



Issue Date: 30 May 2019

BALCA CASE NO.: 2019-TLN-00115

ETA CASE NO.: H-400-19042-686271

In the Matter of:

GOLDEN ACRES HOME, LLC,
Employer.

Appearance: Aida Goines
Employer

Kevin D. Wender, Esq.
For the Certifying Officer

Before: Evan H. Nordby
Administrative Law Judge

AMENDED DECISION AND ORDER DIRECTING REMAND

This case arises from Golden Acres Home, LLC’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

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (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.

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).

I find that the Employer established a temporary need under the second prong of the one-time occurrence classification, and remand for further action.

BACKGROUND

On or about February 11, 2019, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from the Employer. AF 122-164.³ The Employer applied for temporary labor certification for one full-time Housekeeper to work at its retirement home in Yuba City, CA. AF 122-33. The Employer asserted a temporary need, on the basis of a one-time occurrence, for this worker, *see* 8 C.F.R. § 214.2(h)(6)(ii)(B)(1), lasting from April 16, 2019, through April 15, 2020. *Id.* The Employer explained “to perform the housekeeping job of the Resident Caretaker, who will be on vacation leave to visit the relatives [*sic*] and to do repair or maintenance of their house in Manila, Philippines.” AF 132.

The Employer submitted an organization chart showing that it only has two permanent employees, the Resident Caretaker and the Office Manager, who work directly for the owner. AF 158. The Resident Caretaker performs both housekeeping and cooking duties for the residents at this relatively small (18-room) retirement home. AF 132.

The Employer submitted the current Resident Caretaker’s leave request form, showing “Vacation” leave requested and approved from April 30, 2019 to March 31, 2020. Inexplicably, the form is signed and dated by the employee and by management for November 30, 2019.

On February 4, 2019, the OFLC CO issued a Notice of Deficiency to the Employer, setting out two deficiencies in the Application and requesting additional information. AF 112-122. The CO found that the Employer’s initial application did not sufficiently demonstrate that the job opportunity was a temporary one-time occurrence, or, that there was an acceptable job order. *Id.*

Regarding the temporary one-time occurrence, the CO wrote:

The employer did not sufficiently demonstrate how its need meets the regulatory standard. Under the One-Time Standard of need the employer must establish 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. However, the employer’s Statement of Temporary Need establishes that the employer has

³ References to the appeal file are abbreviated with an “AF” followed by the page number.

employed workers to perform services and labor in the past and it will need workers to perform services or labor in the future.

Moreover, in its statement of temporary need, the employer stated that “the period during which the foreign national’s services are need is not unpredictable, [not] subject to change or considered to be a vacation period...” However, the employer stated that the Housekeeper would “perform the housekeeping job of the Resident Caretaker who will be on vacation leave to visit relatives and to do repair or maintenance of a house in Manila, Philippines”. This demonstrates that the employer cannot guarantee that this employee or any employee in a similar occupation will never again take vacation time and will not need workers to perform the services or labor in the future.

The employer has not explained what temporary event(s) of short duration has caused the onetime occurrence.

AF 117. The CO requested several categories of documentation. AF 148-150.

On March 14, 2019, the Employer submitted a response. AF 26-111. The Employer submitted an updated statement of temporary need and a payroll record, stating and showing that the “Contractual Caretaker” works typically in excess of 30 hours per week. AF 29-32. The Employer also submitted lease agreements with residents of the home showing that at least for certain tenants, e.g. AF 44, AF 48, the Employer provides three meals per day.

The CO ultimately denied the application, writing that the Employer “establish[ed] a situation that is otherwise permanent, the employer did not describe a temporary event of short duration that created the need for a temporary worker.” AF 20-21.

The CO continued, quoting the Employer:

In its updated Statement of Temporary Need, the employer further stated:

The period during which the foreign national’s service is needed is not unpredictable, subject to change, or considered to be vacation leave filed by our Caretaker. It is rather defined that our temporary need stems from the vacation leave filed by the Caretaker from April 30, 2019 and the anticipated return to work on March 31, 2020, the time requested one (1) Temporary Housekeeper will end the temporary need and it one time occurrence.

These two statements are inconsistent. Moreover, the absence of an employee for whatever reason is not a temporary event, but it is an interminable possibility, and it is not clear whether the period of time during which the employee will be absent is of short duration.

AF 21.

This case ensued, and both the Employer and the CO filed briefing, which I reviewed and considered.

DISCUSSION

BALCA's review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO; any legal briefs submitted by the parties; and the Employer's request for administrative review, which may only contain legal arguments and evidence that were actually submitted to the CO before the date the CO issued a Final Determination.⁴ 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. 20 C.F.R. § 655.61(e).

Review of the CO's determination of H-2B applications is governed by the "arbitrary and capricious" standard. *J.M. Yanez Const., Inc.*, 2019-TLN-00072 (Apr. 1, 2019); *Jose Uribe Concrete Const.* 2019-TLN-00025 (Feb. 21, 2019); *Three Seasons Landscape Contracting Service, Inc. DBA Three Seasons Landscape*, 2016-TLN-00045, *19 (Jun. 15, 2016); *Brook Ledge, Inc.*, 2016-TLN-00033, *4-5 (May 10, 2016); *see also J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016). Under the "arbitrary and capricious" standard, the reviewing judge or panel looks to see if the initial decision maker examined "the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Three Seasons*, 2016-TLN-00045, *19 (quoting *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted)). "If the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, then it is arbitrary and capricious." *Id.*⁵

⁴ Under 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. The Employer's request for review must set forth "the grounds for the request" and is by regulation the Employer's sole opportunity to make "legal argument." 20 C.F.R. § 655.61(a)(3), (5). 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.

⁵ At least one judge has recently concluded that *de novo*, rather than arbitrary and capricious, is the correct standard to apply in an administrative review of an H-2B determination. *Best Solutions USA, LLC*, 2018-TLN-117, *3 n.2 (ALJ May 22, 2018). However, the weight of the case law, as well as a close reading of the H-2B regulations and the H-2A regulations next door in 20 C.F.R., favor arbitrary and capricious review. In the H-2A program, in which the rules predate the current H-2B rules, an employer may elect either an administrative review or a *de novo* hearing following a denial of certification by a CO. 20 C.F.R. § 655.171. In adopting the current H-2B rules, DHS and DOL stated that the new 20 C.F.R. § 655.61 "does not provide for *de novo* review." 80 Fed. Reg. 24042, 24081. Whether that was meant to either set a standard of review or simply to state the obvious, that the new rule did not allow for hearings as the H-2A rules do, is not clear. Therefore, I read the plain language and the case law to mean both: there are no *de novo* hearings, nor do CO determinations get reviewed *de novo* under administrative review.

The Employer bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, *7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, *2 (Sep. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, *5 (Jul. 28, 2009). 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 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. 20 C.F.R. § 655.1(a).

The Employer must establish why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. 20 C.F.R. § 655.6(a) and (b). *See, e.g., Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012) An Employer must also demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. §655.11(e)(3) and (4); *see Titus Works, LLC*, 2019-TLN-00023 (Feb. 8, 2019); *Roadrunner Drywall*, 2017-TLN-00035, slip op. at 9-10 (May 4, 2017); *see also Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013).

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. 8 C.F.R. 214.2(h)(6)(ii)(B). Temporary need must "be limited to one year or less, but in the case of a one-time event could last up to 3 years." 8 C.F.R. § 214.2(h)(6)(ii)(B), Interim Final Rule (IFR), Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24042, 24055 (April 29, 2015). The 2015 IFR, which was jointly issued by DHS and DOL, adopted by reference the DHS definition of "temporary need" at 8 C.F.R. § 214.2(h)(6)(ii)(B). The agencies categorize and define temporary need into the following four standards: one-time occurrence, seasonal, peakload, or intermittent. 8 C.F.R. § 214.2(h)(6)(ii)(B), 20 C.F.R. § 655.6.

For a one-time occurrence need, an 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) (emphasis added).

That "or" in the middle of the definition of one-time occurrence is a very important "or." Much of the CO's denial discusses the Employer's alleged history of use of the H-2B program and employment of housekeeping and caretaker staff. I say "alleged" because of the contested issue of whether the prior business entities, which apparently operated a similar business at the same address, have any relationship to the current LLC. But this is not necessary to resolve to decide this case, because of the disjunctive "or." The Employer can satisfy either prong.

In the final denial, the CO conceded this Employer showed a permanent employment situation. In the brief, the CO conceded that the Employer had issued an acceptable job order. Therefore, the critical issue to decide is whether the CO's determination that the Employer did

not show that “a temporary event of short duration has created the need for a temporary worker” was arbitrary and capricious.

I conclude it was. The evidence in the record – the approved leave slip – is that the current caretaker’s leave is temporary, and will end on or about March 31, 2020. There is a chance the current caretaker may not actually return. But the regulation directs that employers must project into the future to determine the end of the temporary need, and a leave slip documents just that.

The CO failed to “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” when, in denying the certification, the CO wrote that the Employer did not show a “temporary event, but . . . an interminable possibility.” Moreover, the CO’s finding that “it is not clear whether the period of time during which the employee will be absent is of short duration” is inconsistent with the regulatory definition of “temporary need,” which allows a one-time occurrence to last up to three years. 8 CFR 214.2(h)(6)(ii)(B).

There are some loose ends in this application. The Employer says twice that this is “not a vacation period for our staff,” then continues to say that the permanent employee will be on “Vacation leave.” The leave request and the approval is dated November 30, 2019. There is the relatively short period of time that this LLC has been operating this retirement home, following a series of similarly named business entities at the same location who made routine use of the H-2B program.

Each of these loose ends could probably be tied up if this forum were authorized to hold evidentiary hearings in these cases. But the regulation provides for summary expedited review. And ultimately those loose ends are irrelevant, as I am bound by the plain language of the regulation that the Employer has satisfied.

In briefing, the CO does cite *Cajun Constructors*. But *Cajun Constructors* is distinguishable on its facts. The decision is well summarized in the preamble to the Interim Final Rule:

The BALCA, in *Matter of Cajun Constructors, Inc.*, 2009–TLN–00096 (Oct. 9, 2009), also decided that an employer by the nature of its business works on a project until completion and then moves on to another has a permanent rather than a temporary need.

80 Fed. Reg. at 24055. That project-by-project work scenario, common in construction, is a distinctly different factual scenario than the one presented by the Employer here, where the Employer has a single worksite and ongoing permanent need for housekeeping and cleaning work. The presiding judge in *Cajun Constructors* correctly determined that the H-2B program was and is not a vehicle for bringing in “temporary” foreign workers where the employer’s entire *raison d’etre* is to perform work on a project-by-project basis. Clearly DOL and DHS agreed in the IFR. But that case is not this case, on the facts.

ORDER

For the reasons stated above, I determined the CO's non-acceptance denial to be unsupported by the record and therefore is reversed. This case is **REMANDED** to the CO for further action, in an expedited manner, to the extent possible.

SO ORDERED.

EVAN H. NORDBY
Administrative Law Judge