



**Issue Date: 01 February 2019**

**BALCA Case No.: 2019-TLN-00024**  
ETA Case No.: H-400-18310-224988

*In the Matter of:*

**BE STONE, INC. DBA CHANG'S HONG KONG CUISINES,**

*Employer.*

Certifying Officer: Chicago National Processing Center

Appearances: Qiaoyan Ma, self represented  
*For the Employer*

Matthew Bernt, Esq.  
Associate Solicitor for Employment and Training Legal Services  
Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

Before: Drew A. Swank  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case arises from Be Stone, Inc. DBA Chang's Hong Kong Cuisines ("Employer") request for review of the Certifying Officer's ("CO") decision to deny its application for temporary alien labor certification under the H-2B non-immigrant program. 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 United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers who seek to hire foreign workers under

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<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

<sup>2</sup> On April 29, 2015, the Department of Labor ("DOL") 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. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications

this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

### **BACKGROUND**

On November 6, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for one marketing Sales Director for the period of December 1, 2019 to June 30, 2019. ( AF 167-281).<sup>3</sup> Employer indicated that the nature of its temporary need was “one-time occurrence.” On Employer’s application (Form 9142B), in response to its statement of temporary need, Employer stated, “Requesting this employment to try and bring someone into the company to expand and bring a new clientele and increased brand awareness and sales.” AF-167.

The CO issued a first Notice of Deficiency (“NOD”) on November 16, 2018, finding that the application for temporary employment certification failed to meet the criteria for acceptance. (AF 163-166). The only deficiency noted was failure to satisfy application filing requirements pursuant to 20 C.F.R. § 655.15(b) which states:

A completed *Application for Temporary Employment Certification* must be filed no more than 90 calendar days and no less than 75 calendar days before the employer’s date of need.

The CO noted that Employer submitted an application on November 6, 2018, with stated dates of need of December 1, 2019 through June 30, 2019, which did not meet the application filing timeframe. (AF 166). The CO observed that the application filing date of November 6, 2018 was 390 days before the employer’s December 1, 2019 stated start date of need for H-2B workers which exceeded the 90 calendar-day timeframe. The CO further stated that the deficiency is incurable in that the start date was too far from the filing date to comply with the regulation at 20 C.F.R. 655.15(b). The CO recommended that employer withdraw its application and refile no more than 90 calendar days, and no less than 75 calendar days before the employer’s date of need. The CO further noted that due to the incurable deficiency the application had not yet undergone a full review. *Id.*

Employer responded to the Chicago National Processing Office by email on November 17, 2018. Employer stated that it had listed the wrong start date on its application and that the intended dates of need were December 1, 2018 to June 30, 2019. (AF 155). Employer requested that the start date be corrected to show December 1, 2018 and that Employer’s application

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“submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

<sup>3</sup> References to the appeal file will be abbreviated with an “AF” followed by the page number.

receive a full review. Employer attached a corrected application to its email with dates of need listed as December 1, 2018 to June 30, 2019. (AF 155-162).

The CO issued a second Notice of Deficiency on December 18, 2018. (AF 140 – 151). The following six deficiencies were listed:

- 1) Failure to satisfy application filing requirements;
- 2) Failure to establish the job opportunity as temporary in nature;
- 3) Failure to submit an acceptable job order;
- 4) Disclosure of foreign worker recruitment;
- 5) Failure to submit a complete and accurate ETA Form 9142 (20 CFR 655.15(d)); and
- 6) Failure to submit a complete and accurate ETA Form 9142 20 CFR 655.15(a).

In regard to the first deficiency, failure to satisfy the application filing requirements, the CO noted that the start date of need which was corrected to December 1, 2018, still did not meet the application timeframe stated in 20 C.F.R. §655.15(b). The application was filed on November 6, 2018, which is only 25 days before the Employer's corrected start date of December, 1, 2018. As previously noted by the CO, 20 C.F.R. § 655.15(b) requires that the application for temporary labor be filed "no more than 90 calendar days and no less than 75 calendar days before the employer's date of need."

The CO pointed out that 20 C.F.R. § 655.17 provides that in emergency situations, the "CO may waive the time period(s) for filing an H-2B Registration and/or an Application for Temporary Employment Certification for employers that have good and substantial cause, provided that the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination as required by 20 C.F.R. §655.50." However in order to be considered for a waiver of the filing timeframe, the regulation at Section 655.17(b) requires that an employer submit a request for waiver and also comply with other regulatory criteria. The CO observed that in this case Employer did not submit an emergency request for waiver of the filing timeframe or comply with the criteria pertaining to a waiver of the timeframe. (AF 143-145).

Employer responded to the second NOD on December 26, 2018, by email, providing an explanation and further documentation in an attempt to cure the stated deficiencies. (AF 64-139).

The Employer requested that its start date in its application be modified again to reflect a start date of January 21, 2019. (AF 65). Employer also submitted documentation included an internet printout of the job posting, email correspondence from the Nevada state workforce agency (SWA), a copy of the job order, and an amended job order.

On December 31, 2018, the CO issued a Final Determination denying the application for temporary labor certification. (AF 57- 63). The CO determined that the following two deficiencies

remained: 1) Failure to satisfy the application filing requirements, and 2) Failure to establish the job opportunity as temporary in nature.

The CO also noted that the employer in this case had responded to the NOD requesting that its start date of need be changed to January 21, 2019 so that it would be in compliance with the regulatory filing timeframe. The CO determined, in light of the Employer's original start date of December 1, 2018, that Employer "did not explain how it arrived at its [new] starting date of need, or how the change in start date of need affects its one time need." (AF 61). The CO concluded that the employer "seem[ed] to arbitrarily select a start date in order to meet the filing date timeframe and not necessarily based on the employer's actual start date of need." *Id.*

The CO also addressed the second deficiency, employer's failure to establish the job opportunity as temporary in nature. The CO cited 20 C.F.R. §655.6(a) and (b) for the requirement that "an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary." (AF 61),

The CO noted that an employer's need is considered temporary if it is justified to the CO as one of the following: 1) a one-time occurrence; 2) a seasonal need; 3) a peakload need; or 4) an intermittent need as defined by DHS regulations. The CO determined that the Employer did not sufficiently demonstrate its requested standard of temporary need.

The CO observed that employer is requesting one Marketing Sales Director from December 1, 2018 through June 30, 2019, on the basis of a one-time occurrence temporary need. The CO stated that in order to establish a one-time occurrence temporary need, the petitioner must establish 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.

The CO reasoned that although the employer had explained that its need for a Marketing Sales Director is to be able to "grow its business," the employer had not provided sufficient documentation to justify how it determined its start and end dates of need. In particular, the CO noted that the employer's need for a Marketing Sales Director seemed to be a need that would extend well beyond the requested period, and could be fulfilled by another participant after the requested period of need. Thus, the CO concluded that the described need did not appear to represent a temporary event, based on a one-time occurrence. (AF 61-63).

On January 8, 2018, Employer made a timely request for administrative review of the CO's determination. (AF 1-3). In its request for review Employer stated that it had never filed an H-2B application before and it had been unaware of the requirement that an application be filed at least 75 days in advance of the requested start date. It stated that it originally picked December 1, 2018 because it was anxious to hire a temporary worker to help the company "grow into untapped markets." When the CO notified Employer that the 75 day requirement meant January 20, 2019 would be the earliest start date, assuming a November 6, 2018 filing date, the employer chose a new start date of January 21, 2019. Employer expressed its desire to comply with the rules and regulations but pointed out this was the company's first attempt to hire a foreign temporary H-2B worker. Employer requested that the previous denial be reconsidered because it believed it had sufficiently responded to all requests for information and clarification. *Id.*

By Order dated January 18, 2019, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before January 30, 2019.

On January 23, 2019, Employer filed by email, with OALJ-filings, a brief which supplemented its January 8, 2018 request for administrative review.<sup>4</sup> Employer stated that it had submitted evidence in response to the CO's notice of deficiency which it believed adequately supported its temporary labor application. Employer noted that the current application was its first attempt at hiring a foreign H-2B worker. Employer restated its position as to how a foreign worker would benefit their business. Employer stated:

We feel that if an actual temporary foreign worker is able to travel to the primarily Asian markets hotels and travel companies and "break the ice" about our restaurant and we are able to show our new customers and partnerships how great our dining experience is we will then be able to send them mailings and specials after the relationship is built and easily cater to their needs once a relationship is already established.

Accordingly Employer requested that the CO's previous denial be vacated and it be allowed to hire a temporary foreign worker from January 21, 2019 to June 30, 2019.

No brief was submitted on behalf of the CO.

### **SCOPE OF REVIEW**

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer's request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO's determination; or
- (2) Reverse or modify the CO's determination; or
- (3) Remand to the CO for further action.

(20 C.F.R. § 655.61(e)).

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge's review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard<sup>5</sup> to its review of the CO's determination

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<sup>4</sup> A hard copy of this brief was received on January 30, 2019.

<sup>5</sup> Similarly, judicial review under the Administrative Procedure Act provides that an agency's actions, findings and conclusions shall be set aside that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C § 706(2).

in H-2B temporary labor certification cases. *See Brook Ledge Inc.*, 2016 TLN 00033 at 5 (May 10, 2016); *see also J and V Farms, LLC*, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).

### **ISSUES**

Whether the Certifying Officer properly denied the Employer's H-2B application due to:

- 1) Employer's failure to satisfy application filing requirements pertaining to the timeframe between filing date and start date found in 20 C.F.R. §§ 655.15(b) and 655.17; and
- 2) Employer's failure to establish that its request for one Marketing Sales Director for the period of January 21, 2019 through June 30, 2019 is based upon a "temporary" employment need, according to the Employer's stated standard of "one-time occurrence."

### **DISCUSSION**

In order to obtain temporary labor certification for foreign workers under the H-2B program, the Employer is required to establish that its need for the requested workers is "temporary." Temporary need is defined by the DHS regulation at 8 C.F.R. §214.2(h)(6)(ii). This regulation states:

(A) Definition. Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(8 C.F.R. §214.2(h)(6)(ii)(A)).

The DHS regulation further states in regard to the nature of petitioner's need:

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 peakload need, or an intermittent need.

(8 C.F.R. §214.2(h)(6)(ii)(B)).

The DOL regulation addressing temporary need in H2-B cases also states:

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 DHS regulations.

(20 C.F.R. §655.6).

#### A. Denial for failure to satisfy application filing requirements

The regulations governing H2-B labor certification applications provide a specific timeframe for the filing of H-2B applications in regard to the start date of the requested labor. 20 C.F.R. § 655.15(b) states:

*A completed Application for Temporary Employment Certification must be filed no more than 90 calendar days and no less than 75 calendar days before the employer's date of need.*

The regulations also provide for a waiver of the timeframe, noted above, in certain emergency situations. 20 C.F.R. § 655.17 provides that in emergency situations, the "CO may waive the time period(s) for filing an H-2B Registration and/or an Application for Temporary Employment Certification for employers that have good and substantial cause, provided that the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination as required by 20 C.F.R. §655.50." However, in order to be considered for a waiver of the filing timeframe, the regulation at Section 655.17(b) requires that an employer submit a request for waiver and also comply with other regulatory criteria.

In the instant case, the CO correctly determined in the December 18, 2018 Notice of Deficiency that the Employer's corrected start date of December 1, 2018 did not comply with the regulatory requirement that the start date be at least 75 days after the filing date of the temporary labor certification application which in this case was November 6, 2018. Furthermore, the CO correctly observed that Employer had not submitted an emergency request for waiver of the filing timeframe, nor had it complied with the criteria pertaining to a waiver of the timeframe. (AF 143-144). Accordingly, in the December 18, 2018 Notice of Deficiency, the CO notified the Employer of the filing timeframe deficiency and informed Employer that the earliest start date which would conform to the 75 day requirement was January 20, 2019. (AF 144).

The Employer timely responded to the December 18, 2018 Notice of Deficiency, on December 26, 2018 and requested that its start date in its application be modified to reflect a start date of January 21, 2019. (AF 65). As noted in the final determination issued on December 31, 2018, the CO accepted the Employer's request that the start date in its application be modified to January 21, 2019. *See* AF 59. However, in the final determination, the CO noted the employer had originally stated its start date as December 1, 2018 and requested that the start date be changed to January 21, 2019, but did not explain how it arrived at its new start date or how the change in start date affects its one time need. The CO stated:

The Employer seems to arbitrarily select a start date in order to meet the filing date timeframe and not necessarily based on the employer's actual start dated of need. It is not clear how the employer established its start date for its one time need therefore the deficiency remains.

(AF 61).

This statement appears to conflate the basis for the two separate deficiencies. The CO's reasoning as stated above addresses how the change in start dates may reflect negatively upon whether the requirement of temporary need on the basis of a one-time occurrence has been met in this case, as will be discussed below. However, the CO's reasoning does not support that the change in date does not comport with the 75 day requirement in 20 C.F.R. 655.15(b) because such a finding would not be accurate. January 21, 2019 is over 75 days after the November 6, 2018 application filing date. The change in start dates is also consistent with the CO's statement that January 20, 2019 would be the earliest date that would comply with the 75 day requirement, in light of the application filing date.

The CO apparently allowed the Employer to modify its start date to January 21, 2019 because this date is reflected on the attachment to the Final determination at AF 59 which states the requested period of need as January 21, 2019 – June 30, 2019. As the January 21, 2019 start date is over 75 days after the November 6, 2018 filing date, the undersigned finds that denial on the basis of 20 C.F.R. 655.15(b) is not proper because Employer's modified start date now complies with the 75 day requirement. Accordingly the denial on the basis of failure to satisfy application filing requirements at 20 C.F.R. 655.15(b) is reversed.

#### B. Denial for failure to establish the job opportunity as temporary in nature

The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. *See, e.g., Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

In this case, the Employer applied for temporary labor certification for one Marketing Sales Director for the period of January 21, 2019 to June 30, 2019, on the basis of a "one-time occurrence." In regard to a one-time occurrence the DHS regulation states, "[t]he petitioner must establish 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." 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

In the final determination the CO concluded that the Employer did not prove its temporary need on the basis of a one-time occurrence. The CO reasoned that although the employer had explained that its need for a Marketing Sales Director is to be able to "grow its business," the employer had not provided sufficient explanation or documentation to justify how it determined its start and end dates of need. In particular, the CO noted that the employer's need

for a Marketing Sales Director seems to be a need that would extend well beyond the requested period, and could be fulfilled by another participant after the requested period of need. Thus, the CO concluded that the described need did not appear to represent a temporary event, based on a one-time occurrence.

After reviewing the Employer's explanation for its temporary need the undersigned agrees with the CO that Employer has failed to prove that its need for a Marketing Sales Director is temporary based on a one-time occurrence in accordance with the regulations. Employer gives many good reasons for its need for a Marketing Sales Director to help "grow its business." In its brief the Employer stated the following in support of its need for a temporary Marketing Sales Director:

We feel that if an actual temporary foreign worker is able to travel to the primarily Asian markets hotels and travel companies and "break the ice" about our restaurant and we are able to show our new customers and partnerships how great our dining experience is we will then be able to send them mailings and specials after the relationship is built and easily cater to their needs once a relationship is already established.

(Employer's brief at 1-2).

However, although the Employer has supported its need, or perhaps more accurately its desire, to have a marketing sales director, it has failed to give any support for why this need would be a temporary need on a one time occurrence basis, as opposed to an ongoing employment need. *See Bucron, Inc.* 2013-TLN-00002 (Nov. 8, 2012) (affirming denial because many of the job duties listed in the employer's application appear ongoing and permanent).

Further, Employer has not, alternatively, established "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). As the CO noted, the Employer's ability to easily modify its dates of need in an effort to comply with the regulatory guidelines pertaining to filing date and start date, does not support that the dates of need represent "a temporary event of short duration [that] has created the need for a temporary worker." *See Bassett Construction*, 2016-TLN-00023 (April 1, 2016) (although employer was able to establish a one-time occurrence, he was unable to justify his dates of need). As the CO concluded, the selection of dates of need appears to be an arbitrary choice motivated by the effort to comply with the regulatory timeframe, rather than an accurate representation of a one-time temporary need. (AF 61, 62).

### **CONCLUSION**

For the foregoing reasons, the undersigned concludes that Employer has failed to meet its burden of establishing its temporary need for one Marketing Sales Director for the period of January 21, 2019 to June 30, 2019, on the basis of a "one-time occurrence," as defined by the applicable regulation at 8 C.F.R. §214.2(h)(6)(ii)(B)(1).

**ORDER**

Accordingly, it is hereby ORDERED that the CO's denial of Employer's application for temporary labor certification, due to Employer's failure to establish its temporary need for labor, on the basis of a one-time occurrence, is AFFIRMED.

For the Board of Alien Labor Certification Appeals:

DREW A. SWANK  
Administrative Law Judge