

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 31 May 2018

BALCA Case No.: 2018-TLN-00130
ETA Case No.: H-400-18200-485768

In the Matter of:

KUDAR ENTERPRISES, INC.,

Employer.

Appearance: John C. Bidell, Esq.
Sioux Falls, SD
For the Employer

Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
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” or “Board”) pursuant to the Employer’s request for review of the Certifying Officer’s (“CO”) 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.” 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). 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”) using an ETA Form 9142B, *Application for Temporary Employment Certification* (“Form 9142”). 8 CFR § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a CO of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 C.F.R. § 655.50. If the CO denies

certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.53(b); 20 C.F.R. § 655.61(a). During the administrative review only the material contained within the appeal file (“AF”)¹ 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 C.F.R. § 655.61(e).

STATEMENT OF THE CASE

On January 2, 2018,² the Employer filed an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Kudar Enterprises, Inc., for 3³ “Maids and Housekeeping Cleaners” as a seasonal need for employment from April 1, 2018 to December 15, 2018.⁴ (AF 248-258), with attachments in support of the application (AF 259-277). The position was listed by the Employer as O*Net Code 37-2012, “Maids and Housekeeping Cleaners” in Section B.2 and B.3 of the filed ETA Form 9142B (AF 248) and is to be performed in Jackson, Wyoming. (AF 249). No minimum educational, training, or experience requirement is specified in Section F.b of the application, though the Employer listed special requirements of –

“Workers must be able to lift, carry, push or pull at least 50 lbs.”

(AF 251). Job duties under Section F.a Item 5 requiring –

“The type of work in which housekeepers engage is non-agricultural. Kudar Enterprises, Inc. Workers will be required to, perform and combination of light cleaning duties to maintain commercial establishments, such as hotels and motels, in a clean and orderly manner. Duties may include making beds, replenishing linens, cleaning rooms and halls, and vacuuming, carry linens, towels, toilet items, and cleaning supplies, using wheeled carts. Workers will also disinfect equipment and supplies, using germicides or steam-operated sterilizers, clean rooms, hallways, lobbies, lounges, restrooms, corridors, elevators, stairways, locker rooms, and other work areas so that health standards are met. Workers will empty wastebaskets, empty and clean outdoor ashtrays, and transport other trash and waste to disposal areas, observe precautions required to protect hotel and guest property and report damage, theft, and found articles to supervisors.”

(AF 250, 255). The Employer indicated the Prevailing Wage Determination (“PWD”) was received by the Wyoming State Workforce Agency (“SWA”) on August 15, 2017, a prevailing wage was issued on September 11, 2017, and the expiration date was June 30, 2018. The PWD tracking number was P-400-17223-333135. (AF 275-277). The Employer retained John C. Bidell, Esq., as its attorney representative. (AF 256).

¹ “AF” refers to the Appeal File and is followed by the page number of the relevant page in the Appeal File.

² 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). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR

³ In response to the Notice of Deficiency the Employer reduced the number of workers to 2 on April 13, 2017. (AF 156).

⁴ In the response to Notice of Deficiency the Employer amended the period end date to October 31, 2017. (AF 95) However, it is evident that the year was erroneously entered as 2017 vice 2018.

On February 27, 2018 the CO issued a “Notice of Deficiency” (“NOD”) indicating the application had been reviewed and not accepted for processing due to five specific deficiencies and provided the Employer to correct the deficiencies. (AF 238-247). The NOD specifically stated, in pertinent part:

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

... The employer did not sufficiently demonstrate the requested standard of temporary need ...

Deficiency 2: Failure to establish temporary need for the number of workers requested

... The employer has not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bone fide job opportunities.

In its current application, H-400-18002-485768, the employer is requesting certification for three Maids and Housekeeping Cleaners from April 1, 2018 to December 15, 2018. The employer did not indicate how it determined that it needs three Maids and Housekeeping Cleaners during the requested period of need. Further explanation and documentation is required in order to establish the employer’s need for three Maids and Housekeeping Cleaners.

... The employer must submit supporting evidence and documentation to establish that the number of workers being requested for certification is true and accurate and represented bone fide job opportunities. The employer’s response must include, but is not limited to, the following:

1. A statement indicating the total number of workers the employer is requesting for this occupation and worksite;
2. An explanation with supporting documentation of why the employer is requesting three Maids and Housekeeping Cleaners for Jackson, Wyoming during the dates of need requested;
3. Monthly occupancy rates for the past two years at the employer’s worksite location(s);
4. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Housekeeper, 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
5. Other evidence and documentation that similarly serves to justify the number of workers requested, if any. ...

Deficiency 3: Failure to submit an agent agreement

... In Section E. of the ETA Form 9142, the employer indicated that it is represented by an agent. However, the agent agreement submitted listed an employer not named in the application ...

Deficiency 4: Failure to submit an acceptable job order

... The employer submitted a copy of a job order with its application to the CNPC. However, the job order is not associated with the employer in the application. The job order submitted contains information for another employer not named in the application.

In addition, the Wyoming SWA has confirmed that the employer has not placed a job order for the requested position.

In accordance with Departmental regulations at 20 CFR 655.18, each job order placed in connection with an Application for Temporary Employment Certification must include the following information:

- (1) ...
- (17) ...

In order to be in compliance with the above regulations, the employer must submit amended job order language which includes the following information above.

Additionally, the employer must submit its job order to the SWA serving the area of intended employment.

The employer's NOD response must include corrected language which remedies this deficiency so that the Chicago NPC can provide this information to the SWA.

OR

The employer may submit an already-amended job order that contains all of the required language indicated above.

Deficiency 5: Failure to submit a complete and accurate ETA Form 9142

... The ETA Form 9142, Appendix B submitted by the employer is incomplete. Section A, Attorney or Agent Declaration, is completed and signed. However, Section B of Appendix B was submitted for an employer that was not named in the application ...

On March 16, 2018, the Employer filed a response with attachments. (AF 217-237). On April 11, 2018, the CO issued a "Minor Deficiency Email" ("MDE") notifying the Employer of –

the following deficiencies which prevent the Chicago NPC from further processing:

- The employer submitted 2016 and 2017 payroll reports. However, the reports are not summarized for each month and separately for each 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. It is unclear how the employer determined its need for three workers.
- The employer's NOD response indicates a job order was included; however, the CNCP was unable to identify the employer's job order;
- Lastly, the Wyoming SWA has indicated that they have not received the employer's job order.

In response to this email the employer must:

- Submit summarized payroll reports identifying 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;
- Submit a job order for the correct employer with all required assurances; and
- Submit its job order to the Wyoming SWA.

We require your permission to make corrections to the application on your behalf.

To avoid further delay, you must respond by e-mail to TLC.Chicago@dol.gov or by fax to 312-353-8830 no later than 2:00 PM on April 13, 2018. ...

(AF 215). The Employer filed a response with attachments on April 13, 2018. (AF 154-214). On May 2, 2018 the Employer made a status inquiry with a copy of earlier submitted documents. (AF 93-153).

On May 4, 2018, the CO denied the *Application for Temporary Employment Certification* “because the noted deficiencies still remain:

Deficiency 1: Failure to establish temporary need for the number of workers requested

... The employer has not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bone fide job opportunities.

In its current application, H-400-18002-485768, the employer is requesting certification for three Maids and Housekeeping Cleaners from April 1, 2018 to December 15, 2018. The employer did not indicate how it determined that it needs three Maids and Housekeeping Cleaners during the requested period of need. Further explanation and documentation is required in order to establish the employer’s need for three Maids and Housekeeping Cleaners.

... The employer was asked to submit supporting evidence and documentation to establish that the number of workers being requested for certification is true and accurate and represented bone fide job opportunities. The employer’s response was to include, but was not limited to, the following:

1. A statement indicating the total number of workers the employer is requesting for this occupation and worksite;
2. An explanation with supporting documentation of why the employer is requesting three Maids and Housekeeping Cleaners for Jackson, Wyoming during the dates of need requested;
3. Monthly occupancy rates for the past two years at the employer’s worksite location(s);
4. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Housekeeper, 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
5. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

... In response to the NOD, the employer submitted an explanation for the number of workers requested and payroll summary reports for 2016 and 2017.

The employer did not overcome the deficiency. In the employer’s explanation to support its number of workers request[ed] it stated “[e]ven though our unemployment rate is not a determinate for seasonal need it does establish there are no workers available.” However, labor shortage, no matter how severe, does not justify a temporary need. While the employer submitted payroll reports for 2016 and 2017, the information was not submitted as the CNPC requested. The documents were not summarized 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.

The Chicago NPC issued an MDE to afford the employer another opportunity to submit the payroll in the requested format. In response to the MDE, the employer granted the Department permission to amend its ETA Form 9142 to reflect a request for two temporary workers; this amendment was made to the employer’s application. The employer also submitted payroll information for 2016 and 2017, however the payroll was again submitted in the incorrect and un-

summarized format. Thus, the submitted payroll did not substantiate the employer's requested number of workers.

Therefore, the employer did not overcome the deficiency.

Deficiency 2: Failure to submit an acceptable job order

... The employer submitted a copy of a job order with its application to the CNPC. However, the job order is not associated with the employer in the application. The job order submitted contains information for another employer not named in the application.

In accordance with Departmental regulations at 20 CFR 655.18, each job order placed in connection with an Application for Temporary Employment Certification must include the following information:

- (1) ...
- (17) ...

In order to be in compliance with the above regulations, the employer was asked to submit amended job order language which includes the required information above.

The employer's NOD response was to include corrected language which remedied this deficiency so that the Chicago NPC could provide this information to the SWA.

OR

The employer could have submitted an already-amended job order that contained all of the required language indicated above.

In response to the NOD, the employer attested that its job order was submitted to the Wyoming SWA.

The employer did not overcome the deficiency. While the employer attested to submitting its job order to the Wyoming SWA, the employer did not include a copy of the submitted job order to the Chicago NPC.

The Chicago NPC issued an MDE to afford the employer another opportunity to submit the requested job order. In response to the MDE, the employer attested that as of April 13, 2018 the Wyoming SWA had received the employer's job order and the employer provided the Department with its job order number 2652333. However, the employer still did not submit a copy of its job order to the Department as required in regulation 20 CFR 655.16.

Therefore, the employer did not overcome the deficiency.

(AF 78-84)

On May 8, 2018, the Employer filed a request for review by BALCA with attachments. (AF 1-77). The Employer argues that the unemployment rate for Jackson, Wyoming demonstrates a lack of U.S. workers in the area and that it worked with the Wyoming SWA and "to the company's knowledge; the corrected job order was confirmed and transmitted to the Chicago National Processing Center." The Employer attached a copy of "the job order accepted by the Wyoming [SWA]", a personal statement of the Employer with an explanation of the hours, and "our occupancy rates to demonstrate during the seasonal need the hotel is typically running close to capacity. The Employer submits "we feel we have met the statutory requirements of seasonal and

temporary need and have demonstrated that current statistics show a lack of workers in the local area.”

The CO forwarded the appeal to BALCA on May 15, 2018. On April 24, 2018, BALCA issued a Notice of Assignment and Briefing Schedule directing the CO to assemble and transmit the AF to BALCA and granting leave to the Employer and Solicitor to file briefs on the denial issue involved in this case. No responsive briefs were filed.

DISCUSSION

The interim final rule controlling the Employer’s *Application for Temporary Employment Certification*, 20 C.F.R. Part 655, “requires that the employer conduct recruitment of U.S. workers after its *Application for Temporary Employment Certification* is accepted for processing by the CO ... [in order] to ensure that there are not qualified U.S. workers who will be available for the positions listed in the *Application for Temporary Employment Certification* ... This general requirement to test the U.S. labor market is needed to ensure that the importation of foreign workers will not have an adverse effect on U.S. workers.” *Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 82 Fed. Reg. 24042, 24075 (Apr. 29, 2015); 20 CFR § 655.40.

BALCA’s review of the CO’s denial determination is limited to the evidence in the appeal file upon which the denial determination was based, any legal argument in the request for review, and any legal briefs submitted. 20 C.F.R. § 655.61(a)(5) and (e). Accordingly, no documentary evidence submitted by the Employer after the May 8, 2018, denial determination may be considered, including Employer statements of fact, occupancy rates and job orders.

The Employer argues that the unemployment rate in Jackson, Wyoming, demonstrates the lack of U.S. workers and its need for foreign labor. However, recruitment of available, qualified and willing U.S. workers begins after an *Application for Temporary Employment Certification* is granted. 20 C.F.R. § 655.40(b). Therefore, the availability of U.S. workers is not relevant until after the application process is complete. Accordingly, the Employer’s argument concerning the unemployment rate in Jackson, Wyoming, is without merit.

One of the requirements for Employers seeking H-2B workers is to file with the Chicago NPC a completed *Application for Temporary Employment Certification* with a copy of the job order being submitted concurrently to the SWA serving the area of intended employment. 20 C.F.R. §§ 655.15(a) and 655.16(a). In the original application submission the Employer included a job order for “Three Amigos Masonry, Inc.” for 7 Construction Laborers in Jackson, Wyoming. (AF 259). This job order is not relevant to the current application for the requested “Maids and Housekeeping Cleaners.” No other job order was included in the initial submission. The Employer stated in its April 13, 2017 response to the NOD - “Wyoming job order has been submitted.” (AF 218). The Employer also stated that “Do (sic) to confusion with the Wyoming [SWA], the SWA did not process the H2B application. The new job order we received today is 2652333.” (AF 156). While the Employer acknowledges a job order was in existence with the Wyoming SWA, the employer failed to submit a copy of the job order with its NOD and MDE

response as directed by the CO in “Deficiency #4” and as required by regulations at 20 C.F.R. §§ 655.15(a) and 655.16(a). As noted above, the job order submitted with the Employer’s request for BALCA review (AF 10) cannot be considered by BALCA.

Departmental regulations at 20 C.F.R. § 655.32(a) provides that “The employer’s failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the *Application for Temporary Employment Certification*.” Since the Employer failed to submit the appropriate job order, which is documentation required by 20 C.F.R. §§ 655.15(a) and 655.16(a), with its response to the NOD and subsequent MDE as directed by the CO, this presiding Judge finds that the CO properly denied the Employer’s January 2, 2018, *Application for Temporary Employment Certification* for the two “Maids and Housekeeping Cleaners” for the period April 1, 2018 to October 31, 2018, as amended, pursuant to 20 C.F.R. § 655.32(a).⁵

ORDER

It is hereby ORDERED that the Certifying Officer’s **DENIAL** of the Employer’s January 2, 2018, *Application for Temporary Employment Certification* is **AFFIRMED**.

SO ORDERED.

For the Board:

Alan L. Bergstrom
Administrative Law Judge

⁵ In that the CO properly denied the Employer’s *Application for Temporary Employment Certification* for failure to submit the required job order documentation, the CO’s denial for “failure to establish temporary need for the number of workers requested” is not addressed.