



Issue Date: 29 April 2019

BALCA Case No: 2019-TLN-00119

ETA Case No: H-400-19011-399790

In the Matter of:

**DEVIL’S THUMB RANCH OPERATING COMPANY, INC.,
d/b/a DEVIL’S THUMB RANCH RESORT AND SPA,
Employer.**

DECISION AND ORDER OF REMAND

This case arises from Devil’s Thumb Ranch Operating Company, Inc.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an 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);¹ 20 C.F.R. § 655.6(b).²

Employers who seek to hire foreign workers under 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” or “Application”). 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 “Board”). 20 C.F.R. § 655.61(a).

¹ 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).

² 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 “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.

STATEMENT OF THE CASE

H2-B APPLICATION

Employer operates a resort and spa in Tabernash, Colorado. AF 120.³ On January 14, 2019, the Employer filed a Form 9142 with the CO. AF 109-133. Employer requested certification for 3 Housekeepers from April 1, 2019 to January 1, 2020, based on alleged peakload temporary need during that period. AF 109.

Notice of Deficiency

On March 6, 2019, the CO issued a Notice of Deficiency (“NOD”). AF 103-08. The CO listed two deficiencies: (1) failure to establish the requested period of need as temporary in nature under 20 C.F.R. § 655.6(a) and (b); and (2) failure to justify nature of temporary need under 20 C.F.R. § 655.6(a) and (b). AF 106-108.

On the first deficiency, the CO stated that Employer’s application did not “submit sufficient information in its *Application* ... to establish its requested period of intended employment.” AF 106 (emphasis in original). The CO then presented a chart showing that the Employer had previously received certification for 12 Housekeepers from November 23, 2017, to March 31, 2018, and for 15 Housekeepers from November 23, 2018, to March 31, 2019, and that the current Application seeks certification for 3 Housekeepers from April 1, 2019, to January 1, 2020. AF 106. The CO stated, “[i]t is unclear why the employer’s dates of need have changed from its previous certification” and requested a “detailed statement of temporary need” and “supporting evidence and documentation that justifies the chosen standard of temporary need.” AF 106-07.

On the second deficiency, the CO stated,

The employer has requested three Maids and Housekeeping Cleaners from April 1, 2019 through January 1, 2020. When the employer’s previous certified application (H-400-18208-242504) is factored in, the employer would have a peakload period of 13 months and four days.

...

Except in the case of a one-time occurrence, the Department of Labor has consistently viewed temporary need, as defined in 8 CFR § 214.2(h)(6)(ii)(B), as lasting no more than ten months, which has been reflected in all rules promulgated since 2008. The Department continues to view this as an appropriate threshold for assessing the temporary nature of an employer’s need, which is consistent with the definition of temporary need in DHS regulations, which provides that “[g]enerally, that period of time will be limited to one year *or less*,

³ Citations to the Appeal File are abbreviated as “AF.” For purposes of clarity, the “P” prefix on each page number of the Appeal File has been omitted (*i.e.*, “P120” is instead cited as “120”).

but in the case of a one-time event could last up to 3 years.” 8 CFR § 214.2(h)(6)(ii)(B) (emphasis added).

AF 107-08. The CO then stated that “[t]he employer did not submit sufficient information in its ... *Application* ... to establish that the requested period of need is temporary in nature” and requested that employer provide information establishing that its need for foreign workers is temporary. AF 108.

Employer Response

On March 19, 2019, Employer submitted its H-2B Response to NOD. AF 92-101.⁴

On the first deficiency, Employer changed the basis of temporary need from peakload to a one-time occurrence, stating that a change in its business operations and its plans to replace foreign workers with domestic workers establish a “short term, one-time occurrence need”:

Both the number of workers and the timeframe are in line with a request for an additional temporary period of employment to supplement our permanent staff at the place of employment on this temporary basis due to a short-term demand. ***This need is more accurately described as a one-time occurrence. Devil’s Thumb respectfully requests that the Form 9142B be corrected to reflect the request for three (3) housekeepers for the temporary period ending on January 1, 2020.***

...

As our company and reputation grows, our needs are changing, and we have determined that we currently require 3 temporary housekeepers for our short term, one-time occurrence need over the coming spring, summer and fall months.

...

Our current business plans include in intensive and comprehensive move to obtaining, using, and retaining domestic workers. We have found that the temporary, seasonal work programs are unreliable and leave us without recourse if we are unable to fill open positions with foreign workers. We have changed our recruiting course and intend to fill both summer and winter positions with full

⁴ In the cover letter to its Appeal dated April 4, 2019 (AF 1-73), Employer indicated that its Response to the NOD included “[p]ayroll records by month for 2017 [and 2018] (originally submitted electronically).” AF 1. However, a review of the Appeal File indicates that what Employer actually submitted with its Response to NOD were payroll records only for the months of January 2017 and January 2018. AF 97-98 (January 2017 records); AF 99-101 (January 2018 records). In contrast, with its Appeal dated April 4, 2019, Employer submitted records for all of 2017 and all of 2018. AF 39-50 (2017 records); AF 51-62 (2018 records). There is an unavoidable discrepancy between the statement in Employer’s April 4, 2019 cover letter that its Response to NOD contained all payroll records by month for 2017 and 2018 and the Response to NOD contained in the Appeal File, which indicates that Employer only submitted payroll records for January 2017 and January 2018 with its Response to NOD. I trust that this discrepancy was the result of an innocent mistake.

time, regular domestic employees. These additional Housekeepers [the three requested in the Application] will serve to temporarily fill the positions as we recruit and thereby negate the future need for first half of the year (November through March) H2B workers.

AF 92-93 (emphasis in original).

On the second deficiency, Employer stated:

Given the uptick and continued full capacity bookings throughout the year, we have determined that an additional three Housekeepers will fulfill our temporary housekeeping needs and likely remove the necessity for using the H2B program next winter. We have a bona fide job opportunity for the Housekeepers based upon the anticipated volume of guests.

Devil's Thumb has established that it regularly employs permanent workers as Housekeepers and that due to seasonal demands it has requested and utilized additional foreign workers to supplement its workforce during [its] traditionally highest capacity season in the winter. This is the traditional seasonal peak load need that it has received H2B workers. Based upon the continued growth and expansion of time that guests come to our location, Devil's Thumb has formulated a long term personnel recruiting and retention plan which aims to eliminate the use and need for additional temporary help.

Devil's Thumb anticipates hiring additional full time, permanent staff that will fulfil all of the business needs. Given our request to amend this application to utilize the one-time occurrence of temporary need, the fact that our need extends past one year is reasonable. During the entire period requested, all of the regular full time domestic staff and the additional three Housekeepers will be working in a full time capacity.

AF 93-94.

CO's Final Determination

On March 22, 2019, the CO Issued a Final Determination denying Employer's Application. AF 75-84. The CO determined that Employer did not overcome either deficiency cited in the NOD. *See* AF 77-84. While the CO did not explicitly grant the Employer's request to amend the Application to reflect a one-time occurrence instead of a peakload need, as shown below the CO's discussion in the Final Determination discussed whether Employer had established a one-time occurrence. I thus conclude that the CO implicitly granted the Employer's request to amend the Application to reflect a one-time occurrence.

On the first deficiency, the CO stated:

[A]ccording to Departmental standards, in order to establish a one-time occurrence, the employer must show that it has not employed workers to perform the service or labor in the past, and will not need workers to perform the services or labor in the future or the employer must have an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. The employer has established that it is a resort which sees its largest volume in the winter months when the Rocky Mountains of Colorado has an estimated 7.1 million ski visitors. Also, the employer has had previous certified applications requesting housekeepers. *The employer has employed housekeepers to perform the service or labor in the past, and will need housekeepers to perform the service or labor in the future. Therefore, the employer one-time occurrence temporary need is not valid.*

AF 80 (emphasis added).

On the second deficiency, the CO stated almost the same thing:

[A]ccording to Departmental standards, in order to establish a one-time occurrence, the employer must show that it has not employed workers to perform the service or labor in the past, and will not need workers to perform the services or labor in the future or the employer must have an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. The employer has established that it regularly employs permanent workers as Housekeepers. Also, the employer has had previous certified applications requesting housekeepers. *The employer has employed housekeepers to perform the service or labor in the past, and will need housekeepers to perform the service or labor in the future. Therefore, the employer one-time occurrence temporary need is not valid.*

AF 83 (emphasis added).

PROCEDURAL HISTORY

On April 11, 2019, BALCA received Employer's request for administrative review of the CO's final determination. AF 1-73. Along with its request for administrative review, Employer included its brief setting forth the grounds for its appeal request. *See* AF 3-7. On April 17, 2019, I was assigned this matter. On April 23, 2019, I issued a Notice of Assignment and Expedited Briefing Schedule, granting the parties the opportunity to file briefs. BALCA received the Appeal File on April 15, 2019. On April 23, 2019, Employer submitted another copy of its brief. As of April 29, 2019, the CO has not filed a brief.

SCOPE OF REVIEW

BALCA's standard of review is limited in H-2B cases. 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 actually submitted before the CO. 20 C.F.R. § 655.61(a)(5). Upon 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. 20 C.F.R. § 655.61(e).

DISCUSSION

As a preliminary matter, given the evidentiary limitations cited above, I cannot and will not consider any documents that were not actually submitted to the CO with Employer's Response to NOD. Accordingly, I will not consider the payroll records for February through December 2017 and February through December 2018 that Employer submitted as part of its Appeal because they were not previously submitted to the CO with Employer's Response to NOD.

To qualify as a one-time occurrence, the employer "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).

Employer argues that the CO "neglected to use the alternative definition of one-time occurrence and rested its final determination solely on the employer[']s lack of demonstrating that it '*has not employed workers in the past and will not need workers of this type in the future*' (only the first part of the definition of one-time occurrence)." AF 6 (emphasis in original). Employer further argues:

Devil's Thumb is in the process of transitioning its business model from one that utilizes H-2B workers during the fall and winter and J-1 workers over the summer to one that utilizes a wholly domestic work force. This transition in the business model is a one-time occurrence, and Devil's [T]humb will only require these three housekeepers while the transition is ongoing, from April 2019 to January 1, 2020, at which time the transition will be complete and the company will no longer need [or] require temporary foreign workers. This fully satisfies the second definition of one-time occurrence, that the employer "*has an employment situation that is otherwise permanent, but a temporary event of short duration has created a need for temporary workers.*"

AF 6-7 (emphasis in original; citation omitted).

The CO found the two deficiencies in this case still existed after Employer submitted its Response to NOD for the same reason:

The employer has employed housekeepers to perform the service or labor in the past, and will need housekeepers to perform the service or labor in the future. Therefore, the employer one-time occurrence temporary need is not valid.

AF 80; AF 83. Simply put, while the CO correctly stated that the definition of one-time occurrence included “an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker,” *id.*, there is no indication on this record that the CO considered whether the Employer established that it met this second part of the definition of one-time occurrence.

Accordingly, I am remanding this matter to the CO to consider whether the Employer has 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). Given this remand, I need not address Employer’s argument that the CO erred in not considering its payroll records.⁵

ORDER

Based on the foregoing, this matter is **REMANDED** to the Certifying Officer for additional processing.

I am requesting that this decision and order be served by fax in addition to by regular mail.

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge

⁵ Given the evidentiary limitations outlined above, even if I had considered this second argument, I would be limited to considering only the January 2017 and January 2018 payroll records that Employer submitted to the CO with its Response to NOD.