



Issue Date: 20 May 2020

OALJ Case No.: 2020-TLN-00043
ETA Case No.: H-400-20044-322231

In the Matter of

KDE EQUINE, LLC,
d/b/a STEVE ASMUSSEN RACING STABLE
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

DECISION AND ORDER AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case arises from KDE Equine, 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 nonimmigrant 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, peak-load, 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 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. §

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (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.

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).

BACKGROUND

On February 13, 2020, the Department of Labor’s Employment and Training Administration (“ETA”) received Employer’s application for temporary labor certification. AF 81-98.³ Employer requested certification of “45 Nonfarm Animal Caretakers” based on a temporary “peak-load” need from May 1, 2020 to November 30, 2020. *Id.*

In its application, Employer reported that it is a thoroughbred horse racing stable, and that the president and trainer have been in the thoroughbred horse trainer industry for many years. AF 86. Employer then stated that it, “currently employs permanent employees but needs to temporarily supplement its permanent staff due to the high demand of the racing season in Kentucky.” *Id.* Employer indicated that the temporary workers would stop working, “in the near, definable future, as they are not needed past November 30, 2020.” *Id.* Looking to the responsibilities of the workers, Employer stated that the temporary stable attendants are needed to “perform the services required, in addition to taking care of the horses, cleaning and washing the horses, feeding, inspecting, and exercising the horses, according to instructions.” *Id.* The need for these stable attendants is peak-loaded, and the conditions requiring temporary labor are expected to be recurrent each year. *Id.* In its application for employment, Employer indicated that the worksite would be Churchill Downs in Louisville, Kentucky. AF 84.

On March 18, 2020, the CO issued Employer a Notice of Deficiency (“NOD”) explaining that Employer’s application contained deficiencies. According to the NOD, Employer:

- (1) Failed to submit a complete and accurate ETA Form 9142 under 20 C.F.R. § 655.15(a); and
- (2) Failed to comply with application filing requirements under 20 C.F.R. § 655.11(e)(3) & (4).

AF 78 - 80.

1. Failure to submit a complete and accurate ETA Form 9142

The CO wrote that Employer submitted an ETA form 9142, but that Employer did not accurately complete the following fields/items:

In Section F.d., Item 5 of the ETA Form 9142, the employer indicates “yes” for board, lodging, or other facilities. However, the details of the offer is (sic) not discussed in section F.d., Item 6 or anywhere detailing the ETA Form 9142. Moreover, the job order indicates, “Only Lodging included. Lodging (room) is provided free of charge in the backstretch.”

³ References to the Appeal File are abbreviated with “AF” followed by the page number.

AF 78.

The CO further stated that Employer must either remove the above language, or state, “whether ‘The employer does not provide housing or board during the term of employment’, or ‘Only Lodging included. Lodging (room) is provided free of charge in the backstretch.’” *Id.*

2. Failure to comply with application filing requirements

The CO stated that pursuant to “20 CFR 655.15(f), only one Application for Temporary Employment Certification may be filed for worksites(s) within one area of intended employment for each job opportunity with an employer for each period of employment.” *Id.* According to the CO, Employer submitted two applications for the same position, during the same period of need, in the same area of employment. *Id.* The CO goes on to summarize Employer’s prior filings in the following chart:

Case #	Workers Requested	Location	Occupation Code	Occupational Title	Dates of Need
H-400-20044-322231	45	700 Central Avenue Churchill Downs Louisville, Kentucky 40208 Jefferson	39.2021.00	Nonfarm Animal Caretaker	May 1, 2020- November 30, 2020
H-400-20002-229255	70	700 Central Avenue Churchill Downs Louisville, Kentucky 40208 Jefferson	39.2021.00	Nonfarm Animal Caretaker	April 1, 2020- November 30, 2020

Id.

The CO further asserted that, “employer, therefore, appears to have submitted a second application for the same job opportunity, area of intended employment, and overlap dates of need or is requesting a total of 115 Nonfarm Animal Caretakers.” AF 79. Further, the CO wrote, “In either case, the employer may not submit more than one application for the same job opportunity within the same area of intended employment for the same dates of need.” *Id.* The CO informed Employer that they must either withdraw one of the applications, or demonstrate that the applications are for two different job opportunities.

The CO then requested additional information if Employer chose to change the number of workers on its current application. The CO specifically requested Employer to submit:

1. An explanation with supporting documentation of why the employer is requesting 115 Nonfarm Animal Caretakers for Louisville, Kentucky during

- the dates of need requested. **The explanation must include supporting documentation concerning why the employer is requesting an additional 45 workers for the same worksite(s)**;
2. If applicable, documentation supporting the employer's need for 115 Nonfarm Animal Caretakers 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 employer, 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; and
 4. Other evidence and documentation that similarly serves to justify the total number of workers requested, if any.

Id.

Further, the CO directed that, "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." *Id.*

Alternatively, if Employer was not able to use a prior certification due to the H-2B cap, they were instructed that they, "must notify the Department of its intent to 'return' the certification and not pursue workers under that certification. H-2B regulations do not permit the withdrawal of certifications, but the Department will notify the USCIS that the certification has been 'returned' and may not be used." *Id.*

On March 19, 2020, Employer responded to the CO's Notice of Deficiency. AF 28 - 73. Addressing the first deficiency, Employer requested, "that the ETA Form 9142, Section F.d. Item 5, Item 6, and the Job Order be amended to include: Optional housing and utilities will be provided free of charge to the workers in the backstretch, in order to remain consistent." AF 28. Employer then granted the CO permission to make further corrections to the application on their behalf. *Id.*

With regard to the second deficiency, Employer provided a background of the business and Employer's president. AF 29. Employer listed their president's overall earnings for the past four years, which demonstrated an increase in earnings. *Id.* Employer then provided that, "because the employer is seeing a significant increase in earnings and business expansion, they filed a second **cap-exempt** application, (H-400-20044-322231) for their current temporary H-2B workers who are employed at their Oklahoma worksite location (1 Remington Place, Oklahoma City, OK 73111) ..." *Id.* Employer indicated that the workers from the Oklahoma location would, "begin a temporary, peak-load employment from May 1, 2020 to November 30, 2020, in Kentucky at the worksite location of 700 Central Avenue, Louisville, KY 40208." *Id.* Further, regarding the workers from the Oklahoma site, Employer stated:

These temporary H-2B workers started their employment period from October 1, 2019 and will end on May 1, 2020. Furthermore, because the employer is requesting to extend the stay of these temporary H-2B workers, their job duties remain the same; to take care of the horses, feed them, exercise, and inspect them according to instructions. Because of this, case number H-400- 20044-322231 is a cap-exempt application, and thus, not counted towards the H-2B cap.

According to the United States Citizenship and Immigration Services (USCIS), **workers in the United States in H-2B status who extend their stay, change employers, or change the terms and conditions of employment will not be subject to the cap.** Similarly, H-2B workers who have previously been counted against the cap in the same fiscal year that the proposed employment begins will not be subject to the cap if the employer names the workers on the petition and indicates that they have already been counted. Because these workers are on a H-2B visa in Oklahoma, they are not changing employers, but **changing their worksite location (from Oklahoma to Kentucky) and changing their prevailing wage determination (PWD) (from \$10.99 to \$11.53 per hour), which are material changes.**

Id.

Employer next explained their need for the temporary workers. They stated that there is a lack of a legal qualified workforce, and that employing these 45 workers from the Oklahoma site, “ensures that their horse racing season and their substantial investment they have made, and the safety of the horses will not be jeopardized or compromised.” AF 30. Employer then submitted the following chart that demonstrates the use of their H-2B workers in 2019:

<u>Quarter</u>	<u>Number of Employees</u>	<u>H-2B (Temporary Workers)</u>
1 (January, February, March)	196 Employees	0 Employees
2 (April, May, June)	237 employees	64 Employees
3 (July, August, September)	269 Employees	54 Employees
4 (October, November, December)	255 Employees	73 Employees

Id.

Employer explained in their response that as evidenced by the chart above and the documentation attached, **“the number of employees increased during peak-load periods, specifically during the months of April through November, showing the pattern that more employees, temporary employees, are being hired in the second, third and fourth quarters during the peak-load racing season.”** *Id.* (Emphasis in original).

Regarding the fact that Employer submitted two separate applications, Employer stated that even though the applications are similar, they should be considered different because they are for different dates of need. Employer then noted that, “In addition to the employment period being different, there are also material changes involved, which include the H-2B workers coming from a different worksite location (Oklahoma to Kentucky) and with a different PWD.” AF 31. At the end of their response to the NOD, Employer requested that the CO adjudicate their application for the Oklahoma workers as a separate petition.

On April 20, 2020, the CO issued a Final Determination. AF 19-27. The CO stated that certain noted deficiencies still remained from the original NOD. AF 22. The CO reiterated that, “in accordance with 20 CFR 655.15(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.” *Id.* The CO noted that Employer submitted an “Equibase Earnings Chart Trainer Profile for Steven M. Asmussen,” and determined that the data contained in the profile did not establish a need for an additional 45 Stable Attendants at the Kentucky location for the dates requested. AF 25.

The CO next addressed Employer’s claim that because the workers were on an H-2B visa in Oklahoma, they would not be changing employers. The CO stated that although the workers will be changing worksite, “the current application H-400-20044-322231 represent the same job opportunity within the same area of intended employment for the same period need as previously certified application H-400-20002-229255.” *Id.* The CO noted that even though Employer submitted two different PWDs, the PWDs do not establish that the current application represents a different job opportunity than the previous certified application. AF 26.

Further, the CO referenced Employer’s explanation that they needed additional temporary workers due to the lack of legal qualified work force present. *Id.* The CO stated that neither a labor shortage, nor the 2019 Quarterly Tax Returns submitted by Employer are sufficient to “establish a need for an additional 45 workers in the area of intended employment for a period of need from May 1, 2020 through November 30, 2020.” *Id.* The CO then indicated that the quarterly employee lists and monthly gross pay report submitted by Employer were not in the format specified in the NOD, and therefore it was unclear as to how they support Employer’s request for an additional 45 workers. *Id.*

Lastly, the CO addressed the 2019 horse inventory Employer submitted in its response to the NOD. *Id.* The CO indicated that the inventory list submitted was the same list submitted for Employer’s previous certified application for 70 Stable Attendants, and, “As a result, it remains unclear how the employer’s horse inventory establishes a need for an additional 45 workers in the same area of intended employment from May 1, 2020 through November 30, 2020.” AF 27.

On April 23, 2020, Employer appealed the CO’s denial. AF 1-17. Employer argued that their prior application, which was certified on February 11, 2020, was actually two applications that were recommended to be consolidated. AF 1. Employer reiterated that, “The workers’ temporary, peak-load employment period, for case number H-400-20044-322231, is from May 1, 2020 to November 30, 2020, which is 30 days later than the application filed under H-400-20002-229255 (April 1, 2020 to November 30, 2020), which is clearly a different start date.” AF

2. Employer overall contends that two separate applications were necessary because the dates of need are different.

Employer then explained why they submitted 2019 quarterly payroll lists and tax returns. Regarding the payroll lists, Employer stated that they were, “included to show that the number of employees increased during peak-load periods, specifically during the months of May to November, showing the pattern that more employees and temporary employees are being hired in the second, third, and fourth quarter during the peak-load racing season in Kentucky.” *Id.* As a result, Employer explained that they filed a second application for the Oklahoma workers to cover the anticipated 2020 jump in the peak months. *Id.* Looking to the quarterly tax returns, Employer said that these returns, “were submitted to show that the employer has permanent staff throughout the year, but also has an increased amount of the temporary H-2B workers throughout the peak-load months.” AF 3.

Lastly, Employer relied on the language in 20 C.F.R. § 665.15 (e)-(f) arguing:

According to the Application for Temporary Employment Certification Filing Requirements on the Electronic Code of Federal Regulations website, under Title 20, Chapter V, Part 655, Subpart A, they state “**665.15 (e) *Requests for multiple positions. Certification of more than one position may be requested on the Application for Temporary Employment Certification 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. (f) Separate applications. Except 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.***”

Id. (Emphasis in original).

Employer argued that based on the above quoted language, and because Employer has two sets of workers with different starting dates, each application should be deemed different and reviewed separately. *Id.*

I received the appeal file on May 5, 2020, and issued a Notice of Docketing and Order Setting Briefing Schedule on May 6, 2020. The CO submitted her brief on May 14, 2020. Employer did not submit a closing brief.

STANDARD OF REVIEW

The scope and standard of review in the H-2B program are limited. When an employer requests a review by the Board under 20 C.F.R. § 655.61(a), the request for review may contain only legal arguments and evidence that were actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The Board “must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted.”

20 C.F.R. § 655.61(e). The Board must affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action. *Id.* 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).

DISCUSSION

A CO's denial of certification must be upheld unless shown by employer to be arbitrary and capricious or otherwise not in accordance with the law.⁴ After considering the evidence of record de novo, 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.⁵

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 Employer's Application to admit H-2B workers for temporary nonagricultural employment if Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which 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). Temporary need generally lasts for less than a year. 8 C.F.R. § 214.2(h)(6)(ii)(B). However, the CO is instructed to deny the Application if the need exceeds nine (9) months. 20 C.F.R. § 655.6(b).

The employer also bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; see also *Alter and Son Gen. Eng'g*, 2013-TLN-3, slip op. at 4 (ALJ Nov. 9, 2012). Under 20 C.F.R. § 655.6(a) and (b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peak-load, or intermittent need.

To qualify for peak-load need, an employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment, that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation. 20 C.F.R. § 655.6(b).

⁴ See *Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016); *Tarilas Corp.*, 2015-TLN00016, slip op. at 5 (Mar. 5, 2015).

⁵ 20 C.F.R. § 655.61(e); *The Original Roofing Company, LLC*, 2017-TLN-00027, slip op. at 5 (Apr. 11, 2017).

The issue here is whether the CO properly denied certification on the basis that Employer did not comply with the application filing requirements under 20 C.F.R. § 655.15(f). In the NOD, Employer was instructed to either withdraw one of its applications for workers at the Kentucky location, or demonstrate that the job opportunities in the applications are not the same. The CO noted in the Final Determination that while Employer provided documentation to address the issues in the NOD, Employer's quarterly employee lists and monthly gross pay report were not compliant with the NOD and did not establish the need for an additional 45 workers.

Looking to the facts here, it appears that Employer is attempting to hire 45 additional workers for the same job opportunity as their previously certified application. As the CO stated in her Final Determination, the "previously certified application H-400-20002-229255 and the current application H-400-20044-322231 represent the same job opportunity within the same area of intended employment for the same dates of need." AF 14. Employer's position is that two applications were needed because the first application had an anticipated start date of April 1, 2020, whereas the second application had an anticipated start date of May 1, 2020. Relying on 20 C.F.R. § 655.15(e)-(f), Employer assert that because the start dates are not the same, paragraph (f) is controlling, and separate applications are necessary. Employer's argument is unpersuasive because, although the two applications have different start dates, they are the same job, at the same location, during the same time of need. Further, even though the start dates differ by one month, these workers are essentially working "during the same period of employment" as mentioned in 20 C.F.R. § 655.15(e), meaning they should have been included in the initial application. Therefore, I find that CO's determination persuasive, and Employer has failed to demonstrate how these two applications represent different job opportunities.

Employer has not met its burden of showing that it is entitled to temporary labor certification for its requested Nonfarm Animal Caretakers. After reviewing the evidence considered by the CO and all legal arguments, I agree that Employer has not provided sufficient information to overcome the deficiencies listed in the NOD. Further, I find that the Employer has not demonstrated that the decision of the CO was arbitrary or capricious or otherwise not in accordance with the law. Accordingly, for the foregoing reasons, I find that the Denial issued by the CO was proper. Therefore, the denial is **AFFIRMED**.

ORDER

Wherefore, the Denial of Temporary Labor Certification issued by the Certifying Officer in this matter is **AFFIRMED**.

For the Board:

CARRIE BLAND
District Chief Administrative Law Judge