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**Issue Date: 23 January 2018**

**BALCA Case No.: 2018-TLN-00034**

ETA Case No.: H-400-17255-029753

*In the Matter of:*

**PHILLIP ALLEN,**  
*Employer.*

Certifying Officer: William L. Carlson, Ph.D.  
Chicago National Processing Center

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Before: **JONATHAN C. CALIANOS**  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

This case arises under 8 U.S.C. § 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, and the H-2B rules and regulations governing temporary labor certification.<sup>1</sup>

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<sup>1</sup> On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security (“DHS”) jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A, established by the “2008 Rule” found at 73 Fed. Reg. 78020 (Dec. 19, 2008). See 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) (“2015 IFR”). Where the Employer filed its Application after April 29, 2015, and its period of need begins after October 1, 2015, the process outlined in the 2015 IFR applies. See 20 C.F.R. § 655.4(e) (explaining transition procedures).

## STATEMENT OF THE CASE

On October 9, 2017, the Employer filed an *H-2B Application for Temporary Employment Certification* (“Application”) seeking to hire a “Full-Time Nanny (Partial Live-In)” from 9 a.m. to 5 p.m. for a “one-time occurrence” from December 26, 2017, to September 4, 2020. (AF at 38, 87-116).<sup>2</sup> The Employer is a private household comprised of two working parents needing care for their two children until the youngest turns five years old and starts kindergarten; at which time, the children will attend before and after-school care. (AF at 97-98).

The Certifying Officer (“CO”) issued a Notice of Deficiency on October 18, 2017, identifying four deficiencies – only one of which is relevant to this appeal. (AF at 76-86). Citing 20 C.F.R. § 655.6(a) and (b), the CO alleged that the Employer did not establish that the job opportunity is temporary in nature. (AF at 79-81). In support thereof, the CO cited previously denied Applications where “the employer indicated that it previously hired and employed a Childcare Worker from April 2015, through June 2016.” (AF at 79). Accordingly, the CO requested that the Employer describe: its past and present need for childcare dating back to the birth of the couple’s eldest daughter; why the nature of the job opportunity reflects a temporary need; and how the request for temporary certification fits into the regulatory scheme. (AF at 80).

On October 30, 2017, the Employer responded to the CO’s deficiency notice. In pertinent part, the sum and substance of the Employer’s response was that its temporary need is a one-time occurrence that started when the mother returned to work after the birth of the couple’s eldest daughter and will cease when the youngest daughter starts kindergarten. (AF at 57-66).

Nevertheless, the CO denied the Employer’s Application on December 4, 2017. (AF at 36). In concluding the Nanny position is not temporary, the CO pointed out that “[t]he Employer’s need for a full-time childcare worker has been consistent and ongoing since September of 2013 when it hired a previous childcare worker.” (AF at 41). The CO also said “the Employer has been requesting H-2B certification for a childcare worker for dates going back to November of 2016, and its currently requested period of need extends beyond any temporary period as defined by the regulation.” (AF at 41).

On December 13, 2017, the Employer requested administrative review before the Board of Alien Labor Certification Appeals (“BALCA”), and this matter was assigned to me for single member review. *See* 80 Fed. Reg. at 24128; (AF at 1). I held a telephonic conference on December 21, 2017, to discuss preliminary deadlines. The Appeal File in this case, ETA case number H-400-17255-02975, was transmitted on December 28, 2017. One week later, on January 4, 2018, the consolidated Appeals Files for ETA case numbers H-400-16333-812044 and H-40017189-101850 were unexpectedly transmitted. As a result, the CO requested a one day extension to file its brief, which it did on January 11, 2018. Due to a misunderstanding about the applicable briefing deadline, the Employer filed its brief on January 12, 2018. This matter is now ripe for disposition.

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<sup>2</sup> References to the Appeal File appear as “(AF at [#]).”

## DISCUSSION

The employer did not prove its eligibility for temporary labor certification. Under the 2015 IFR, “temporary need” should be interpreted in accordance with (1) the DHS’s definition of that term, and (2) the DOL’s experience in the H-2B program. 80 Fed. Reg. at 24055. “The DHS regulations define temporary need as a need for a limited period of time, where the employer must ‘establish that the need for the employee will end in the near, definable future.’” *Id.*, quoting 8 C.F.R. § 214.2(h)(6)(ii)(B). “DHS categorizes and defines temporary need into four classifications: seasonal need; peakload need; intermittent need; and one-time occurrence.” 80 Fed. Reg. at 24056; *see also* 8 C.F.R. § 214.2(h)(6)(ii)(B).

A one-time occurrence “could last up to 3 years,” and to fall into that classification of temporary need, an Employer must prove one of two circumstances. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). Specifically, the Employer must prove either:

[(1)] 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 [(2)] that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

Preliminarily, it is unclear why the CO uses information from the Employer’s past Applications to support that the nanny position in question is not temporary where all of those Applications were denied, and they were clearly denied for containing various errors and inadequacies. The benefit of filing a new Application once a previous Application has been denied is that the Employer starts with a clean slate to correct whatever deficiencies and mistakes may have prevented certification in the past. It is unsurprising and frankly expected that an Employer’s new Application will contain slightly different information than was contained in a previously denied Application. A prudent Employer will likely alter its Application approach to facilitate the likelihood of securing certification the second, or in the case of this Employer, third time around.

Under the 2015 IFR, “[t]he BALCA must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted . . .” 80 Fed. Reg. at 24128; *see also OGS, LLC*, 2018-TLN-00020, slip op. at 11 (Dec. 26, 2017). Accordingly, I refuse to consider any information contained in the Appeal Files of previously denied Applications where the Employer did not submit that information in support of its current Application. *See* 80 Fed. Reg. at 24128; *see also Earthworks, Inc.*, 2012-TLN-000017, slip op. at 4-5 (Feb. 21, 2012); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009). Further, any information procured from the Employer as a direct result of the CO’s improper use of information from previously denied Applications is fruit of the poisonous tree, and I will not consider it. *See* 80 Fed. Reg. at 24128; *see also Earthworks, Inc.*, 2012-TLN-000017, slip op. at 4-5 (Feb. 21, 2012); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009). To conclude otherwise would only serve to

delay and complicate the expedited nature of the H-2B process, as occurred here, and offend traditional notions of fundamental fairness. If the CO wanted to test the integrity of the Employer's current Application, it could have and should have selected the Application for audit; the CO did not do so here. *See* 80 Fed. Reg. at 24128.

Based on its current Application, the Employer has shown that it has not and will not require a full-time nanny outside the period of need identified thereby satisfying the first and only prong needed to qualify as a "one-time occurrence." *See* 8 C.F.R. § 214.2(h)(6)(ii)(B); 80 Fed. Reg. at 24055. Specifically, the period of temporary need began when the mother returned to work after the birth of her first child in 2013, and the temporary need will end when the couple's youngest child starts kindergarten in 2020. (AF at 87, 99-100). While the Employer hired a domestic caretaker prior, that was after the birth of the couple's eldest child and therefore occurred during the Employer's identified period of temporary need. (AF at 99).

Nevertheless, the Employer's duration of need exceeds the accepted timeframe of a "one-time occurrence" under the H-2B program. Under the 2015 IFR, a "one-time occurrence" may only last "for a period of up to 3 years." 80 Fed. Reg. at 24056. By, the Employer's own admission, its temporary need spans seven years having started in 2013 and ending in 2020. (AF at 87, 99-100). While common sense as it relates to basic child-rearing and compulsory education requirements support that the full-time nanny position at issue here is temporary in the traditional sense, the regulatory scheme does not support the same finding under the H-2B program. The full-time nanny position at issue here is not temporary under the regulation.

### **ORDER**

Accordingly, it is hereby **ORDERED** that the Certifying Officer's determination is **AFFIRMED**.

For the Board:

**JONATHAN C. CALIANOS**  
Administrative Law Judge