



Issue Date: 28 September 2020

BALCA Case No: 2020-TLN-00072
ETA Case No.: H-400-20203-726801

In the Matter of:

JOLE ENTERPRISE LLC,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Jorge Guerrero
Jole Enterprise
Ingleside, Texas
For the Employer

Before: John P. Sellers, III
Administrative Law Judge

DECISION AND ORDER AFFIRMING FINAL DETERMINATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Jole Enterprise LLC’s (the “Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination 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 (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis. *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). 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”). 8 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA. 20 C.F.R. § 655.61(a).

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). In this Decision and Order, all citations to 20 C.F.R. Part 655 pertain to the IFR.

STATEMENT OF THE CASE

The Employer is a landscape contractor located in Texas. On July 3, 2020, the Employer filed with the CO an Application for Temporary Employment Certification, Form ETA-9142B (“Application”), and supporting documentation. (AF 134-57.)² The Employer requested certification for sixty coating technicians³ from October 5, 2020, to July 30, 2021, based on an alleged peakload need for workers during that period. (AF 134.)

On July 29, 2020, the CO issued a Notice of Deficiency (“NOD”), which outlined six deficiencies in the Employer’s Application. (AF 122-33.) According to the NOD, the Employer (1) failed to meet the definition of an employer pursuant to 20 C.F.R. § 655.5 and 655.15(a); (2) failed to establish the job opportunity as temporary in nature; (3) failed to establish temporary need for the number of workers requested; (4) failed to satisfy the obligations of H-2B employers; (5) failed to submit an acceptable job offer; and (6) failed to submit a complete and accurate Form ETA-9142B. (AF 126-33.) Specifically, for deficiency 6, the CO noted that

Section F.d., Item 5 indicates “Yes” for employer-provided board, lodging, or other facilities. However, the employer did not state the terms, cost, or indicate in Section F.d., Item 6;⁴ and

The ETA Form 9142, Appendix B submitted by the Employer is not compliant. The Employer submitted an Appendix B with signatures dated in April 2020, which is too distant in time before the filing of the Application for Temporary Labor Certification for the employer to be able to make all the attestations contained in the Appendix.

(AF 133.) The CO instructed the Employer to amend Section F.d., Item 5, and the job order to indicate the terms and costs for housing, or to amend Section F.d., Item 5 to indicate “No.” In addition, the CO instructed the Employer to submit a completed Form ETA-9142B - Appendix B with a new signature and current date. (*Id.*)

On July 29, 2020, the Employer responded to the NOD. (AF 117-21.) The Employer submitted three documents in response to the NOD. First, the Employer submitted a certificate of filing from the Texas Secretary of State, which certified the Employer as a Domestic Limited Liability Company. (AF 117.) Second, the Employer submitted a Department of Treasury Form 940 Employer’s Annual Federal Unemployment Tax Return. (AF 118-19.) Finally, the Employer submitted a document from the Internal Revenue Service’s website that listed the Employer’s EIN. (AF 120-21.)

² “AF” refers to the Appeal File.

³ SOC (O*Net/OES) occupation code 51-9121.00 and occupation title “Coating, Painting, and Spraying Machine Setters, Operators, and Tenders.” (AF 134.)

⁴ I note that the quotation is accurate and any ambiguity is in the original.

On August 5, 2020, the CO issued a Final Determination outlining five deficiencies. (AF 106-116.) The CO concluded that the following five deficiencies remained: (1) failure to establish the job opportunity as temporary in nature; (2) failure to establish temporary need for the number of workers requested; (3) failure to satisfy the obligations of H-2B employers; (4) failure to submit an acceptable job offer; and (5) failure to submit a complete and accurate Form ETA-9142B. (AF 108-16.) Therefore, the CO denied the Employer's Application.

On August 13, 2020, the Employer requested reconsideration. (AF 56-104.) The Employer explained that although it had "all the required documentation," it had difficulties submitting the documents "through the Flag System." (AF 56.) The Employer stated that it "sent full documentation for all deficiencies." (*Id.*) With its request for reconsideration, the Employer submitted a letter of intent from its customer-client stating that it requested supplemental labor from the Employer, a copy of the job duties and job order, and a copy of signed Form ETA 9142B, Appendix B, dated July 29, 2020. (AF 79-104.)

On August 31, 2020, the CO issued a second Final Determination. (AF 42-55.) The CO noted that the Employer's August 13, 2020, request for reconsideration was granted. (AF 45.) However, the CO stated that the deficiencies noted in the first Final Determination remained. (*Id.*) Therefore, the CO denied the Employer's Application.

By letter dated September 1, 2020, the Employer requested administrative review of the CO's Final Determination.⁵ (AF 1-41.) The Employer stated that it had the required documentation and attached to the request for administrative review a letter asserting temporary nature, a letter asserting statement of need, a letter discussing experience required, a copy of the job order, a copy of Form ETA-9142B, a copy of Form ETA-9142B - Appendix A, and a copy of Form ETA-9142B - Appendix B. (*Id.*)

On September 15, 2020, 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. 20 C.F.R. § 655.61(c). Neither the Solicitor nor the Employer filed a brief.

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 of the CO's determination. 20 C.F.R. § 655.61. 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). While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, BALCA has adopted the arbitrary and capricious standard in reviewing the CO's determinations. *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017). Therefore, a CO's denial of certification must be upheld

⁵ The Employer requested "to be reconsidered for the H-2B Visa program." I interpret this as a request for administrative review.

unless shown by the Employer to be arbitrary and capricious or otherwise not in accordance with the law.

The Employer bears the burden of proving that it is entitled to temporary labor certification. 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). The CO may only grant the Employer's Application to admit H-2B workers for temporary non-agricultural 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). 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. 20 C.F.R. § 655.6(b); 20 C.F.R. §655.11(a)(3).

Moreover, under 20 C.F.R. § 655.15(a), the Employer must file a "completed Application Temporary Employment Certification (ETA Form 9142B and the appropriate appendices...)." In the NOD, the CO noted a deficiency of failure to submit a complete and accurate Form ETA-9142B. Specifically, the CO noted that the Employer did not accurately complete Section F.d., Item 5, and that Form ETA-9142B - Appendix B was not compliant. (AF 133.) The CO instructed the Employer to amend its Form ETA-9142B and to submit a new Form ETA-9142B - Appendix B with a new signature and current date. (*Id.*) The CO reiterated the deficiency in its first Final Determination. (AF 116.) In its request for reconsideration following the first Final Determination, the Employer explained that it had difficulty submitting the documents, but noted that it had "all the required documentation." (AF 56.) Although the Employer submitted a new Form ETA-9142B - Appendix B dated July 29, 2020, it did not provide an amended Form ETA-9142B listing the terms and cost of lodging. Therefore, the CO concluded that the Employer did not overcome the deficiency.

Attached to its request for administrative review, the Employer submitted an amended Form ETA-9142B. The Employer does not argue that the CO's determination was incorrect, but instead attempts to submit with its request for administrative review the documentation needed to remedy the deficiencies outlined in the NOD. However, an administrative law judge may consider "only legal arguments 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)(5). Therefore, I cannot consider the documents that the Employer submitted with its request for administrative review. Because the Employer did not submit an amended Form ETA-9142B with a complete and accurate Section F.d., Item 5 before the date the CO's determination was issued, I find that the Employer has not overcome the deficiency listed in the NOD.

Further, I find that the Employer has not demonstrated that the CO's decision to deny certification under 20 C.F.R. § 655.15(f) was arbitrary, capricious, or otherwise not in

accordance with the law. Therefore, the Employer has not met its burden of showing that it is entitled to temporary labor certification.⁶

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's denial is **AFFIRMED**.

For the Board:

JOHN P. SELLERS, III
Administrative Law Judge

⁶ The CO denied the Employer's application on four additional bases: failure to establish the job opportunity as temporary in nature; failure to establish temporary need for the number of workers requested; failure to satisfy the obligations of H-2B employers; and failure to submit an acceptable job offer. Given this appeal can be resolved on the issue of submission of complete and accurate Form ETA-9142B, I need not address the other bases for denial.