



Issue Date: 13 December 2017

BALCA Case No.: 2018TLN00018
ETA Case No.: H-400-17241-436718

In the Matter of:

SELMARA R. RYDELL,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Anne C. Lahren, *Esq.* Jeffrey L. Nesvet, *Esq.*
Pender & Coward, P.C. C. Cleveland Fairchild, *Esq.*
Virginia Beach, Virginia Office of the Solicitor
For the Employer U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Peter B. Silvain, Jr.
Administrative Law Judge

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Selmara R. Rydell’s (“the Employer”) request for review of the Certifying Officer’s (“the CO”) Non Acceptance Denial in the above-captioned H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States on a one-time, seasonal, peakload, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).³ A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews

¹ On April 29, 2015, the Department of Labor (the “Department”) 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. 80 Fed. Reg. 24042 (Apr. 29, 2015). The IFR applies to this case.

² 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 definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). 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).

³ 8 C.F.R. § 214.2(h)(6)(iii).

applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.⁴

STATEMENT OF THE CASE

The Employer is an actress based in Grand Forks, North Dakota. (AF 49, 50).⁵ Her work often requires travel, sometimes on very short notice. (AF 49). The Employer's husband also works a demanding schedule with frequent business travel. (*Id.*). Based on this, the Employer seeks full-time childcare for two children ages 13 and 15 for a period of up to three years when the older child is expected to be age 18 with a driver's license and capable of caring for himself and the younger child during short periods when both parents are away for business. (AF 17, 49). Additionally, the Employer states that she is a U.S. citizen originally from Brazil and the relatives on the Employer's side of the family speak only Portuguese. (*Id.*). Thus, the Employer specifically seeks a childcare provider who can speak to the children in Portuguese while she travels for work so that the children will maintain their knowledge and ability to communicate with relatives. (*Id.*).

On August 31, 2017, the Employer filed with the CO the following documents: (1) ETA Form 9142B, *Application for Temporary Employment Certification* ("Application"); (2) Appendix B to ETA Form 9142B; (3) ETA Form 9141, *Application for Prevailing Wage Determination*; (4) DHS Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*; (5) Emergency Waiver Request; and (6) State Workforce Agency ("SWA") Job Order. (AF 49-69). The Employer requested certification for one childcare worker (live-in nanny) from October 1, 2017, to September 30, 2020, based on a one-time occurrence. (AF 49).⁶

On September 11, 2017, the CO issued a Notice of Deficiency, which outlined six deficiencies in the Application. (AF 37-48). Specifically, the CO determined that the Employer failed to: (1) show proof and substantial cause supporting its emergency waiver request; (2) establish the job opportunity as temporary in nature; (3) submit job order assurances and contents; (4) satisfy the obligations of H-2B employers; (5) submit an acceptable job order; and (6) disclose foreign worker recruitment. (AF 40-48).

As to the second deficiency, the sole remaining issue on appeal, the CO explained, "[t]he [E]mployer'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 DHS regulations." (AF 21). The CO determined that the Employer "did not sufficiently demonstrate the requested standard of temporary need." (*Id.*). Specifically, the CO provided: "[i]n order to establish a one-time occurrence, the [E]mployer must demonstrate 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 in the future, or 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." (*Id.*). Citing Section B., Item 9 of the ETA Form 9142 and the Employer's Emergency filing request, the CO explained that:

⁴ 20 C.F.R. § 655.61(a).

⁵ In this Decision and Order, "AF" refers to the Appeal File.

⁶ The Employer later amended its purported start date to November 14, 2017. (AF 17).

[t]he [E]mployer has clearly stated that they have had an ongoing need for childcare and have not identified a specific temporary event of short duration that has created the need for a temporary worker. The [E]mployer does not explain with specificity how they provided consistent care for their children prior to the need which will commence with the current request, and no supporting documentation was provided with the application. The [E]mployer has not established a one-time occurrence temporary need as defined by the regulation.

(AF 41-42).

The CO advised that in order to establish a temporary need, the Employer needed to submit an updated temporary need statement containing: (1) a detailed description of the Employer's use of childcare since the birth of the first child; (2) an explanation regarding why the nature of the Employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need, specifically including (a) an explanation as to how it has provided care for its children when both parents were outside of the home working or were traveling and unable to care for the children themselves, and (b) information regarding how the Employer's oldest child reaching age of 17 years will cause the Employer's need for a nanny to come to an end; and (3) an explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need. (*Id.*). Additionally, the CO requested that the Employer submit supporting evidence and documentation that justifies the chosen standard of temporary need as defined by the regulation. (*Id.*).

Thereafter, on September 21, 2017, the Employer filed a response to the CO's Notice of Deficiency. (AF 31-36). With its response, the Employer submitted the following documentation: (1) Response Letter dated September 21, 2017; (2) revised Statement of Temporary Need; and (3) revised SWA Job Order. (*Id.*).

On October 30, 2017, the CO issued a Non Acceptance Denial including the denied Application for Temporary Employment Certification H-400-17241-436718. (AF 19-30). Although the Employer cured five of the six deficiencies outlined in the Notice of Deficiency, the CO concluded that the Employer still failed to establish that the job opportunity was temporary in nature. (AF 6-9). The CO noted that in response to the Notice of Deficiency, the Employer submitted a one page statement of temporary need, but did not provide any additional supporting documentation or evidence as requested. (AF 8). The CO further noted that the Employer's new statement of temporary need provided "little additional information beyond what was provided" in the initial application despite the CO's requests for specific explanations. (*Id.*). The CO also noted that the Employer responded to the CO's inquiries in generalities, stating only that "the new family members who live in the same city are busy with their own lives and the babysitters who have helped me in the past either moved away or to college, got married or have kids of their own." (*Id.*). Based on the Employer's response, the CO determined that it was "clear from the [E]mployer's statement [sic] that the [E]mployer has had a long standing need for childcare for a number of years prior to its request for temporary employment certification." (*Id.*). The CO further determined that "the need for fulltime

childcare created by both parents' career activities does not appear to be a new or temporary event based on the description provided.” (*Id.*). In conclusion, the CO provided that because the Employer did not provide any supporting documentation or evidence to demonstrate that its need meets the regulatory definition of a one-time occurrence as defined by regulation, it was unable to overcome the deficiency. (*Id.*).

On November 16, 2017, the Employer requested administrative review of the CO's Non Acceptance Denial, as permitted by 20 C.F.R. § 655.61. (AF 1-18).⁷ With its request, the Employer submitted the following documentation: (1) copy of Non Acceptance Denial; (2) copy of *Prevailing Wage Determination P-400-17177-549009*; (3) copy of revised Statement of Temporary Need; (4) copy of revised SWA Job Order; (5) copy of Notice of Deficiency response letter; and (6) mailing receipt. (*Id.*). On November 17, 2017, the undersigned issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File.⁸ On November 29, 2017, BALCA received the Appeal File from the CO. The Employer filed its brief on December 7, 2017. On December 8, 2017, the Solicitor filed a Notice indicating that it would not file a brief on behalf of the CO.

DISCUSSION AND APPLICABLE LAW

BALCA's standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued a final determination.⁹ After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action.¹⁰

The Employer bears the burden of proving that it is entitled to temporary labor certification.¹¹ The CO may only grant the Employer's Application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the

⁷ Pursuant to 20 C.F.R. § 655.61(a), within ten (10) business days of the CO's adverse determination, an employer may request that BALCA review the CO's denial. Within seven (7) business days of receipt of an employer's appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO's decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO's brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery

⁸ 20 C.F.R. § 655.61(c).

⁹ 20 C.F.R. § 655.61.

¹⁰ 20 C.F.R. § 655.61(e).

¹¹ 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009).

Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.¹²

Failure to Establish a One-Time Occurrence for Workers

The sole issue on appeal is whether the Employer has established a temporary need for workers. To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent.¹³ 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.”¹⁴

Pursuant to § 113 of the Department of Labor Appropriations Act, 2016, “for the purpose of regulating admission of temporary workers under the H-2B program, the definition of temporary need shall be that provided in 8 CFR 214.2(h)(6)(ii)(B).”¹⁵ Accordingly, 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

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. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner’s need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

8 C.F.R. § 214.2(h)(6)(ii)(B).

In this case, the Employer alleges that it has a temporary need for one childcare worker (live-in nanny) on a one-time occurrence, from November 14, 2017, to September 18, 2020. (AF 6, 15, 17).¹⁶ To establish a one-time occurrence, an employer must show 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 of short duration has created the need for a temporary worker.”¹⁷ Accordingly, the regulations provide for two prongs under which an employer may establish that its need qualifies as a one-time occurrence.

No Past or Future Employment

The Employer argues that it has satisfied the one-time occurrence standard because 1) she has not required full-time childcare in the past, instead relying on family and friends in addition

¹² 20 C.F.R. § 655.6(a); 20 C.F.R. § 655.1(a).

¹³ 20 C.F.R. § 655.6(b); 20 C.F.R. § 655.11(a)(3).

¹⁴ 20 C.F.R. § 655.6(a).

¹⁵ Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113), § 113 (Dec. 18, 2015).

¹⁶ This date was amended in the Employer’s September 21, 2017 correspondence to September, 18, 2020, which is the date of Employer’s oldest child’s eighteenth birthday.

¹⁷ 8. C.F.R. § 214.2(h)(6)(ii)(B)(1).

to greatly scaling back her career to manage childcare needs and 2) there will be no need for the employment after her older child turns 18 years of age and can provide supervision of the younger child as needed. (AF 2). The Employer additionally argued that while her need for some childcare has been longstanding, her need for full-time childcare has only recently come about. (*Id.*). She avers that she did not want a nanny to raise her children through their younger years while she pursued her career, but now that her children are teenagers, she feels that with the assistance of a full-time nanny, she can appropriately balance her career and her now-teenage children's needs. (*Id.*).

The Employer concedes that she did not provide any "concrete" documentation to support her position. (*Id.*). The Employer argues a "catch-22" situation, providing that she is unable to provide documentation of meeting her childcare needs in the past because she primarily chose to stay home and put her career on hold. (*Id.*). She explains that on the few occasions when she did work and her schedule conflicted with her husband's schedule, she was able to rely on family, friends, and neighbors. (AF 2). The Employer avers that due to only occasional childcare in the past and the very nature of the childcare used, she does not have documentation to show her specific childcare arrangements. (*Id.*). The Employer further highlights the alleged "catch-22" situation, providing that she is unable to provide documentation of her current need for childcare unless and until she obtains full-time childcare that would enable her to enter into contracts for her acting and film career. (*Id.*). She explained that while "good opportunities are coming [her] way," she has to turn them down because she "really [doesn't] have anyone to stay home with the kids and help with meal, laundry etc..." (AF 14).

Here, to the Employer's detriment, the CO failed to differentiate between the Employer's prior occasional uses of childcare from her current need for full-time childcare. While the Employer may have had a longstanding need for some level of childcare for a number of years prior to her request for temporary employment certification, it is evident that the Employer's need for childcare has changed from occasional to full-time. According to the Employer, her career was largely scaled back or put on hold for several years in order to accommodate raising her young children. Now that her children are older, the Employer wishes to resume her career, necessitating the employ of a full-time childcare worker, a service that the Employer did not previously require. Despite the Employer's failure to adduce the additional requested documentation to support her position, I find that the Employer's credible statement and arguments adequately demonstrate that she has not needed a full-time childcare worker in the past.

The Employer must also show that she will not need a worker to perform the services she currently seeks in the future.¹⁸ The Employer argues that she will have no need for a full-time childcare worker beyond September 18, 2020, once her older child has reached age 18. (AF 2). In her revised Statement of Temporary Need ('Statement of Prior Childcare and Current Temporary Need'), the Employer provided:

¹⁸ Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to three years. 8 C.F.R. § 214.2(h)(6)(ii)(B).

Our older child just turned fifteen year of age on September 18, 2017 and I am only in need of temporary help until he reaches the age of eighteen and is legally an adult. At that point, I expect to be able to rely on him to provide any needed supervision for our other child who will be age sixteen.

(AF 14).

The Employer based her temporary need on the increased level of child care necessitated by the changes in her career demands. The Employer explained that she based the job's end date on a particular event: her oldest child's 18th birthday. The Employer's application supports her position that she will no longer need a worker once her oldest child reaches the age of majority and is legally (and actually) capable of providing the necessary levels of temporary care to her younger child. Based on the above, I am persuaded that the Employer has demonstrated that she will not have a need for a full-time childcare worker in the future beyond the specific end-date.

The applicable regulations provide that the employer's need is considered temporary when the employer requires a worker for a limited period of time and can establish that the need for the employee will end in the near, definable future.¹⁹ The record establishes that the Employer has not needed full-time childcare in the past and will not need full-time childcare beyond September 18, 2020. Thus, the undersigned cannot sustain the CO's denial on the basis set out in the Non Acceptance Denial.

ORDER

In light of the foregoing, it is **ORDERED** that the Certifying Officer's decision denying certification be, and hereby is, **REVERSED** and **REMANDED** for certification.

For the Board:

Peter B. Silvain, Jr.
Administrative Law Judge

¹⁹ 8 C.F.R. § 214.2(h)(6)(ii)(B).