



Issue Date: 02 April 2020

BALCA Case No.: 2020-TLN-00029
ETA Case No.: H-400-20002-228172

In the Matter of:

BEAT THE STREET USA, INC.,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

**DECISION AND ORDER AFFIRMING THE
DENIAL OF CERTIFICATION**

Employer requests review of the Certifying Officer's (CO) Non-Acceptance Denial rendered in this H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural 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 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.⁴

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 Employer's request for administrative review, which may only contain legal arguments and evidence that Employer actually submitted to the CO before the date the CO issued a final determination.⁵ A CO's denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law.⁶ After considering the evidence of record, BALCA must:

¹ 20 C.F.R. Part 655.

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).

³ 8 C.F.R. § 214.2(h)(6)(iii).

⁴ 20 C.F.R. § 655.61(a).

⁵ 20 C.F.R. § 655.61.

⁶ See *Brook Ledge, Inc.*, 2016-TLN-33, slip op. at 5 (10 May 16).

(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.⁷

PROCEDURAL BACKGROUND

On 2 Jan 20 Employer applied for H-2B temporary labor certification, seeking approval to hire three foreign nationals as Entertainment Logistic Trainers from 1 Apr 20 to 31 Mar 21, based on a one-time occurrence need.⁸

On 9 Jan 20 the CO issued a Notice of Deficiency (NOD), determining that employer failed to establish the job opportunity as temporary in nature;⁹ failed to establish temporary need for the number of workers requested;¹⁰ failed to submit an acceptable job order;¹¹ and failed to submit a complete and accurate ETA Form 9142.¹²

On 22 Jan 20 Employer responded including a letter of explanation, supplemental statement of temporary need, employer's training programs, employer's business proposals and acceptance emails, purchase and lease agreements, a request to amend form ETA 9142B, and a request to amend the job order.¹³

On 24 Jan 20 the CO issued a Second NOD, listing the singular deficiency as the area of intended employment.¹⁴

On 6 Feb 20 Employer responded with a letter of explanation and a letter from the chief operating officer regarding training programs.¹⁵

On 12 Feb 20, the CO issued a Final Determination denying the H-2B application for a deficiency in the area of intended employment.¹⁶

FACTUAL BACKGROUND

Employer is a domestic application of a European service that provides chauffeur-driven double-decker busses for the entertainment industry.¹⁷ It seeks to use three of its existing European entertainment logistic trainers to train its initial intake of American drivers over an

⁷ 20 C.F.R. § 655.61(e).

⁸ AF 270.

⁹ *Id.*

¹⁰ AF 265.

¹¹ AF 266.

¹² AF 268.

¹³ AF 154-259.

¹⁴ AF 148-153.

¹⁵ AF 141-147.

¹⁶ AF 132-140.

¹⁷ AF 275.

intensive one-year period to train its initial team of between five and ten drivers.¹⁸ The training program involves an initial three-week period of office- and yard-based work that would be performed at the primary worksite location, near Nashville, Tennessee.¹⁹ Any trainee that progresses to the following level of training is observed during 9 weeks of driving and interacting with clientele on a music tour.²⁰ These tours generally start and end in the Nashville MSA, with many US cities on the itineraries.²¹

DISCUSSION

Employer contends that the work of the Entertainment Logistic Trainers will be performed primarily at the listed worksite, in the Nashville MSA.²² Given the nature of the workers' position and the specific assignments, any required travel outside the Nashville MSA is only occasional and incidental to the main job duties and so meets the exception to the rule found in ETA's 4 Oct 16 H-2B Program's Guidance Letter:

As a general rule, an employer seeking to employ workers who will perform work at more than one location outside of a single area of intended employment are required to file a separate application for each area of intended employment, regardless of the number of workers named. However, the Department has recognized that for some job opportunities, work may be required occasionally outside of the usual area of intended employment. For such job opportunities, the Department will consider the primarily location where the work is performed as the official worksite and will permit certification of the job opportunity, even though travel may sometimes be required to other locations that extend beyond the area of intended employment. Certification is permissible, because travel is the exception not the norm.

Employer avers that since the requested employees would be "training" and imparting specific skills, abilities, and knowledge to an employee, that the formal classroom instruction and practical hands-on training conducted in the Nashville MSA are the "norm," and the observation and evaluation are not part of the core training duties. Only when a U.S. driver has successfully passed the first three levels and is ready for final observation and evaluation, would the trainer travel outside the Nashville MSA. Employer notes that it "conclusively establish[ed] that the workers' job opportunity will be performed regularly in the official worksite listed on the Form ETA-9142B and their occasional trips to perform the observation and evaluation will be incidental to their main teaching duties specified in the levels 1 to 3 of the Training Program."

¹⁸ *Id.*

¹⁹ AF 178.

²⁰ *Id.*

²¹ *E.g., see* AF 180-207.

²² AF 5.

The CO denied the application on the basis that Employer had failed to demonstrate that the job took place in a single area of intended employment. “A job that spans multiple areas of intended employment is ineligible for certification.” BALCA has routinely affirmed denials of certification of an H-2B application where the employer requested certification of multiple positions that involved work to be performed across the United States. “Read together, the regulations permit a single application for multiple positions only where ‘all H-2B workers will perform the same services or labor’ in the same ‘geographic area’ within ‘normal commuting distance’ of the primary worksite.” If the positions’ work will be performed outside of the same area of intended employment, an employer is required to file a separate application for each position.²³

BALCA affirmed denial of certification of a single application for 25 truck drivers who were to drive routes throughout the US, since they would not be performing the same services or labor in the same geographic area within normal commuting distance of the worksite.²⁴ “[T]he business of trucking requires movement. The trucks will be dispatched to different locations, along different routes, to serve different ‘market forces’ and satisfy different orders . . . [M]any of those routes and orders will take the truckers beyond southern Arizona.

BALCA also affirmed a denial of an application for certification of twenty multi-lingual tour guides leading trips across the United States and into Canada, from a starting base in Los Angeles. It explained that,

Even accepting the employer’s argument that Los Angeles is the only “worksite,” the geographic area where the job opportunity is performed is not within commuting distance of Los Angeles. Indeed, the tour guide job opportunities will be performed all over the country, and even into Canada. The 20 H-2B workers will not all be traveling together and could be thousands of miles away from each other at any given time as they escort separate tour groups all around the country.²⁵ As such, certification of more than one position cannot be requested on a single application[.]²⁶

APPLICABLE LAW

Employer bears the burden of proving that it is entitled to temporary labor certification.²⁷ An employer seeking H-2B certification must provide, among other things, a copy of the job order being submitted concurrently to the state workforce agency serving the area of intended employment, as set forth in § 655.16.²⁸ The “area of intended employment” influences many

²³ *Manuel Huerta Trucking, Inc.*, 2015-TLN-59 (16 Oct 15)(citing 20 C.F.R. § 655.15(e)-(f).

²⁴ *Id.*

²⁵ *American Tours Int’l, LLC*, 2011-TLN-9 at *8 (16 Mar 11).

²⁶ *Id.* at 8-9.

²⁷ 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011).

²⁸ 20 C.F.R. § 655.18.

other steps of the certification process, e.g. the location of advertising, the state workforce agency to which the job order must be submitted, whether the job qualifications and requirements are bona fide and consistent with other local H-2B employers, etc.²⁹

The regulations define the area of intended employment as

the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought[.] If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.³⁰

Certification of more than one position may be requested as long as all H-2B workers will perform the same services or labor under the same terms and conditions, in the same occupation, *in the same area of intended employment*, and during the same period of employment.³¹

DISCUSSION

The CO determined that the workers' travel outside commuting distance of the Nashville MSA is a core portion of the duties of the position and not occasional, based on the similarity of the duties of truck drivers or tour guides. Even if the initial three-weeks of a class of trainees yielded only 1-2 that progressed to the fourth level of training, the Entertainment Logistic Trainer would spend three times as long with each of those drivers observing and evaluating the trainee on the road, on a music tour. Nine weeks of travel all around the U.S. while observing and evaluating, likely out of every 12 weeks, is a core portion of the Entertainment Logistic Trainer's duties. The three H-2B workers would not all be traveling together and could be thousands of miles away from each other at any given time as they observe and evaluate drivers/chauffeurs on separate music tour groups all around the country. As such, and as found by the CO, certification of more than one position cannot be requested on a single application. As employer has requested three in the same application, I cannot find the CO's denial to be arbitrary or capricious.

²⁹ See 20 C.F.R. §§ 655.15(a); 655.5; and 655.18.

³⁰ 20 C.F.R. § 655.5.

³¹ Emphasis added.

ORDER

In light of the foregoing, the Certifying Officer's decision denying certification is AFFIRMED.

SO ORDERED.

For the Board:

PATRICK M. ROSENOW
Administrative Law Judge