



Issue Date: 11 September 2018

BALCA Case No.: 2018-TLN-00160
ETA Case No.: H-400-18178-35621

In the Matter of:

KACHINA BOOKKEEPING & ACCOUNTING

Employer

Appearance: None Listed
For the Employer

Employment and Training Administration
Office of Foreign Labor Certification
Chicago National Processing Center
Chicago, IL
For the Certifying Officer

Before: THERESA C. TIMLIN
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from Kachina Bookkeeping and Accounting’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an 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, peak-load, 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). See 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. Further Continuing Appropriations Act, 2018, Pub. L. No. 115-90, Division A, § 101 (2017).

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 ha[ve] 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 9142B”). 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).

STATEMENT OF THE CASE

H-2B Application

On March 18, 2018, Employer submitted a Form 9142B to the Department of Labor’s Employment and Training Administration (“ETA”). (AF 89.)³ Employer sought to hire one Maid/Housekeeping Cleaner to assist Ms. Barbara Klein for the period of October 1, 2018 to October 1, 2019. (AF 81.) The duties of the Maid/Housekeeper Cleaner would include housekeeping, cooking meals, yard work, running errands, and minimal care-giving. (AF 83.)

Notice of Deficiency

On July 12, 2018, the CO issued a Notice of Deficiency (“NOD”), identifying nine deficiencies in Employer’s Form 9142B. (AF 68.) First, the CO found that Employer failed to establish the job opportunity as temporary in nature pursuant to 20 C.F.R. § 655.6(a) and (b). Specifically, Employer did not justify the need for an employee on a one-time occurrence basis. To do this, Employer must not have employed workers to perform the services desired in the past and must not need workers to do so in the future, or it must otherwise show a temporary event of short duration. Employer based its need for the position on old age and did not explain what temporary events of short duration caused the one-time occurrence or how it determined the dates of need for the worker. To remedy this error, the CO directed Employer to submit an updated temporary need statement including an explanation and supporting documents that establish a need for one housekeeper or caretaker; documentation and explanation justifying how it determined the dates of need; an explanation of how the duties of this position were handled before and will be provided after the requested timeframe; and an explanation regarding how the request meets the regulatory standard of a one-time occurrence. (AF 71-72.)

Second, the CO could not verify whether Employer actually met the definition of “employer,” in that the entity has a place of business by which it may be contacted; has an employer relationship with respect to an H-2B worker; and possesses a Federal Employer Identification Number (FEIN) in accordance with 20 C.F.R. § 655.15(a). Moreover, Employer did not make clear how it would use the services of the worker for a business purpose given the household worker duties listed on the application. The CO advised that Employer may either amend the Form 9142B or satisfy the regulatory obligations of H-2B employers, the latter requiring Employer to show evidence of its business name and association with the State of Arizona. (AF 72-73.)

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

Third, Employer submitted a job order inconsistent with the Form 9142B to the Statewide Work Agency (“SWA”) serving the area of intended employment as required by § 655.16. The job order advertised an hourly wage of \$10.50, called for five years of experience, and required a driver’s license, while the Form 9142B showed an hourly wage of \$9.62, sought twelve months of experience, and did not reference a driver’s license requirement. In addition, the job duties between these two documents did not correspond and the job order did not include the required assurances under 20 C.F.R. § 655.18, which the CO listed as seventeen items. Therefore, the CO instructed Employer to submit a job order reflecting these items as well as an amended Form 9142B or job order to show consistent job requirements. Alternatively, Employer could submit an already-amended job order that contains the required language. (AF 74-75.)

Fourth, Employer’s job order for a Housekeeper/Caregiver indicates a possible live-in situation benefitting Employer. In such a case, employers must disclose provision and cost of board, lodging, or other fringe benefits on their job orders. Deductions or costs incurred for facilities that are primarily for the benefit of an employer may not be charged to the worker. Under § 655.20(c), the job order must make all deductions required by law and specify all deductions not required by law which the employer intends to make from the worker’s pay. Moreover, under § 655.20(a) and (b), the job order must offer a wage that equals or exceeds the higher of the prevailing wage, Federal minimum wage, State minimum wage, or local minimum wage and must pay such wage, free and clear. To correct this deficiency, the CO ordered Employer to amend the job order to indicate that it will pay the cost of lodging to the extent such costs would reduce the worker’s pay below the offered wage rate and to include corrected language which remedies this deficiency in its NOD response. Alternatively, Employer could submit an already-amended job order that contains the corrected language. (AF 75-77.)

Fifth, Section F(a), Item 2 of Employer’s Form 9142B offers only thirty hours of work per week to the employee. Under § 655.20(d), an employer’s job opportunity must be a full-time temporary position, defined by § 655.5 as thirty-five hours of work per week. Thus, the CO instructed Employer to amend Section F(a), Item 2 to reflect at least thirty-five hours per week for this position. (AF 77.)

Sixth, Employer did not include normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment for the job opportunity pursuant to § 655.20(e). Here, the job order describes shared housing as a condition of employment. Employer can only offer optional housing to workers, but cannot mandate such housing. The job order further indicated that Employer would subtract \$800 per month for room and board. To cure this defect, the CO directed Employer to provide documentation demonstrating that the job opportunity is a bona fide, full-time temporary position with normal and accepted qualifications imposed by non-H-2B employers in the same occupation and area of intended employment. The CO also ordered Employer to provide a letter detailing why workers must pay boarding costs as a condition of employment. Employer may alternatively remove the housing requirement as a condition of employment. (AF 77-78.)

Seventh, Employer checked the “No” box asking if the position is a full-time position in Section B, Item 4 of the ETA. Section 655.20(d) requires the job opportunity to be a full-time temporary position in which the employee works at least thirty-five hours per week. The CO

requested that Employer amend Section B, Item 4 of the Form 9142B to reflect a full-time opportunity. (AF 79.)

Eighth, Employer neglected to identify and include any agreements with agents or recruiters whom it engages or plans to engage in the recruitment of H-2B workers as per § 655.9. Employer must have either identified such parties and submitted their corresponding agreements or notified the Department that it will not utilize any agent or recruiter for seeking H-2B workers, which Employer did not do. The CO asked Employer to provide such agreements and include the identity and location of all persons or entities involved in recruitment or to notify the Department that it will not use such an agent or recruiter. (AF 79-80.)

Finally, Employer did not accurately complete the Form 9142B when it indicated in Section B, Item 9 that it wished to hire a friend named Evelyn Quijano, meaning the job opportunity may not be bona fide. The CO directed Employer to remove Ms. Quijano's name to demonstrate that this job is available to U.S. workers. (AF 80.)

Employer's Response to Notice of Deficiency

Employer resubmitted its Form 9142B in an email correspondence dated July 19, 2018. (AF 67.) It reflected several changes that addressed the CO's Notice of Deficiency, but did not correct all nine defects. Among the uncorrected deficiencies, Employer again checked the "No" box asking whether the position is full-time in Section B, Item 4 of the Form 9142B and retained Ms. Quijano as its preferred candidate. (AF 51.) Although Employer represented that the worker would average thirty-five hours per week in the amended job order, it still represented that the employee will work fewer than thirty-five hours per week on the Form 9142B (AF 53, 59). Likewise, Employer indicated two different hourly wage rates on the job order and Form 9142B; it also represented the unavailability of overtime on the former and an overtime rate of \$14.43 on the latter. (AF 55, 60.) Employer also did not submit any documentation substantiating its status as an employer or addressing payroll deductions and housing as a condition of employment.

However, Employer included a statement that it will not utilize an agency or recruiter for the recruitment of this position. (AF 58.) In addition, the job order and Form 9142B both showed that the position does not require a driver's license and calls for one year (twelve months) of experience. (AF 54, 59-60.) The undersigned also notes that Employer provided its FEIN in Section C, Item 12 on both the original Form 9142B and amended version. (AF 52, 82.)

Employer also submitted a statement of temporary need, stating its desire to offer a trial period of one year to ensure the worker is a good fit for the job, at which time it will extend a permanent offer or seek a replacement. Employer explained that Ms. Klein does not need help until October 1, 2018 because her daughter lives with and helps her with household chores, but will relocate at the end of September. (AF 57.)

Final Determination

On August 6, 2018, the CO issued a Final Determination, this time detecting five deficiencies. (AF 41.) The CO reiterated the first deficiency in the NOD, stating that

Employer's amended statement did not demonstrate a temporary need. In particular, Employer's intention to use the one-year duration as a trial period to ensure that the worker is a good fit for the job did not fit the regulatory definition of one-time need, the CO ruled. Moreover, that Ms. Klein's daughter has performed household chores, but will leave October 1, 2018, suggests Employer has needed these services in the past and will need them in the future. Employer also did not submit supporting documentation as requested. (AF at 44-45.)

Employer also failed to cure the second deficiency from the NOD because it did not submit documentation to verify the existence of the business showing the business's name, or that the address provided in the Form 9142B is incorporated in the State of Arizona. Neither did it amend the application or provide the Chicago National Processing Center ("CNPC") permission to amend the application on its behalf to identify an individual or family name as the employer, according to the CO. (AF 46.)

The CO also found that Employer did not correct the third deficiency from the NOD. The CO acknowledged that Employer submitted an amended job order that reduced the experience requirement to twelve months as requested and removed the driver's license requirement to correspond to the ETA, but also pointed out that Employer neither amended the job order nor the Form 9142B to identify a consistent basic rate of pay and consistent job duties, as requested. It also did not amend the job order to include the job assurances at 20 C.F.R. § 655.18. (AF 48-49.)

Employer further did not overcome the NOD's fifth deficiency in that it did not amend Section F(a), Item 2 of the Form 9142B or give CNPC permission to amend the application on its behalf to indicate at least thirty-five hours of work per week to demonstrate the availability of a bona fide, full-time temporary position. (AF 49.)

Finally, Employer did not correct the seventh deficiency by not amending Section B, Item 4 of the Form 9142B or giving CNPC permission to do so on its behalf to indicate "Yes" when asked if the job opportunity is a full-time position. (AF 49-50.)

Employer's Appeal of the Final Determination

By letter dated August 15, 2018, Employer requested an administrative review of the CO's Final Determination and maintained that it could not submit information correctly due to a lack of information provided to it. Employer claims that the July 12 NOD did not require it to give permission for the application to be corrected. (AF 1-2.)

On July 19, Employer submitted a new modified application (Case No. H-400-18194-152534), which it attached as part of the current appeal. The attached documents include an amended Form 9142B (AF 14-19); a copy of its prior statement of temporary need (AF 20); a copy of its prior statement regarding foreign recruitment (AF 21); an amended job order (AF 22-29); and a July 19, 2018 email from Employer advising CNPC that it submitted an amended application correcting all deficiencies, along with CPNC's confirmation of receipt dated July 23, 2018. (AF 30-31.) In the email, Employer requested that CPNC contact it if it needed further information, which Employer indicated CPNC did not do.

On July 23, Employer received word that its application had been returned without review due to an expired prevailing wage determination (“PWD”). (AF 32.) Employer avers that it resubmitted an amended PWD (No. P-400-18204-149544) that same day without any indication that it had completed the PWD incorrectly. (AF 2, 36-39.) Employer also attached emails dated July 25, 2018 from CPNC again confirming receipt of the aforementioned amended documents. (AF 34-35.)

Employer argues that because it followed the instructions provided to it, and given its inexperience in completing such documents, this matter should be reviewed. (AF 2).

SCOPE OF REVIEW

BALCA has a limited standard 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 only contain legal arguments and evidence actually submitted before the CO. See 20 C.F.R. § 655.33(e). Employer did not proffer any evidence that is not part of the Appeal File and did not submit a brief. After considering the evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO’s denial of temporary labor certification, or
- (2) Direct the CO to grant temporary labor certification, or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.33(e)(1)-(3).

The evidence is reviewed *de novo*, and the Board must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. See 20 C.F.R. § 655.61(e). While neither the Immigration and Nationality Act nor the regulations applicable to H-2B temporary labor certifications identify a specific standard of review, the Board “has fairly consistently applied an arbitrary and capricious standard” in reviewing the CO’s determinations. See The Yard Experts, Inc., 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017); see also Brook Ledge Inc., 2016-TLN-00033, slip op. at 5 (May 10, 2016). The decision must be affirmed if the CO considered the relevant factors and did not make a clear error of judgment. See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (describing the requirements to satisfy the “arbitrary and capricious” standard of review).

DISCUSSION

1. Deficiency One: Did Employer establish the job opportunity as temporary in nature based on a one-time occurrence?

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. 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 DHS regulations provide that 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.” 8 C.F.R. § 214.2(h)(6)(ii)(B). The employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B); see also Tampa Ship, 2009-TLN-44, slip op. at 5 (May 8, 2009). A bare assertion without supporting evidence is insufficient to carry the employer’s burden of proof. See AB Controls & Technology, Inc., 2013-TLN-00022 (Jan. 17, 2013).

Here, Employer requests a temporary Housekeeper/Caregiver for a “one-time” occurrence. To establish a one-time occurrence, an employer

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 or short duration has created the need for a temporary worker.

8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

Employer’s evidence fails to establish that it has a need for temporary workers on a one-time occurrence basis because it does not show that it has not employed workers to perform housekeeping functions in the past and that it will not need workers to perform these functions in the future. Further, the evidence fails to show that a temporary event or short duration created a need for a temporary worker in an otherwise permanent employment situation for the requested dates of October 1, 2018 through October 1, 2019.

a. Amended Statement of Temporary Need (AF 20)

On appeal of the Final Determination, Employer simply resubmitted the identical statement of temporary need that it sent when it appealed the NOD:

I am asking for this to start as temporary position...I want to offer a trial period of 1 year to make sure this employee is a good fit for the job, at that time I will extend the job offer further to a permanent position, or at that time search for a replacement. The reason I do not need help until Oct 1st is, at this time my daughter is living with me and helping me with household chores. She is moving to Maryland at the end of September. I will be in need [of] a housekeeper, cook, laborer and minimal caregiving. I am a 71 yr old woman that needs assistance. I need someone I know and trust to do this job, being [that] it is my private home and need private care. Duties include cleaning, vacuum, dust, laundry, cooking, yard work, and light care-giving such as making sure taking medicine, lifting or moving anything I may need help with. Just to have someone available if needed.

(AF 20, 57.)

The CO found that the basis of Employer's need does not qualify under the regulatory definition of one-time occurrence because not only has Employer needed somebody to perform housekeeping chores in the past, but it will also need someone to do so in the future. This is clearly evident in the statement of need when Employer states that Ms. Klein's live-in daughter had helped her with household chores, suggesting that her need for assistance with household chores and caregiving predated this request. Although Employer might argue that the daughter's move to Maryland constitutes an event necessitating a temporary worker, Employer makes no indication that the daughter's relocation to Maryland starting in late September will be temporary or of a short duration. Moreover, Employer's statement of need conveys that at the one-year mark of the temporary worker's employment, it will either extend an offer to that person for a permanent position or search for a replacement. This plan of action at the conclusion of the one-year trial period indicates that the need for assistance with household chores and caregiving will extend beyond the one-year date of October 1, 2019. Because Employer's need for assistance both predates the temporary period and will continue after its expiration, Employer's need for assistance is indefinite, not temporary. Therefore, Employer's statement of temporary need runs in direct contravention to the regulatory definition of "one-time occurrence."

b. Amended Form 9142B (AF 14-19)

Section B, Item 9 of the amended Form 9142B provides a very similarly-worded statement of temporary need as Employer's representation at AF 20.

c. Conclusion

As provided in 8 C.F.R. § 214.2(h), Employer must establish an employment situation that is not permanent or otherwise caused by a temporary event of short duration. Its Form 9142B and statement of temporary need do not meet the regulatory standard of "one-time occurrence" in that Employer has failed to show that it will not need assistance before and after the requested period. Further, Employer does not characterize Ms. Klein's daughter's absence as time-limited so as to render the need temporary. Instead, these factors suggest that Employer's need for housekeeping and caregiving assistance is not, in fact, a temporary need.

The CO also found that Employer did not provide any documentation to support its contention that the request qualifies as a one-time occurrence. (AF 45.) Aside from a handwritten statement, Employer indeed failed to provide probative documentation in support of its contention. Therefore, the undersigned finds that the CO properly evaluated the relevant factors and did not err in finding that Employer did not meet its burden of establishing the need for temporary, one-time occurrence assistance.

2. Deficiency 2: Did Employer meet the statutory definition of "employer?"

Under 20 C.F.R. § 655.15(a), an employer must file the Application for Temporary Employment Certification. An employer is an individual or entity that

- (1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;
- (2) Has an employer relationship (such as the 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)

20 C.F.R. § 655.5.

Section C, Item 1 of Employer's initial and subsequently amended Form 9142Bs lists Kachina Bookkeeping and Accounting as Employer's legal business name, while Items 3-8 list its address as 1900 Bloody Gulch Road, PO BOX 220, Tombstone, Arizona 85638. Item 12 provides its FEIN as 8605155000. (AF at 52, 82.)

The CO could not verify the existence of the business associated with this application and could not ascertain how Employer intends to use the services of the worker for a business purpose when the application outlines duties of a household worker. Thus, the CO asked Employer to identify the business's name and address provided on the Form 9142B and proffer underlying documentation showing its incorporation in the State of Arizona.

a. Amended Form 9142B (AF 14-19)

Section C of Employer's most recently amended Form 9142B provides nearly the exact same information as the two prior versions, except it lists Barbara Klein as Employer's legal business name in place of Kachina Bookkeeping and Accounting in Item 1. (AF 15.) However, Employer did not provide documentation confirming the business's name and address have been incorporated with the State of Arizona. Neither did it explain how or provide documentation showing that the housekeeping and caregiving services it sought serve a business purpose.

In Dev One Nevada, a ranch owner provided a document from the IRS pertaining to the company to confirm its status of an employer, but the FEIN number listed on that document did not match the one listed on the application. See 2018-TLN-00087, slip op. at 7 (Apr. 2, 2018). The ranch owner also purported to attach business licenses allowing it to operate in the State of Nevada, but it did not provide these licenses to the CO. Id. On appeal, the ranch owner sought to submit additional documents addressing its status as an employer for the first time, but because the owner did not proffer them to the CO, the ALJ did not consider these documents and held that the owner failed to establish himself as an employer. Id. at 7-8.

Here, Employer provided the same business address and FEIN number in each of the three versions of the Form 9142B. Without supporting documentation, however, the Form 9142B is insufficient to prove Employer's representations, as happened in Dev One Nevada. The CO sought documentation showing proof of incorporation with the State of Arizona, such as a license to operate in the state. This likely would have confirmed

Employer's name, address, and FEIN number, but Employer did not provide such a document or any documents bearing on this deficiency for that matter. Further, it did not even argue that it qualifies as having an employment relationship with respect to an H-2B worker, let alone proffer evidence of it. Employer also did not attempt to explain how the household duties described in Section F, Item 5 would serve a business purpose. In the absence of such evidence and explanation, Employer failed to satisfy all three elements of 20 C.F.R. § 655.5.

b. Conclusion

The CO sought "evidence which showed the employer's business name, and that the address provided on the ETA Form 9142 is associated in the State of Arizona..." (AF 46.) Due to the complete absence of such evidence in the record, Employer could not credibly prove the elements of 20 C.F.R. § 655.5, thereby failing to show that it statutorily qualifies it as an employer. Therefore, the undersigned affirms the CO's finding that Employer did not overcome this deficiency.

3. Deficiency Three: Did Employer fail to submit an acceptable job order?

The CO asked Employer to amend the job order language, including a list of seventeen job assurances as per 20 C.F.R. § 655.18 and to amend inconsistencies in the job order and Form 9142B as to the worker's wages, job duties, experience requirement, and driver's license requirement.

The first version of Employer's Form 9142B called for twelve months of experience in Section F, Item b(4), while the job order required five years of experience. (AF 84, 90.) Employer correctly amended the two documents to reflect the same experience requirement of one year in its subsequent submission. (AF 54, 59.) Likewise, Employer corrected the job order to reflect that the position does not require a driver's license, consistent with the Form 9142B, on its second submission. (AF 60.)

However, the amended job order and Form 9142B still reflected two different hourly wages: \$10.50 and \$9.62 (AF 55, 60.) Further, Section F(a), Item 5 of the original Form 9142B sets forth the duties of the job as housekeeping, cooking meals, yard work, errand running, and minimal caregiving, whereas the job order provides a much more extensive list of tasks under the "Essential Talents" section. (AF 83, 92.) This same disparity appears on the subsequent iteration of each. (AF 53, 60-61.)

a. Amended Job Order

As to compensation, Section G, Item 1 on the updated Form 9142B lists a basic pay rate of \$10.50 and an overtime rate of pay rate of \$15.75, while the job order shows a flat pay rate of \$10.50. (AF 18, 23.) While Employer did correct the Form 9142B to reflect the regular hourly pay rate shown on the job order, it did not provide the \$15.75 overtime pay rate in the job order. In fact, the job order explicitly states that overtime is not available. (AF 22.) Among the job assurances listed under § 655.18, subsection (6) directs the job order to, if applicable, "specify that overtime will be available to the

worker and the wage offer(s) for working any overtime hours.” Employer plainly did not do this on the job order. The absence of an overtime compensation rate in the amended job order created an inconsistency between the job order and Form 9142B. In particular, the omission of the overtime rate on the job order to be read by U.S. workers constitutes less favorable conditions as compared to the inclusion of the increased overtime rate on the Form 9142B. Therefore, Employer did not cure this defect and the undersigned affirms the CO’s determination that Employer failed to submit an acceptable job order.

Regarding job duties, the most recent version of the Form 9142B expanded the job duties in Section F(a), Item 5 to the following:

Housekeeping, clean rooms, vacuum, disinfect using germicides, wash dishes, empty waste baskets, polish fixtures, silver, and metal work, dusting furniture, clean rugs, sweep, scrub, wax floors, wash windows, walls, dust window blinds, arrange furniture, replace light bulbs, sort, wash, and fold clothes, Plan and cook meals, yard work, run errands, shop for groceries, answer door and phone, and minimal care-giving for elder person, oversee activities, and assist with other needs.

(AF 16.)

The duties listed on the updated job order do not deviate from the prior versions of the job order. The aforementioned duties appear word-for-word under the “Job Description” heading of the job order. However, the job order also lists a number of additional tasks not included on the Form 9142B under the “Essential Talents” heading. Some of these include:

- Clean rooms, hallways, lobbies, lounges, restrooms, corridors, elevators, stairways, locker rooms, and other work areas so that health standards are met.
- Replenish supplies, such as drinking glasses, linens, writing supplies, and bathroom items.
- Request repair services and wait for repair workers to arrive.
- Remove debris from driveways, garages, and swimming pool areas.
- Hang draperies.
- Care for children or elderly persons by overseeing their activities, providing companionship, and assisting them with dressing, bathing, eating, and other needs.

(AF 28.)

Although these duties are officially listed under “Essential Talents,” the duties materially differ from those described in the Form 9142B. Most striking, the job order includes caring for children and assisting the elderly with dressing and bathing as tasks not featured on the Form 9142B. In all likelihood, reading a job order that lists intimate caretaking tasks such as dressing and bathing would elicit a different reaction from U.S.

workers pursuing the job opportunity, as compared to the reaction of potential applicants upon reading the job duties that omit such tasks. “BALCA has strictly enforced the H-2B job order requirements.” GLD Concrete, LLC, 2018-TLN-00077, slip op. at 6 (Mar. 20, 2018)(affirming denial where the job order failed to include information regarding a lifting requirement detailed on the Form 9142B as a job requirement). Here, the CO instructed Employer to amend either the job order or Form 9142B to identify job duties consistent with the other. Because Employer failed to do this, it did not cure this defect.

b. Conclusion

Employer did not properly amend the job order or Form 9142B to reflect a common overtime rate and common job duties pursuant to § 655.16. Employer also neglected to include the required job assurances under § 655.18. Because Employer did not correct these deficiencies, the undersigned affirms the CO’s finding.

4. Deficiencies Five and Seven: Did Employer fail to satisfy obligations of an H-2B employer?

Section 655.20(d) provides that Employer’s job opportunity is a full-time temporary position, consistent with § 655.5. Section 655.5 defines full-time employment as a workweek of thirty-five hours.

Section B, Item 4 and Section F(a), Item 2 of Employer’s Form 9142B indicated that the position is not full-time and would require only thirty hours of work per week, respectively. (AF 81, 83.) Due to its non-compliance with the aforementioned regulations, the CO asked Employer to amend the Form 9142B to indicate that the position is full-time and consists of thirty-five hours per week. Employer did not make this amendment in response to the NOD.

a. Amended Form 9142B

This time, Employer made the requested modification in its most recently amended Form 9142B and checked “Yes” in response to whether the position is full-time in Section B, Item 4. (AF 14.) It also provided that the Housekeeper/Caregiver would work thirty-five hours per week in Section F(a), Item 2. (AF 16.)

b. Conclusion

Because Employer now represents that the candidate will work thirty-five hours per week on a full-time basis on the Form 9142B as requested by the CO, the undersigned finds that it has overcome these deficiencies and demonstrated the availability of a bona fide, full-time position. However, having cured this deficiency does not overcome the failure of Employer to cure the other listed deficiencies, as discussed above.

ORDER

The Certifying Officer reasonably considered the relevant factors and did not make a clear error of judgment in concluding that Employer failed to remedy the first three deficiencies of the NOD. Therefore, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

SO ORDERED.

For the Board:

THERESA C. TIMLIN
Administrative Law Judges

Cherry Hill, New Jersey