Issue Date: 26 August 2020

BALCA Case No.: 2020-TLN-00051
ETA Case No.: H-400-20185-694424

In the Matter of:

MOREL LANDSCAPING, LLC

Certifying Officer: Leslie Abella
Chicago National Processing Center

Before: Peter B. Silvain, Jr.
Administrative Law Judge

ERRATA

On August 25, 2020, the undersigned issued a Decision and Order affirming the Certifying Officer's denial of the Employer's H-2B application for temporary labor certification. Through administrative error, however, the wrong portable document format ("PDF") was uploaded into the case tracking system and erroneously served on the parties in this matter. Therefore, the August 25, 2020 Decision and Order is hereby corrected and reads as follows:

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals ("BALCA") pursuant a request for review of the Certifying Officer's ("CO") Final Determination in the above-captioned H-2B temporary labor certification matter by Morel Landscaping, LLC. ("the Employer").[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,

[1] On April 29, 2015, the Department of Labor 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.

peakload, or intermittent basis.[2] Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the Department of Labor ("Department"). 8 C.F.R. § 214.2(h)(6)(iii). A CO 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).

BACKGROUND

On July 3, 2020, the Employer's representative filed an *Application for Temporary Employment Certification*, Form ETA-9142B ("Application") under the H-2B program.[3] (AF 55-57). The Employer requested certification for twelve Landscape Laborers (SOC "Landscaping and Groundskeeping Workers"), with the H-2B employment occurring from October 1, 2020, through November 30, 2020, at a site in North Royalton, Ohio, based on an alleged seasonal need for workers during that period. (AF 3, 42, 45). The Employer included an Addendum to its Application:[4]

ADDENDUM FOR SECTION B.8: STATEMENT OF TEMPORARY NEED

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

[3] In the Employer's brief it states that "MAS Labor H2B, LLC ('másH2B') is the Employer's non-attorney agent-of-record for matters pertaining to its participation in the H-2B program, and is filing this appeal on the Employer's behalf." (Employer's Brief at 1). However, the Agent in this case has signed the Employer's Brief "Devon Kenefick, *Associate Counsel*, Mas Labor H2B, LLC, Non-attorney Agent Representative." (*Id*. at 13 (emphasis added)). In the legal profession, the term "Counsel" is a term of art, especially when being used to sign a pleading filed with the U.S. Government in a legal proceeding. In relevant part, Black's Law dictionary provides the following definition of the word"counsel": "One or more lawyers who, having the authority to do so, give advice about legal matters; esp., a courtroom advocate <the client acted on advice of counsel>. — In the singular, also termed counselor; counselor-at-law. Cf. attorney; lawyer." Despite the inclusion of the later term "Non-attorney Agent Representative," I find that Ms. Kenefick's signature block is likely to confuse or mislead individuals as to the Agent's status. Further, I note that Ms. Kenefick has used the title "Associate Counsel" without the disclaimer of her non-attorney status in her filings with the Department of Labor. (*See* AF 28). The instant claim involves representation of an Ohio corporation by Mas Labor H2B, LLC, which appears to be an Ohio agency, in a federal proceeding. Although the regulations allow agents to file non-agricultural H-2B applications and represent employer's seeking workers in proceedings before BALCA, this does not equate to the use of a potentially misleading title implying both the attainment of an accredited law degree *and passage of a state bar*. Notably, the particular Act which the Employer is relying on to seek foreign workers includes the definition: *Attorney* means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the U.S., or the District of Columbia. (*See* 20 CFR § 655.5). Both federal law and Ohio state law contain significant provisions regarding the unauthorized practice of law and prohibit acts which may mislead individuals as to a non-attorney's status as a lawyer. I do not believe that Mas Labor H2B or Ms. Kenefick have filed these pleadings with the intent to deceive the parties regarding their status. Further, I am in no way trying to denigrate the quality of the work submitted by Ms. Kenefick in these proceedings. However, it is essential in an ethical legal process for representatives to accurately state their qualifications and earned title *at the time pleadings are filed*. In the future, MAS Labor H2B will refrain from using the word "counsel" for any representative who is not an attorney pursuant to 20 CFR § 655.5 in H-2B temporary labor certification matters before me.

[4] Full caps changed to lower case in the reproduction of the addendum text for legibility.

To establish our temporary need for H-2B workers, we refer you to the H-2B detailed Statement of Temporary Need previously submitted with ETA case # H-400-20002-225060, a copy of which is additionally uploaded.

Post-certification refile our requested beginning date of need for this current application is later than the most recent 2020 labor certification that DOL/CNPC granted prior to the start of our traditional season. Morel landscaping, LLC was most recently certified to employ H-2B workers beginning in April 2020. Because the Department of Homeland Security did not release additional cap relief visas for Fiscal Year (FY) 2020, we were unable to meet the entirety of our previously approved labor need. We remain unable to satisfy our bona fide temporary labor need through the H-2B program due to lack of available visas as well as an insufficient number of U.S. applicants ready, willing, and available to perform the work.

Our requested end date of need remains unchanged from our prior certification, and our truncated period of employment remains within our previously established season. Given that our industry traditionally experiences an increased workload in the fall months with tree/shrub installation, intense clean-up work, mulching, and other tasks to ready properties in advance of winter, we are filing this replacement application to meet our labor need for the remainder of our established season.

This new, fully compliant ETA FORM 9142B (in accordance with OFLC H-2B FAQ round 12) represents the earliest date that we reasonably expect to employ H-2B workers. This application does not represent additional seasonal workers, as the statutory visa cap impeded the full use of the earlier labor certification (H-400-20002-225060). While we were able to locate 10 H-2B workers in the US, we still have a need for the remaining temporary workers to meet our previously approved need. A copy of the I-797B showing that we have only used 10 of the visa spots has been uploaded for your reference.

This subsequent Labor Certification Application should not be interpreted to suggest that the dates of need specified in our previous H-2B application was anything other than true and accurate. Nor, for that matter, is it indicative of an unpredictable or lack of a temporary labor need. To the contrary, our unanticipated inability to obtain the workers earlier in our season has caused irreparable harm, financially as well as reputational harm and loss of goodwill. We have undertaken reasonable efforts to satisfy our labor need through alternative means and have been unsuccessful in doing so.

While we fully expect to file future applications with worker numbers and dates of need more comparable to our historical filing patterns, the present application represents only a portion of our standard labor need and work season (for the reasons discussed above). The number of workers represents our current assessment of the local labor market and historical demand for services during the remaining months of our season. Our inability to employ the full number of foreign H-2B workers earlier in our season does not negate the legitimacy of our ongoing temporary labor need, as we are dependent on a labor force of sufficient size to complete our work obligations for the balance of our season.

(AF 47).

On July 9, 2020, the CO issued a Notice of Deficiency ("NOD"), which found that "employer has submitted an application that matches a filing for which the employer previously received certification. The current filing is for the same position in the same area of intended employment, and for an overlapping period of need as a prior, still valid certification." (AF 34). The CO provided further detail, stating that:

> The employer provided an explanation that while it was certified for 22 workers in its prior application (H-400-20002-225060), it was unable to fill all of its positions due to the H-2B visa cap. The employer stated that it was able to locate 10 H-2B workers already in the U.S., providing I-797A Notices of Action in support, and is now requesting 12 workers for the remaining 12 positions unfilled. However, the employer may only receive one certification for the same job opportunity, area of intended employment, and period of employment need. The employer is not permitted to file for a new application for the same job opportunity with partially open positions due to the unavailability of H-2B visas in a prior certification.
>
> **Additional Information Requested:**
> The employer must provide a detailed explanation and supporting documentation that demonstrates that the work described in the certification application is not the same as that covered by the newly filed application. The Department notes that the employer has already indicated that the newly filed application is for the same job opportunities as those for which it has already received certification.
>
> OR
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> The employer must provide support to show that it has a need for additional workers, totaling 34 Landscaping and Groundskeeping Workers, SOC Occupational Title, 37-3011, and also demonstrate that this need was not present at the time the employer's prior application was filed.
>
> The employer must provide:
>
> 1. An explanation with supporting documentation of why the employer is requesting 34 Landscape Laborers, SOC Occupational Title, Landscaping and Groundskeeping Workers, for 13928 Progress Pkwy, North Royalton, OH 44133 during the dates of need requested. The explanation must include supporting documentation concerning why the employer is requesting an additional 12 workers for the same worksite(s) and provide information to demonstrate that this need was not present at the time the employer's prior application was filed;
> 2. If applicable, documentation supporting the employer's need for 34 Landscape Laborers, SOC Occupational Title, Landscaping and Groundskeeping Workers, such as contracts, letters of intent, etc. that specify the number of workers and dates of need;

3. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system;
4. An explanation of the data in submitted payroll documentation; and
5. Other evidence and documentation that similarly serves to justify the total number of workers requested, if any.

The Department notes that the employer has already indicated that the newly filed application is for the same job opportunities as those for which it has already received certification.

Note: If the submitted document(s) and its relationship to the employer's need is not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) supports its requested number of workers.

The employer cannot make modifications to the form itself. We require your written permission to make any corrections to the application on your behalf.

If the employer is seeking to use a portion of slots from a certification for cap-exempt workers, while at the same time filing a new application under a new cap, for cap-subject workers, this is not permitted. The employer must notify the Department that it wishes to withdraw the current application.

(AF 34-35, 40-41).

On July 10, 2020, Employer's Representative responded to the NOD, stating in pertinent part that:

The Employer is requesting twelve (12) temporary Landscape Laborers on its current application (H-400- 20185-694424), which represents its current total need for Landscape Laborers at this location for this requested period of employment. The Employer had previously noted these circumstances in its Statement of Temporary Need, which was submitted concurrently with the ETA Form 9142.

The Employer is <u>not</u> requesting 34 Landscape Laborers. Under the Employer's current application with a start date of October I, 2020, the Employer is only requesting twelve (12) Landscape Laborers. This application represents a portion of the Employer's need that was not satisfied under its April 1, 2020 application due to visa cap limitations. The Department errs in its determination that the Employer is filing a new application for the same job opportunity with partially

open positions due to the unavailability of H-2B visas in a prior certification. The Employer's current application is for a different start date, making this a different period of employment.

The pertinent regulations at 20 CFR § 655.IS(f) state, "only one *Application for Temporary Employment Certification* may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for **each** period of employment." (Emphasis added). The Employer is not attempting to obtain two labor certifications for the same period of employment, as the application at issue is for a different period of employment than that of the Employer's April 1st application, (H-400- 20002-225060).

The Employer will not be amending the number of workers requested on its current application, as the prior labor certification, (H-400-20002-225060), was not utilized to cross the full number of certified workers. USCIS will be able to confirm that the prior labor certification (H-400-20002-225060) was used solely to cross ten (10) cap-exempt out-of-country workers on a named petition. The remaining twelve (12) positions have not been filled and the prior labor certification will not be used to obtain workers. If there was a method in which the Employer could return a portion of the certification they would do so, but unfortunately, no such method exists within the parameters of the H-2B program.

(AF 27).

On July 16, 2020, the Employer's representative emailed USCIS stating that:

H- 2B employer Morel Landscaping, LLC remains unable to use the balance of their H- 2B labor certification for ETA Case # H- 400- 20002- 225060 and is hereby formally surrendering the unused portion. The case was certified on February 26, 2020 for 22 positions. As this occurred after US Citizenship and Immigration Services reached the second half visa cap on February 18, 2020, the employer was unable to request the full amount of visa slots with your agency. Fortunately, they were able to locate 10 cap exempt workers (petition WAC- 20- 134- 50517), leaving 12 positions remaining on this labor certification (H- 400- 20002- 225060). This email serves as notification to your office of the unused portion of the labor certification and to attest that Morel Landscaping, LLC has no intention of utilizing the unused positions associated with said certification. A copy of this email will also be submitted to DOL as part of the employer's in- process application with an October 1, 2020 date of need (H- 400- 20185- 694424). The October 1, 2020 application will serve as a replacement for, not in addition to, the unused portion of the earlier (capped) certification.

(AF 21).

The CO issued a Final Determination on July, 17, 2020, denying the Employer's application seeking H-2B temporary non-agricultural temporary labor certification. As stated in the NOD, the CO found that the Employer's pending application is "for the same position in the same area of intended employment as a previously submitted application, H-400-20002-225060, for which the employer received certification." (AF 19). The CO noted the prior certification for twenty-two workers from April 1, 2020, to November 30, 2020, is still valid. As a result, the CO determined that the current filing, which "seeks certification to employ 12 workers from October 1, 2020, to November 30, 2020" overlaps with the period of need of the previously-certified application. (AF 19-20).

On July 29, 2020, the Employer filed the instant appeal of the CO's determination. (AF 2-11). This case was assigned to me on July 30, 2020, and I 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). The Appeal file was received from the Department of Labor on August 6, 2020. A brief was received by the Employer on August 13, 2020 and by the Solicitor on August 14, 2020.

STANDARD OF REVIEW

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, the Board 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).

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 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). Employer bears the burden of demonstrating eligibility for the H-2B program. *See* 8 U.S.C. § 1361. To obtain certification under the H-2B program, an employer must establish that its need for workers qualifies as temporary under one of four standards: one time occurrence, seasonal, peak-load or intermittent. 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The CO's denial of the Employer's July 3, 2020 application pursuant to 20 C.F.R. § 655.15(f) is not arbitrary, capricious or contrary to law.

Twenty C.F.R. § 655.15(f) states in pertinent part that "[e]xcept as otherwise permitted by this paragraph (f), only one *Application for Temporary Employment Certification* may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment."[5]

On February 26, 2020, the Employer received certification for twenty-two Landscape Laborers. Despite this, the Employer asserts that they were unable to fully "utilize the entire labor certification to cross the full number of workers for which it was approved." (AF at 27). In particular, the Employer notes that "the visa cap limit was reached for the second half of Fiscal Year 2020 before the Employer was able to obtain all visas for out-of-country workers." (*Id.*). However, as the Employer goes on to explain, it "was able to locate ten (l0) out-of-country cap exempt workers and filed a named petition to bring in these workers using its valid labor certification with the start date of April 1, 2020." (*Id.*).[6]

The Employer asserts that its July 3, 2020, for twelve Landscape Laborers should not have been denied by the CO for the following reasons: (1) the July 3, 2020 application only represents a portion of the Employer's need from the February 26, 2020 approval, that was not satisfied by the previous April 1, 2020 start date workers, and is not an attempt to obtain two labor certifications "for the same period of employment" as prohibited by 20 C.F.R. § 655.15(f); (2) allowing employers to return totally unused certifications as opposed to partially used certifications is arbitrary and unsupported by the regulations; and (3) the Employer is improperly prejudiced by its inability to "surrender" a portion of the partially utilized February 26, 2020 certification, in a way that other employers have been allowed in the past.

A. *The Employer's two H-2B applications cover the same period of employment.*

The Employer's initial H-2B application requested Landscaping Laborers for a period starting on April 1, 2020 and ending on November 30, 2020. (AF 25). Thereafter, the Employer

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[5] 20 C.F.R. § 655.15(f)(1)-(2) provides exceptions to these requirements for the seafood industry which are only indirectly relevant to the case at hand. These exceptions in the regulations were promulgated pursuant to the 2015 Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014), and provide for staggered starting work dates for the seafood industry but not for other H-2B applicants. The only relevance of this to the instant case is that it demonstrates that Congress chose to provide this relief to the seafood industry, and despite their awareness of the potential for staggered starting dates, determined not to extend this relief to other types of employers. *See* Consolidated and Further Continuing Appropriations Act § 108; 80 Fed. Reg. at 24,060. Therefore, approval of the requested staggered dates in the instant case would be contrary to Congressional intent.

[6] Throughout its arguments the Employer emphasizes the difficulties imposed on this process by the vagaries of the yearly federal visa cap numbers. While the practical difficulties this poses are substantial and obvious, these are appropriate arguments before the legislative branch of the federal government and not for administrative adjudication.

sought the same Landscape Laborers from October 1, 2020 to November 30, 2020 in its July 3, 2020 application. The Employer's argument is that, although the periods of need overlap, they are not the "same" and therefore 20 C.F.R. § 655.15(f) does not bar its current application. However, the assertion that these are separate "overlapping" time periods is specious when one considers that these are the identical positions and the period of the initial approved certification entirely subsumes the requested period from the second application. I concur with Judge Bland's findings in *KDE Equine, LLC d/b/a Steve Asmussen Racing Stable*, 2020-TLN-00043, slip. op. at 9 (May 20, 2020) that this Employer's application impermissibly seeks H-2B workers for the same job opportunity and period of employment as their previous certification, even though the start dates of employment differed. Further, I find persuasive the Solicitor's argument that the rationale behind the 20 C.F.R. § 655.15(f) restriction was clearly set forth at the time the rulemaking. Specifically, the Solicitor explained that "it would continue to prohibit 'staggered entries based on a single date of need,' in order to 'ensure that employers provide U.S. workers the maximum opportunity to consider the job opportunity.'" (CO's Brief at 5-6, *quoting* Final Rule, Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,038, 10,062 (Feb. 21, 2012)). As the Solicitor notes, for this reason, an employer must file individual complete applications, sufficiently establishing temporary need for the requested labor, in order to hire workers for the same job in the same location during the same time period, even if the starting dates vary. (CO's Brief at 6).

B. *Employer is not improperly prejudiced by its inability to "surrender" a portion of the partially utilized February 26, 2020 certification.*

The Employer also argues that the Department's willingness to permit employers to surrender unused certifications as opposed to partially-used certifications is arbitrary and requires a full rulemaking process to effectuate. The Solicitor responds that, as the administrator of the program, the OFLC/Department of Labor has determined that the plain language of the regulations does not prohibit the Department from "accepting the return of unused certifications in order to allow employers to subsequently file applications for the same job opportunities," but that doing so for partially-used certifications would make required administration impossible and potentially violate these same regulations.

After review, I can find no applicable statutory or regulatory prohibition on the OFLC/DOL, as the program administrator, allowing employers to surrender *unused* certifications. The Solicitor credibly asserts that "[t]hrough this procedure, OFLC balances flexibilities for employers that may not always be able to accurately predict their labor needs, and/or who may ultimately choose not to participate in the program, with the Department's available integrity measures under the regulations." (CO's Brief at 10). I further find credible the CO's distinction that allowing the same process of surrender for partially-used certifications would cause substantially greater difficulty in administration of the audit/verification/revocation procedures which are regulatorily required of OFLC (*See* 20 C.F.R. § 655.70; 20 C.F.R. § 655.72), and might lead to a violation of § 655.15(f), which prohibits the filing of more than one application for the same job in the same location for the same time period.

The Employer's own application demonstrates the practical difficulties inherent in a partial surrender process. As previously described, the Employer submitted a July 3, 2020

application for twelve workers during a time period where it had already attained a certification for twenty-two workers. While the Employer in this case laudably submitted a multi-paragraph addendum which attempted to portray the complex situation it faced, there is no guarantee that other employers would be so diligent. It would be entirely understandable for a CO in receipt of such an application to believe an employer was seeking thirty-four workers for the same job in the same location and for the same period of time even after a partial surrender of a prior certification.

Thus, based on the foregoing, I find that the OFLC's policy of allowing employers to surrender unused certifications as opposed to partially-used certifications is not arbitrary, capricious or contrary to law.

C. *The assertion that OFLC has approved H-2B applications after a partial surrender of a prior certification in other cases is not part of the record in this case and cannot be considered.*

The Employer has listed six cases in which it asserts that COs have allowed employers to surrender partially used certifications and submit new applications for the unfulfilled portions. (Employer's Brief at 11). These cases were not part of the record when this matter was pending before the CO for determination. Therefore, these cases are not of record and I cannot them in making a decision in this case.[7] *See* 20 C.F.R. § 655.61(a)(5).

ORDER

Accordingly, for the reasons described, I find that the Certifying Officer's decision denying the Employer's July 3, 2020 Application for Temporary Employment Certification is neither arbitrary or capricious nor contrary to the relevant law and is therefore, **AFFIRMED**.

[7] Even assuming *arguendo* that I could consider these cases, *inadvertent* approval of an application after surrender of partially fulfilled certifications would not be fatal to the CO's case. However, the CO should note that intentional approval of such cases on *some* occasions without elucidation as to the relevant difference in treatment of the various employers/certifications (or other statutory/regulatory support) would be the type of conduct which may be determined as arbitrary and capricious. Unless there is a statutory or regulatory basis for treating employers differently (i.e., congressional action regarding the seafood industry) *all* employers must have the same opportunities for appropriate access to foreign workers' under the provisions of the Act.

For the Board:

Digitally signed by PETER SILVAIN JR.
DN: CN=PETER SILVAIN JR.,
OU=ADMINISTRATIVE LAW JUDGE,
O=US DOL Office of Administrative Law
Judges, L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

Peter B. Silvain, Jr.
Administrative Law Judge