



Issue Date: 06 December 2017

BALCA Case No.: 2018-TLN-00014
ETA Case Nos.: H-400-17207-842147

In the Matter of:

MARK EDWARD CASSE, d/b/a CASSE RACING, LLC

Employer.

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For the Certifying Officer

Before: Alan L. Bergstrom
Administrative Law Judge

DECISION AND ORDER - AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s denial in the above-captioned H-2B temporary labor certification matter. 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 Department of Homeland Security, “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 8 CFR §214.2(h)(1)(ii)(D); see also 8 U.S.C.

§1101(a)(15)(H)(ii)(b); 8 CFR §214.2(h)(6)(ii)(B); 20 CFR §655.1(a)¹ Employers who seek to hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”). 8 CFR §214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 CFR §655.50 If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 CFR §655.53 During the administrative review only the material contained within the appeal file (“AF”)² upon which the denial determination was made may be considered as evidence, while the Employer’s legal argument in its request for review and that legal argument in filed briefs may be considered as argument in the case, 20 CFR §655.61(e). Accordingly, the documents attached to Employer’s filings after the October 27, 2017, final denial determination are not considered.

STATEMENT OF THE CASE

On August 18, 2017³ the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Mark Edward Casse, dba Casse Racing LLC (“Employer”) for five “Thoroughbred Racehorse Grooms” as seasonal workers for employment from November 1, 2017 through September 1, 2018 (AF 34-43, 61). The position is classified as O*Net Code 39-2021, Nonfarm Animal Caretakers, and is to be performed in Hallandale, Broward County, Florida. (AF 60-61). No specific educational requirement is specified in Section F.b of the application. The Employer indicated that no training for the job opportunity or employment is required in Section F.b Item 3; but, indicated 1 month of experience as a Thoroughbred Racehorse Groom is required in Section F.b Items 4 (AF 37). The Employer retained Craig D. McDougal, Esq. as its attorney (AF 36).

On August 25, 2017 the CO issued a “Notice of Deficiency” (“NOD”) indicating the following deficiencies (AF 30-33):

“Deficiency 1: Failure to establish the job opportunity as temporary in nature.

... The employer did not submit sufficient information in its *Application for Temporary Employment Certification* to establish its requested period of intended employment.

The employer did not include adequate attestations to justify the change in dates of need from the employer’s prior certification, H-400-16260-981002, which requested dates of need from December 1, 2016 through April 30, 2017. The current application request dates of need from November, 2017 through September 1, 2018.

The employer has provided calendar dates for the previous racing season for Gulfstream Park; however the employer indicated the upcoming racing dates have not yet been released. The employer’s dates of need are indicated based off of previous racing schedules. Therefore,

¹ The Interim Final Rule revising federal regulations related to the H-2B program, 20 CFR Part 655, Subpart A, was published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015) and are effective as of April 29, 2015.

² “AF” refers to the Appeal File and is followed by the page number of the relevant page in the Appeal File.

³ Applications filed after April 29, 2015 with an employment start date of need after October 1, 2015 are processed under the Interim Final Rule revising federal regulations related to the H-2B program published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015). 20 CFR §655.4(e)

additional information is needed to support the significant change in dates of need from its previous certification.

... The employer must submit supporting evidence and documentation that justifies the standard of temporary need. The employer's response must include, but is not limited to, the following:

1. Summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Thoroughbred Racehorse Groom, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and,
2. Other evidence and documentation that similarly serves to justify the chosen dates of need, if any."

On September 8, 2017 the Employer filed its response to the NOD by e-mail transmitted at 5:51 PM, Friday, September 8 to TLC, Chicago – ETA SVC (AF 26-29).

On October 27, 2017, the CO denied the *Application for Temporary Employment Certification* for the five Thoroughbred Racing Grooms requested by Employer in accordance with Departmental regulations at 20 CFR §655.32(c). The CO set forth the following reason for the denial of the application (AF 13-16):

Deficiency: Failure to establish the job opportunity as temporary in nature.

"... The employer did not submit sufficient information in its Application for Temporary Employment Certification to establish the requested period of intended employment.

The employer did not include adequate attestations to justify the change in dates of need from the employer's prior certification, H-400-16260-981002, which requested dates of need from December 1, 2016 through April 30, 2017. The current application request dates of need from November, 2017 through September 1, 2018.

The employer has provided calendar dates for the previous racing season for Gulfstream Park; however the employer indicated the upcoming racing dates have not yet been released. The employer's dates of need are indicated based off of previous racing schedules. Therefore, additional information is needed to support the change in dates of need from its previous certification.

... The employer was to submit supporting evidence and documentation that justifies the standard of temporary need. The employer's response was to include, but was not limited to, the following:

1. Summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and,
2. Other evidence and documentation that similarly serves to justify the chosen dates of need, if any."

In response to the NOD, the employer submitted a letter from the National Horseman's Benevolent & Protective Association which stated that for the last two years Gulfstream Park has extended its racing dates expanding the season from December 1 through September 30.

However, the employer did not include in its NOD response copies of racing calendars for the previous two years to support its claim that the season has expanded starting two years ago.

Furthermore, the NOD requested the employer submit summarized monthly payroll reports for a minimum of two previous calendar years which were to identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. This documentation was requested to support the requested change in the employer's dates of need as it indicated in its application that it always follows the Florida horse racing schedule which is typically the same each year. However these requested documents were not submitted in the response to the NOD. No other documentation was provided in the NOD response to support the change in the dates of need from the employer's previous filing. Therefore the employer did not overcome the deficiency.

... Based on the foregoing reason, the employer's application is denied."

The Employer filed a timely formal request for administrative review of the denial determination with additional documentation (AF 1-12). In its "Request for Administrative Review," the Employer's attorney agent argues that the "DOL requested payroll records that do not exist. There is no previous payroll evidence to show the history of our need at Gulfstream because of the change in the racing calendar and the change in business practices by the Employer. ... Over the last two years, however, Gulfstream Park has made the decision to expand its racing dates. ... Since Gulfstream Park only recently opened their track from December through September, two years of payroll for the dates requested from Casse Racing do not exist. Therefore, our office submitted a letter from the national Immigration Liaison for the National Horseman's Benevolent and Protective Association explaining the racing date changes that occurred within the last two years." He argues that this letter is sufficient to show Employer now has a need for the dates covering November 1, 2017 through September 30, 2018.

The Solicitor filed notice on November 28, 2017 that she would not file a legal brief in this case.

DISCUSSION

An employer seeking certification to employ H-2B nonimmigrant workers bears the burden to establish eligibility for issuance of a requested temporary labor certification. The qualifications and requirements for the job "must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment," 20 CFR §655.20(e). Additionally, the employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary ... 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 [the Department of Homeland Security] regulations.

These regulations provide that in order for an employer to establish a "seasonal need," the employer "must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that

the temporary additions to staff will not become a part of the [employer's] regular operation.” 8 CFR §214.2(h)(6)(ii)(B)(3)

Where an employer has submitted an application for temporary labor certification of H-2B workers and that application fails to meet all the obligations required by 20 CFR Part 655 or other requirements of the H-2B program, the CO issues an Notice of Deficiency (NOD) to the employer setting forth the deficiency in the application and permitting the employer to submit supplemental information and documentation for consideration before issuance of a final determination on the application. 20 CFR §655.31(b). BALCA may only consider the documentation considered by the CO in its final denial determination as contained in the AF and may also consider the arguments set forth in the request for review and legal briefs submitted to BALCA. 20 CFR §655.61(e). Accordingly, the documents the Employer attached to the request for review cannot be considered.

Program regulations at 20 CFR §655.31(c) provide: “If the CO finds the response to the Notice of Deficiency unacceptable, the CO will deny the *Application for Temporary Employment Certification* in accordance with the provisions in §655.51.”

In its *Application for Temporary Employment Certification* the Employer avers that “Mark Edward Casse dba Casse Racing LLC is engaged in the business of training race horses for competing at Gulfstream Park in Hallendale, Florida. Our training facility has been in operation for many years. In our busy season, we need multiple grooms to assist in these operations. Our business peaks in that it is dictated by the Florida horse racing season. Our work begins on or around November 1st when the track opens and allows us to begin training and concludes on or around September 1st at the end of the racing season.” (AF 17). This statement contradicts the Employer’s statement in its request for review that no payroll records exist for the past two years. Where a business has been operating a horse racing training facility for many years, it is reasonable to expect payroll accounting, tax accounting, and employment personnel records exist. By failing to submit the specifically requested “summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received” that are signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system, the Employer’s response to the NOD was unacceptable and denied the CO that information which was needed to support a change in dates of need for the seasonal positions different than that set forth in the Employer’s prior 2016 certification H-400-16260-981002.

After deliberation on the AF and argument of the Parties, this Administrative Law Judge finds that the CO properly denied the Employer’s August 18, 2017, *Application for Temporary Employment Certification* for the requested additional five foreign workers as H-2B thoroughbred racing grooms for the dates of need from November 1, 2017 through September 1, 2018, in Hallendale, Florida, pursuant to 20 CFR §655.31(c) and §655.51.

ORDER

It is hereby ORDERED that the Certifying Officer's DENIAL of the Employer's August 18, 2017, *Application for Temporary Employment Certification* is AFFIRMED.

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia