10</sup>

#### Failure to Meet the Application Filing Requirements

In the present case, the CO denied certification for three reasons. The Employer bears the burden of showing that each of the three reasons for the denial should be reversed. If the Employer fails to overcome the deficiency of even one of the denial reasons, the order of the CO must be affirmed.

An employer seeking temporary labor certification for H-2B positions must request a PWD from the National Prevailing Wage Center ("NPWC") prior to filing its ETA Form 9142.<sup>11</sup> The regulations require that "an employer must also request and receive a PWD from the NPWC before filing the job order with the SWA" and "the PWD must be valid on the date the job order is posted."<sup>12</sup> An employer must have a valid and correct PWD prior to filing its application.<sup>13</sup> If an employer receives an incorrect SOC classification from the NPWC, the employer must appeal the NPWC Director's decision at the time the PWD is assigned, not in the context of the adjudication of the application.<sup>14</sup> The regulations specifically provide,

A registered employer seeking H-2B workers must file a completed *Application for Temporary Employment Certification* (ETA Form 9142B and the appropriate appendices and **valid PWD**), a copy of the job order being submitted concurrently to the SWA serving the area of intended employment, as set forth in §655.16, and copies of all contracts and agreements with any agent and/or recruiter, executed in connection with the job opportunities and all information required, as specified in §§655.8 and 655.9.<sup>15</sup>

The CO argues that the Employer failed to provide a valid PWD. The Employer listed the SOC as "Helpers, Construction Trades, All Other" on its application, ETA Form 9142. However, the PWD submitted with the application lists "Construction Laborers" as the SOC. The CO provided the Employer with an opportunity to cure the deficiency on its ETA Form

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<sup>8</sup> 20 C.F.R. § 655.61(e).

<sup>9</sup> 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).

<sup>10</sup> *Brook Ledge*, 2016-TLN-00003 (May 10, 2016); *Three Season Landscape Contracting Services*, 2016-TLN-00045 (June 15, 2016).

<sup>11</sup> 20 C.F.R. § 655.10.

<sup>12</sup> 20 C.F.R. § 655.10(c)(1),(2).

<sup>13</sup> *Grigoriy & Family Enterprises, Inc.*, 2013-TLN-00032 (Feb. 26, 2013) (affirming denial when the employer did not request a prevailing wage determination until after it filed its application); *Creation Landscape*, 2012-TLN-00023 (Mar. 30, 2012).

<sup>14</sup> *Killington Pico Ski Resort*, 2016-TLC-00013 (Dec. 14, 2015).

<sup>15</sup> 20 C.F.R. § 655.15(a)(emphasis added).

9142. Instead, of changing the ETA Form 9142 the Employer requested and obtained an alternative PWD with a SOC reading “Helpers, Production workers.” When filing an application for temporary labor certification, an employer must submit a completed application with a valid PWD. Even if the CO had accepted the new PWD, the SOC still would not match the one on the filed application. (See AF 23, 35, 84). The Employer must use the same SOC specified on the PWD when filing its application. If the Employer disagreed with the initial PWD job classification, it should have appealed the NPWC’s determination prior to filing its application. The Employer cannot circumvent the appeal process and contest the job’s classification or seek to change the classification at a later date. Therefore, the Employer did not cure the deficiency and the CO properly denied the application based on this issue.<sup>16</sup>

### **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:

JOSEPH E. KANE  
Administrative Law Judge

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<sup>16</sup> Since I have affirmed the CO on this issue, I will not discuss the other two deficiencies.