



**Issue Date: 18 September 2018**

**BALCA Case No.:** 2018-TLN-00153  
**ETA Case Nos.:** H-400-18109-723814

*In the Matter of:*

**NiGeo Corp.**  
**DBA The Shrimp Box and Outside the Box Patio Bar,**  
*Employer.*

Before: DANA ROSEN  
Administrative Law Judge

**DECISION AND ORDER REVERSING CERTIFYING OFFICER'S**  
**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)<sup>1</sup> 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 of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 CFR §655.50 If the Certifying Officer 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”)<sup>2</sup> 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).

<sup>1</sup> 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 is effective as of April 29, 2015.

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

## STATEMENT OF THE CASE

On April 23, 2018,<sup>3</sup> the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Nicholas Gyftakis dba Nigeo Corporation/ The Shrimp Box and Outside the Box Patio Bar (“Employer”) for six “kitchen prep” and “dishwasher” workers as seasonal workers for employment from June 1, 2018 through October 1, 2018 in the beach community of Point Pleasant Beach, New Jersey. (AF 48-55). The positions were classified as O\*Net Code 35-9021, Dishwashers, and were to be performed in Pleasant Beach, New Jersey. (AF 48-51). No specific educational requirement was specified in Section F.b of the application. The Employer indicated that no training for the job opportunity or employment was required in Section F.b Item 3. (AF 51). The Employer retained Alfonso Ramos as its attorney. (AF 53).

On May 1, 2018, the Certifying Officer issued a “Notice of Deficiency” (“NOD”) indicating the following deficiencies (AF 135-145):

### **Deficiency 1: Failure to satisfy application filing requirements.**

...The Employer submitted an application which did not meet the application filing timeframe. The Employer indicated on its ETA Form 9142 that its dates of need are June 1, 2018 through October 1, 2018, and the Employer filed its application on April 23, 2018. This is 38 days before the Employer’s start date of need for H-2B workers.

The Employer did not submit an emergency request with this application.

Additional Information Requested:

1. The Employer must submit an emergency request that meets the requirements outlined in 20 C.F.R. 655.17; or
2. The Employer must amend Section B, Item 5, to reflect a start date of need that is in compliance with the above regulation.

### **Deficiency 2: Failure to satisfy application filing requirements.**

...The Employer submitted an ETA Form 9142; however, the Employer did not accurately complete the following fields/items:

Section B, Item 7. Total Worker Positions Being Requested for Certification, indicates the Employer is requesting six workers. However, Section B, Items 7a through 7f, indicate a total of one worker.

Additional Information Requested:

The Employer must complete Section B, Items 7a through 7f, to correspond with the total number of workers being requested in Section B, Item 7. If these fields are intended to be left blank, the Employer must enter “0” in each of the incomplete fields.

### **Deficiency 3: Failure to establish the job as temporary in nature.**

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<sup>3</sup> 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)

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

The Employer is requesting six dishwashers from June 1, 2018 to October 1, 2018 based on a seasonal need. In order to establish a seasonal need, the petitioner must show that the service or labor for which it seeks workers is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. Employment is not seasonal if the period during which the service or labor is needed is unpredictable, subject to change, or considered a vacation period for the Employer's permanent employees.

Section B, Item 9, of the ETA Form 9142 indicates the following: "Seasonal need." However, the Employer did not submit any statement or documentation explaining its need for temporary seasonal workers during the requested dates of need.

The Employer has not explained what events cause the seasonal need and the specific period of time in which the Employer will not need the services or labor.

Additional Information Requested:

1. A statement describing the Employer's business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. Summarized monthly payroll reports for two previous calendar years that identify for each month and separately for full-time permanent and temporary employment in the requested occupation, dishwasher, the total number of workers or staff employed, total hours worked, and total earnings received;
3. Summarized monthly food/beverage gross sales report for a minimum of two previous calendar years for the Employer's worksite location, 175 Inlet Drive, Point Pleasant Beach, New Jersey. 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;
4. Other evidence and documentation that similarly serves to justify the dates of business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the Employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the Employer must submit any other evidence and documentation relating to the Employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

**Deficiency 4: 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 bona fide job opportunities.

In its current application, H-400-18109-723814, the Employer is requesting certification for six dishwashers from June 1, 2018 through October 1, 2018. The Employer did not indicate how it determined that it needs six dishwashers during the requested period of need. Further explanation and documentation is required in order to establish the Employer's need for the six dishwashers.

Additional Information Requested:

...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 six dishwashers for Point Pleasant Beach, New Jersey during the dates of need requested;

3. If applicable, documentation supporting the Employer's need for six dishwashers, such as contracts, letters of intent, etc., that specify the number of workers and dates of need;
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, 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 5: Failure to submit an acceptable job order.**

...The Employer submitted a copy of its job order with its application to the CPNC. However, the job order did not address each required content and assurance.

Additionally, the Employer's job order did not include a statement requiring inbound and outbound transportation....

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. State the Employer's name and contact information;
2. Indicate that the job opportunity is a temporary, full-time position, including the total number of job openings the employer intends to fill;
3. Describe the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity;
4. Indicate the geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;
5. Specify the wage that the Employer is offering, intends to offer, or will provide to H-2B workers, or, in the event that there are multiple wage offers (such as where an itinerary is authorized through special procedures for an Employer), the range of wage offers, and ensure that the wage offer equals or exceeds the highest of the prevailing wage or the Federal, State, or local minimum wage;
6. If applicable, specify that overtime will be available to the worker and the wage offer(s) for working any overtime hours;
7. If applicable, state that on-the-job training will be provided to the worker;
8. State that the Employer will use a single workweek as its standard for computing wages due;
9. Specify the frequency with which the worker will be paid, which must be at least every two weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent;
10. If the Employer provides the worker with the option of board, lodging, or other facilities, including fringe benefits, or intends to assist workers to secure such lodging, disclose the provision and cost of the board, lodging, or other facilities, including fringe benefits or assistance to be provided;
11. State that the Employer will make all deductions from the worker's paycheck required by the law. Specify any deductions the Employer intends to make from the worker's paycheck which are not required by law, including, if applicable, any deductions for the reasonable cost of board, lodging, or other facilities;
12. Detail how the worker will be provided with or reimbursed for transportation and subsistence from the place from which the worker has come to work for the Employer, whether in the

- U.S. or abroad, to the place of employment, if the worker completes 50 percent of the period of employment covered by the job order, consistent with 20 C.F.R. 655.20(j)(1)(i);
13. State that the Employer will provide or pay for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the Employer, if the worker completes the certified period of employment or is dismissed from employment for any reason by the employer before the end of the period, consistent with C.F.R. 655.20(j)(1)(ii);
  14. If applicable, state that the Employer will provide daily transportation to and from the worksite;
  15. State that the Employer will reimburse the H-2B worker in the first workweek for all visa, visa processing, border crossing, and other related fees, including those mandated by the government, incurred by the H-2B worker (but need not include passport expenses or other charges primarily for the benefit of the worker);
  16. State that the Employer will provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned, in accordance with 20 C.F.R. 655.20(k); and
  17. Instruct applicants to inquire about the job opportunity or send applications, indications of availability, and/or resumes directly to the nearest office of the SWA in the State in which the advertisement appeared and include the SWA contact information.

Additional Information Requested:

...Employer must submit amended job order language which addresses each required content and assurance noted above.

Additionally, the job order must indicate the amount for daily subsistence will be at least \$12.26 per day during travel to a maximum of \$51.00 per day with receipts.

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

OR

The Employer may submit an already-amended job order that contains all of the required content of 20 CFR 655.18 as listed above.

**Deficiency 6: Disclosure of foreign worker recruitment.**

...The Employer's application did not include any agreements between itself or its attorney and an agent or recruiter engaging in the recruitment of H-2B workers.

Additional Information Requested:

The Employer and its attorney must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2B workers under this *Application for Temporary Employment Certification*, including the identity and location of all persons and entities hired by or working for the recruiter or agent. All agreements must contain the required language prohibiting seeking or receiving payment from prospective employees as indicated at 20 C.F.R. 655.20(p).

OR

The Employer must notify the Department that they will not utilize any agent or recruiter for the recruitment of H-2B workers under this *Application for Temporary Employment Certification*.

**Deficiency 7: Failure to submit a complete and accurate ETA Form 9142.**

...The Employer did not submit the correct version of ETA Form 9142B, Appendix B....

Additional Information Requested:

The Employer must submit a complete ETA Form 9142 B, Appendix B. Appendix B must be dated and contain the original signatures of the Employer and, if applicable, its agent or attorney.

**Deficiency 8: Failure to submit a complete and accurate ETA Form 9142.**

...The Employer submitted an ETA Form 9142; however, the Employer did not accurately complete the following fields/items:

Section Fc, Item 4, on the ETA Form 9142 indicates “NJ” as a worksite county.

Modification Required:

The Employer must enter the name of its worksite county in Section Fc, Item 4, on the ETA Form 9142.

On May 17, 2018, the Employer’s response to the NOD was received at the Chicago National Processing Center. (AF 5). On May 30, 2018, the Certifying Officer denied the *Application for Temporary Employment Certification* for six dishwashers requested by Employer in accordance with Departmental regulations at 20 CFR §655.11(e)(3) and (4). The Certifying Officer set forth the following reason for the denial of the application (AF 5-7):

**Deficiency: 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 bona fide job opportunities.

In its current application, H-400-18109-723814, the Employer is requesting certification for six dishwashers from June 1, 2018 through October 1, 2018. The Employer did not indicate how it determined that it needs six dishwashers during the requested period of need. Further explanation and documentation is required in order to establish the Employer’s need for the six dishwashers.

...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 six dishwashers for Point Pleasant Beach, New Jersey during the dates of need requested;
3. If applicable, documentation supporting the Employer’s need for six dishwashers, such as contracts, letters of intent, etc., that specify the number of workers and dates of need;
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, 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, the Employer stated that it is requesting six Kitchen Prep/Dishwashers for its worksite in Point Pleasant Beach, New Jersey, during the requested dates of need. It also included

its monthly and quarterly payroll reports from both 2016 and 2017. However, the payroll reports list the monthly and quarterly hours worked and wages paid to all workers employed by the Employer and are not specific to the requested position.

Further, the Employer submitted yearly totals for each of its departments for both 2016 and 2017, including for its kitchen department. The yearly totals identified 23 workers as having worked in the kitchen department during 2016 and 21 such workers during 2017. However, the totals are not depicted on a monthly basis. As a result, the determination cannot be made as to whether these workers were staffed during the Employer's requested dates of need. Moreover, the reports list the monthly and quarterly hours worked and wages paid to all kitchen workers employed by the Employer and are not specific to the requested position.

The Employer was requested to provide an explanation and supporting documentation detailing how it determined that it needs six kitchen prep/dishwashers for its seasonal temporary need between July 7 and October 1, 2018. The NOD response did not provide an explanation regarding how the Employer made this determination. The Employer simply referred to its payroll, which was not specific to the Employer's requested occupation. Therefore, the Employer did not overcome the deficiency.

...Based on the foregoing reason(s), the Employer's application is denied.

On June 14, 2018, the Employer filed a timely formal request for administrative review of the denial determination with additional documentation (AF 1-42). In its "Request for Administrative Review," the Employer provided a copy of Employer's 2016 and 2017 payroll identifying the kitchen prep/dishwasher positions, which it argued established the need for six kitchen prep/dishwashers for seasonal temporary need between June 1 and October 1, 2018. Employer's attorney identified and highlighted the six employees on the payroll who held the position in 2016 and 2017.

On August 28, 2018, the undersigned issued a Notice of Assignment and Briefing Schedule with briefs due September 10, 2018. Neither the Employer nor the Solicitor submitted briefs.

## **DISCUSSION**

Based upon the evidence in the Appeal File, the Certifying Officer's Denial of Determination is reversed. On June 14, 2018, the Employer addressed the deficiencies, and submitted specific payroll receipts for the years 2016 and 2017 with the names of the six specific employees listed and marked with a check mark. The Employer corrected the deficiencies noted by the Certifying Officer.

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 Employer must establish that the "number of worker positions and period of need are justified, and that the request represents a bona fide job opportunity." 20 C.F.R. 655.11(e)(3) and (4).

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 Certifying Officer 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 Certifying Officer in its final denial determination as contained in the Appeal File and may also consider the arguments set forth in the request for review and legal briefs submitted to BALCA. 20 CFR §655.61(e). As stated above, no briefs were submitted by the Parties.

Employer is located in Point Pleasant Beach, New Jersey. In its *Response to Notice of Deficiency*, the Employer argued that Employer's "high season for vacationers is during the June-October months when the population swells to at least 20x the winter population." (AF 57). Employer argued housing and rentals are extremely expensive during the peak season and employees become "impossible and difficult to find and retain during the summer months." (AF 57). The difficulty of finding employees added stress to the Employer because the Employer could not meet "the huge demand." (AF 57). Employer had to rely upon its summer business to sustain the business through the slower seasons of Fall, Winter, and Spring. (AF 57). Employer paid for recruiters to assist in finding employees. (AF 57). Employer placed ads on websites and in newspapers. (AF 57). Employer contended it dedicated most of its resources to recruiting employees during the peak season, and this caused other areas of their restaurant business to suffer. (AF 57). Employer argued, "Every aspect of their business has suffered as a result of the employment situation in this geographic location during high season." (AF 57).

Employer stated it was requesting six kitchen prep/dishwashers for Pleasant Point Beach, New Jersey, during the dates of need requested. (AF 57).

Employer submitted payroll reports and highlighted the six employees whom Employer needed as kitchen prep/dishwashers. The payroll reports support the Employer's argument that six employees were on staff during peak season in 2016 and 2017. Employees appeared on the Employer's payroll in March and remained on staff throughout the peak season, with employment ending in early December. (AF 8-31). In 2016, according to the payroll receipts, Employer named six employees on staff as kitchen prep/dishwashers. (AF 8-31). In 2017, Employer named six employees on staff as kitchen prep/dishwashers. (AF 8-31). This is sufficient evidence that Employer needed six employees on staff as kitchen prep/dishwashers during "peak season" of June through October 2018.

The payroll reports submitted have Nigeo Corp. Shrimp Box listed at the top of each payroll receipt along with the company name, "Olympic," that Employer used for payroll accounting purposes. (AF 8-31). This is sufficient evidence that Employer submitted payroll information from actual accounting records.

After review of the Appeal File, this Administrative Law Judge finds that the payroll receipts are sufficient to satisfy the deficiency. The court approves the Employer's April 23, 2018, *Application for Temporary Employment Certification* for the requested additional six foreign workers as H-2B dishwashers for the dates of need from July 7, 2018 through October 1, 2018 pursuant to 20 CFR §655.31(c) and §655.51.

## ORDER

It is hereby **ORDERED** that:

1. Certifying Officer's DENIAL of the Employer's April 23, 2018, *Application for Temporary Employment Certification* is REVERSED.
2. Employer corrected the deficiency set forth by the Certifying Officer on May 30, 2018, pursuant to the Departmental regulations at 20 C.F.R. 655.11(e)(3) and (4).
3. This matter is REMANDED to the Certifying Officer for further processing consistent with this decision.

For the Board:

DANA ROSEN  
Administrative Law Judge

DR/CN/mjw  
Newport News, VA