

**Issue Date: 26 February 2020 U.S. Department of Labor Board of Alien Labor  
Certification Appeals**



**BALCA Case No.:** 2020-TLN-00024  
**ETA Case No.:** H-400-20002-224571

*In the Matter of:*

**MILLER TIME MANUFACTURING, LLC.,**  
*Employer.*

**Certifying Officer:** Leslie Abella  
Chicago National Processing Center

**Appearances:** Kathy Haws, Esquire  
Kathy Haws & Associates  
Locust Grove, Oklahoma  
*For the Employer*

**Before:** Larry S. Merck  
Administrative Law Judge

**DECISION AND ORDER**

This case arises from the Employer’s request for review before the Board of Alien Labor Certification Appeals (“BALCA”) of a denied *H-2B Application for Temporary Employment Certification* (“Application”). See 20 C.F.R. § 655.61. For the reasons discussed below, the Certifying Officer’s (“CO”) denial of the Employer’s Application is affirmed. 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.<sup>1</sup> 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” of “DOL”). 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).

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<sup>1</sup> 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). The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Division A, Title I, § 111 (2019).

For the reasons discussed below, the CO's denial of the Employer's Application is affirmed.

### STATEMENT OF THE CASE

On January 2, 2020, Employer Miller Time Manufacturing, LLC. ("Miller Time" or "Employer") filed an *H-2B Application for Temporary Employment Certification* ("Application") with the DOL's Employment and Training Administration. (AF at 330-387).<sup>2</sup> Miller Time seeks temporary certification to hire seventeen full-time fabrication welders for employment at their utility trailer manufacturing site with a start date of April 1, 2020 and an end date of January 1, 2021. (AF at 330).

On January 15, 2020, the CO issued a "Notice of Deficiency" ("NOD") identifying four deficiencies with Miller Time's application. (AF 321-329). One of the deficiencies identified was that Miller Time failed to submit an acceptable job order pursuant to 20 C.F.R. §§ 655.16 and 655.18. The CO stated (in part):

If the employer states in Section F.d, Item 5 of the ETA Form 9142 that they intend to provide workers with board, lodging, or other facilities, and/or intends to assist workers to secure such lodging . . . the employer must mention housing in the job order.

(AF 327-328).

In order to remedy the deficiency, the CO directed Miller Time to amend its job order to list the housing availability and to state that the housing was optional so that the language was consistent throughout the application. (AF 328).

On January 23, 2020, Miller Time filed a Response to the NOD. (AF 295-319). In response to the deficiency with the job order, Miller Time stated:

Employer has amended Section F. d, Item 6 to indicate workers will be provided with board, lodging or the employer will assist workers in securing other facilities. Housing to the worker is optional at no cost to the worker.

(AF 297).

In addition to the amended ETA form, Miller Time amended the job order #1813148 to state that "Housing is available and optional to the worker." (AF 317).

On January 27, 2020, the CO issued a Final Determination denying the Employer's Application. The CO concluded that the Employer failed to rectify three deficiencies, including the deficiency regarding the language in the job order. (AF 282-294). In the Final Determination, the CO stated:

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<sup>2</sup> References to the Appeal File appear as "(AF at [#])."

In response to the NOD, the employer provided housing language for its ETA Form 9142 that corrected the deficiency which states:

“Workers will be provided with board, lodging, or the employer will assist workers in securing other facilities. Housing to the worker is optional at no cost to the worker.”

However, the employer also provided an amended job order. Its housing language does not match the language now included in the employer’s ETA Form 9142. The job order states, “Housing is available and optional to the worker.”

Furthermore, the language included in the job order does not include the cost of housing. The information submitted with the NOD response shows that optional housing is available free of charge to the worker. Interested U.S. applicants must be informed of this via the job order.

Therefore, the employer did not overcome the deficiency.

(AF 293).

On February 6, 2020, Miller Time timely filed a Request for expedited administrative review of the CO’s denial of its Application. (AF 1-12.) Miller Time noted that in its denial, the CO stated that Employer did not include the cost of the housing in the Employer’s job order. (AF 2). Miller Time argued that “the job order clearly states that housing is available and optional to the worker.” It further argued that “the cost of housing is not included in the Employer’s listed payroll deductions.” (AF 2).

On February 6, 2020, BALCA docketed the appeal. The case was assigned to the undersigned on February 20, 2020. The same day the undersigned issued a Notice of Docketing and Order Setting Brief Schedule, permitting the parties to file briefs within seven days of receiving the Appeals File. 20 C.F.R. § 655.61(c). BALCA received the Appeals File on February 13, 2020. Neither party filed a brief.

## DISCUSSION

BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00004/17, slip op. at 4-5 (Feb. 21, 2012). “The scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application.” 20 C.F.R. § 655.33(a), (e). The employer bears the burden of proof to establish it has met the requirements under the H-2B program. *D&R Supply*, 2013TLN-00029 (Feb. 22, 2013) (*citing* 8 U.S.C. § 1361).

Granting an employer's request for temporary labor certification for the employment of foreign workers in the H-2B nonimmigrant classification of the Immigration and Nationality Act ("INA") reflects that the Secretary of Labor ("Secretary") has made the following two determinations:

- (1) There are no sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to hire foreign workers, and that
- (2) The employment of the H-2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.

20 C.F.R. § 655.1(a).

Having reviewed the evidence of record, I find that the Employer failed to comply with 20 C.F.R. §§ 655.16 and 655.18.

The regulation at 20 C.F.R. 655.16(b) provides that the State Workforce Agency "must review the job order and ensure that it complies with criteria set forth in § 655.18." Under 20 C.F.R. § 655.18(a)(1), the Employer's job order "must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2B workers." Moreover, pursuant to 20 C.F.R. § 655.18(b)(10), if an "employer provides the worker with the option of board, lodging, or other facilities, including fringe benefits, or intends to assist workers to secure such lodging, disclose the provision and cost of the board, lodging, or other facilities, including fringe benefits or assistance to be provided."

In response to the CO's NOD, the Employer amended ETA Form Section F.d, Item 5 to state that "workers will be provided with board, lodging or the employer will assist workers in securing other facilities." (AF 319.) The Employer also amended its Application to state that "housing to the worker is optional at no cost to the worker or housing is optional." (AF 319). Although, Miller Time amended its job order to state that "housing is available and optional to the worker," it did not inform U.S. applicants that it would provide housing at no cost. (AF 317). As discussed above, the regulation at 20 C.F.R. 655.18(a)(1) requires the Employer to offer U.S. workers "no less than the same benefits, wages, and working conditions" that it intends to offer to H-2B workers. Here, the Employer did not apprise U.S. applicants that it would provide housing at no cost, whereas it did include that information in its Application. Because the benefits the Employer listed in its Application were less than the benefits listed in its job order, I find that the Employer failed to comply with 20 C.F.R. § 655.18.

Because Miller Time's job order failed to notify U.S. workers that it would provide them housing at no cost, it failed to meet the requirements of 20 C.F.R. §§ 655.16 and 655.18. The other deficiencies noted in the Final Determination need not be addressed here, as the failure to overcome the job order deficiency is a sufficient basis to affirm the CO's determination.

**ORDER**

Accordingly, it is hereby **ORDERED** that the Certifying Officer's Final Determination is **AFFIRMED**.

For the Board:

**LARRY S. MERCK**  
Administrative Law Judge