



Issue Date: 13 July 2018

BALCA Case No.: 2018-TLN-00154
ETA Case No.: H-400-18011-855194

In the Matter of:

JEFFREY WILLIAM STICKLE DBA STICKLE FAMILY,

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Jeffrey William Stickle, self-represented
Gaithersburg, MD
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 THE CERTIFYING OFFICER'S DENIAL OF
TEMPORARY LABOR CERTIFICATION**

This case arises from Jeffrey William Stickle's (DBA Stickle Family) ("Employer") request for review of the Certifying Officer's ("CO") decision to deny his applications 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

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-120, Division B (2018).

this 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 May 24, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for one childcare worker for the period of August 7, 2018 to August 6, 2021. (AF 51-67).³ Employer indicated that the nature of its temporary need was “one-time occurrence.” On Employer’s application (Form 9142), in response to its statement of temporary need, Employer stated:

We are in need of in-home day care temporarily through the time that our children can be home by themselves briefly after school safely. Our children are currently age 5 and 8 (going into K and 3rd). They cannot be home safely without a nanny’s supervision. They also require assistance, transportation, academic help, and engagement that cannot be provided during the parent’s working hours. We are choosing to no longer participate in the au pair program due to concerns with the management organization’s policies so we require a private nanny to fill that role. After the three year temporary period our children will be 8 and 11 (3rd and 6th grade) and will be able to safely manage certain out of school activities without the need for a nanny. Currently, the children need a nanny not only for safety and supervision, but to facilitate a home and community life outside of school, as opposed to pre- or post-school day care.

(AF 51).

The CO issued a notice of deficiency on June 4, 2018, listing six deficiencies in the Employer’s application. (AF 39- 50). The CO noted the first deficiency as the Employer’s “[f]ailure to establish the job opportunity as temporary in nature.” This is the only deficiency noted in the CO’s final denial of the Employer’s application. As the CO based the final denial on the first deficiency, and the other five deficiencies were apparently cured, they will not be addressed in this decision.

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.

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

The CO cited 20 C.F.R. §655.6(a) and (b) for the requirement that “an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” (AF 42).

The CO noted that an employer’s need is considered temporary if it is justified to the CO as one of the following: 1) a one-time occurrence; 2) a seasonal need; 3) a peakload need; or 4) an intermittent need as defined by DHS regulations. The CO determined that the Employer in this case had not submitted sufficient information to establish its requested standard of need or period of intended employment. *Id.*

The CO noted that the employer is requesting one child care provider from August 7, 2018 to August 6, 2021 based on a one-time occurrence need. The CO asserted that in order to establish a one-time occurrence,

[T]he petitioner must show that it has not employed workers to perform the service or labor in the past, and will not need workers to perform the services or labor in the future or the employer must have an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

Id.

The CO stated that the Employer had not sufficiently explained the household’s care for the children since birth. The CO also noted the Employer’s statement that it would not have the need at the end of the three year period because the children would be eight and eleven and therefore could manage certain out of school activities. The CO apparently questioned whether the Employer had established that it had not employed childcare workers in the past and that it would not need workers to perform the services or labor in the future. In other words, the CO questioned whether a one-time occurrence had been established. Accordingly, the CO determined that the Employer had not sufficiently demonstrated that it meets the regulatory standard for a temporary need.

The CO requested additional information including the following:

1. A description of the household’s care for the children since birth and a detailed explanation as to the household’s plan for the future care of the children until care is no longer needed;
2. An explanation regarding how the employer determined it needed a temporary worker beginning on August 7, 2018, and how it determined it would no longer need that worker after August 6, 2021; and
3. 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.

(AF 43).

The CO further pointed out that if the submitted documents were not clear to a layperson then the documentation should be accompanied by an explanation of how the documents support the requested dates of need.

On June 5, 2018, Employer filed a response to the Notice of Deficiency providing additional supporting information and further explanation of the submitted documentation, much of which addressed the other five deficiencies noted by the CO in the Notice of Deficiency. (AF 27-38).

In regard to the first deficiency addressing its temporary need, the Employer attempted to address the CO's three points noted above. In regard to the first point Employer explained that he had used several different individuals to supply child care to his children as follows:

Amelia May Stickle (DOB 3/3/10) was cared for out of the home at Robin's Nest Child Care LLC from birth until May 2013.

Oliver Norman Stickle (DOB 12/14/12) was also cared for out of the home at Robin's Nest Child Care LLC (apparently birth until May 2013).

In-home au pairs were employed beginning in May 2013 who provided "cultural exchange-based day care":

Alejandro Castillo Urias May 2013 – May 2014

Fernanda Alva Trillo (Mexico)- May 2014 to May 2015

Kelsey Bonnet (South Africa)- May 2015 to May 2017

Lisa Keil (Germany)- June 2017 to present

(AF 27).

Employer stated that he had never before employed an in-home nanny but was not clear how the care provided by the au pair was significantly different from an in-home nanny. Employer did explain that he was not pleased with the au pair agencies he had previously utilized, nor with agency fees, and stated somewhat cryptically that he had "become dismayed by the actions of au pair agencies with regard to the treatment of their participants." (AF 27).

In regard to the family's future childcare needs the Employer stated that he planned to have a one-time in-home nanny for the three year requested period, and then would no longer need daily in-home day care services because the younger child would be starting third grade and the older child sixth grade. Employer stated that the children could "legally" be allowed to remain unsupervised for brief periods," the older child "would be able to supervise herself and her brother for brief periods after school," and "they will remain after school more frequently for activities and will not require in home care during that time." (AF 27).

In regard to their specific dates of need the Employer stated that they would need a temporary worker because their current au pair leaves service on July 13, 2018, the family would be traveling until August 8, 2018, and then would need to orient the new nanny so that she could begin caring for the children when they return to work on August 13, 2018. Employer further

stated that they would not need the worker beyond August 6, 2021, for the reasons previously stated, and because they vacation in August, or would place the children in day camps until the 2021-2022 school year begins. (AF 27-28).

On June 12, 2018 the CO issued a Non-Acceptance Denial to the Employer, stating that the noted deficiency regarding Employer's failure to establish the job opportunity as temporary still remained and therefore the application was denied. (AF 11-23). Specifically the CO stated that in order to establish a one-time occurrence the petitioner must establish 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. The CO noted that Employer's response included information on the services it utilized for its previous childcare needs including a day care service and several au pairs.

The CO concluded from the statements provided by the Employer that it did employ persons including "a total of four au pairs" that had fulfilled the duties listed in Section F.a., Item 5 of the H-2A application. Therefore, the CO concluded that the Employer did not show that it had not employed workers to perform the service or labor in the past, as required by the one-time occurrence temporary need standard. Accordingly, the CO determined that Employer did not overcome the deficiency. (AF 15).

By letter postmarked June 19, 2018 (received on June 27, 2018), Employer made a timely request for administrative review of the CO's determination. (AF 1-10). In his request for review Employer argues primarily that the duties performed by his previous child care workers were different than the duties to be performed in the current position. Therefore, he argued that he had not employed workers in the past for the position at issue. Employer asserted that the CO had not properly considered the Employer's description of the children's child care since birth and had failed to recognize the distinction between the position employer seeks to fill and previous child care provided to Employer's children. Employer argues that the positions are distinguishable.

Employer argues that the workers for the day care center utilized were not "employees" of the employer as the Employer did not have control over the type of care provided, terms of employment etc. Similarly, Employer argued that its use of au pairs is distinguishable because an au pair provides "cultural exchange based day care" and this type of childcare involves individuals who are under J1 Visas, which limit the terms of the child care services to include, for e.g., no more than 10 hours per day or 45 hours per weeks, the au pairs must also take classes, are between the ages of 18 and 26, etc.

The CO and the Employer were given the opportunity to file briefs in support of their positions. No briefs were received by the undersigned.

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)).

STANDARD OF REVIEW

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, n. 1 (Mar 4, 2016).

Some BALCA cases have recognized a distinction in BALCA's review of the CO's determination involving review of a long established policy-based interpretation of a regulation by the Office of Foreign Labor Certification ("OFLC"), in which case OFLC's interpretation would be owed considerable deference. However, in the absence of such an interpretation, the CO's finding would be reviewed *de novo*. *In the matter of Zeta Worldforce, Inc.*, 2018-TLN-00015 (Dec. 15, 2017). *See also Gallegos Masonry, Inc.*, 2018-TLN-00115 (May 10, 2012).

I find that the approach taken in *Zeta Worldforce, Inc.*, is consistent with BALCA's discussion of the proper standard of review in *Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). In *Brook Ledge*, a three-judge BALCA panel held that the CO's definition of a "worksite" was not entitled to deference where the OFLC or the CO had articulated no clear definition of the term. BALCA noted that the CO offered "no reasoned explanation for its determination and apparently seeks deference based merely on the fact that the decision was issued by OFLC," adding that there is "no legal support for such a contention." *Id.*

While the *Brook Ledge* panel acknowledged that it reviewed the CO's decision under an arbitrary and capricious standard, the panel ultimately found that deference to the CO's determination was unwarranted. The panel explained that where the review did not involve a longstanding or clearly articulated interpretation of a regulation, and the CO had not shown that

⁴ Similarly, 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).

he had considered the relevant factors and articulated a rational connection between the facts found and the choice made, BALCA need not defer to the OFLC's or the CO's interpretation.⁵

In the current case, which does not involve a longstanding policy-based interpretation of a regulation by the OFLC, I find that deference need not be shown to the CO's determination. However, for the reasons discussed below, I find the record supports the CO's determination in this case, as Employer has failed to meet its burden of establishing its temporary need for the requested one child care worker between August 7, 2018 and August 6, 2021 on the basis of a "one time occurrence."

ISSUES

Whether the Certifying Officer properly denied the Employer's H-2B application due to Employer's failure to establish that its request for one childcare worker for the period of August 7, 2018 to August 6, 2021, was based upon a "temporary" employment need, according to the Employer's requested standard of "one-time occurrence?"

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program the 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.

⁵In *Brook Ledge Inc.*, 2016 TLN 00033, slip op. at 5 (May 10, 2016), the BALCA panel stated, "We take no issue with the assertion that BALCA should defer to OFLC's rational and reasonable interpretation of an ambiguous regulatory term."

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).

(8 C.F.R. §214.2(h)(6)(ii)(B)).

The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. 20 C.F.R. § 655.6(a) and (b). *See, e.g., Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

In this case the Employer is alleging that it has a temporary need for one childcare worker (a live-in nanny) due to a one-time occurrence, from August 7, 2018 to August 6, 2021 for the care of Employer's two children, currently ages 5 and 8. Under the DHS regulation in order to establish a temporary need on the basis of a one-time occurrence the following criteria must be met:

The petitioner must establish 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.

(8 C.F.R. §214.2(h)(6)(ii)(B)(1)).

The CO requested information from the Employer concerning "the household's care for children since birth," apparently in an effort to determine whether the employer had "employed workers to perform the services or labor in the past." Information provided by the Employer reflects that the Employer had used a day care service until May of 2013, but then utilized four consecutive "live-in" au pairs between May of 2013 through the present.

In the CO's final denial the CO noted that Employer's response to the Notice of deficiency included information on the services it utilized for its previous childcare needs, including a day care service and several au pairs. The CO concluded from the statements provided by the Employer that it did employ persons including "a total of four au pairs" that had fulfilled the duties listed in Section F.a., Item 5 of the H-2A application. Therefore, the CO concluded that the Employer did not show that it had not employed workers to perform the service or labor in the past, as required by the one-time occurrence temporary need standard. Accordingly, the CO determined that Employer did not overcome the deficiency. (AF 15).

The CO's determination was reasonable and supported by the record. Employer pointed out in its response to the Notice of Deficiency and in its request for review that it is apparently dissatisfied with the au pair program which involves the use of J-1 visas with certain regulatory requirements. However, this explanation is insufficient to establish that the Employer did not "employ a worker to perform the services or labor in the past." Although there may be certain distinctions between an au pair and a live in nanny this is not relevant to the fact that employer is filling its need for in-home child care regardless of which method he utilizes.

Employer has not met its burden of establishing that its prior employment of four live-in child care providers was significantly different than its request for a live-in nanny to provide child care through the H-2B program, such that one could conclude that Employer had not employed a live-in child care worker in the past, as required to establish its temporary, rather than ongoing need for an in-home childcare provider.

In an attempt to support his assertion that he had not previously employed someone to perform the duties of the requested in-home nanny, the Employer emphasizes that the two children will be progressively older in the next three years and therefore asserts that their childcare needs will be different than those provided in the past. However, the childcare needs of the five year old in the next three years would presumably be similar to those of the eight year old over the last three years. Clearly the required duties would overlap. Therefore, it would appear disingenuous for the Employer to attempt to carve out a three year “one time occurrence” on this basis. If an Employer were able to merely alter job requirements slightly, in order to establish a “one time occurrence,” a similar Employer employing child care workers could potentially file H-2B applications for six consecutive “one time occurrences” based on the changing needs of a child from birth to age eighteen. Clearly this would contravene the purpose of the H-2B program which is in place to address temporary and not permanent employment needs. *See Bucron, Inc.* 2013-TLN-00002 (Nov.8, 2012) (affirming denial of certification because many of the job duties listed in the employer’s application appear ongoing and permanent).

The regulations address the guidelines for defining the four types of temporary need under the H-2B program, that is, “a one- time occurrence, a seasonal need, a peak load need, or an intermittent need.” The regulations provide, “[G]enerally, 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 purpose of the “one time occurrence” regulatory requirement that an Employer not have employed workers for the position in the past, or in the future, is to assure that the H-2B program is being utilized to address a one-time temporary event, and which cannot exceed three years. In this case Employer has utilized four live-in child care workers over the last four years. Accordingly, Employer has not established that its need for an in-home child care provider, for which it utilized the “au pair” program in the past, was significantly different than its current need for an in-home child care worker (in-home nanny) for which it has filed an H-2B application, so as to establish a “temporary need” on the basis of a one-time occurrence rather, than an ongoing need for fulltime in-home childcare. *See In the matter of Phillip Allen*, 2018-TLN-00034 (Jan. 13, 2018). (Employer’s duration of need spanned seven years and therefore exceeded the accepted timeframe of a “one-time occurrence” under the H-2B program).

For the reasons stated above, the CO reasonably and properly determined that the Employer failed to meet its burden of establishing a temporary need on the basis of a one-time occurrence, for one in-home child care worker from August 7, 2018 to August 6, 2021.

ORDER

Employer has failed to meet its burden of demonstrating how its employment need for one child care provider for the period of August 7, 2018 to August 6, 2021 is temporary, based on Employer's stated standard of a one-time occurrence, as defined by the applicable regulation at 8 C.F.R. §214.2(h)(6)(ii)(B)(1). The CO's determination is neither arbitrary nor capricious. Accordingly, the CO's denial of Employer's application for temporary labor certification is **AFFIRMED**.

For the Board of Alien Labor Certification Appeals:

RICHARD A. MORGAN
Administrative Law Judge