

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 November 2019

BALCA Case No.: 2020-TLN-00001
ETA Case No.: H-400-19242-049594

In the Matter of:

Squaw Valley Ski Holdings LLC
Employer

Certifying Officer: Leslie Abella
Chicago National Processing Center

Before: **Judge Francine L. Applewhite**

DECISION AND ORDER VACATING DENIAL OF CERTIFICATION AND REMAND

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Squaw Valley Ski Holdings LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination regarding the Employer’s H-2B temporary labor certification.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States.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 (“DOL”).³ Such applications are reviewed by a CO in the Office of Foreign Labor Certification of the Employment and Training Administration (“ETA”).

H-2B Application

The Employer is a ski resort operator in the State of California.⁴ On August 30, 2019, the Employer filed an ETA 9142B, *Application for Temporary Employment Certification*

¹ On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule (“2015 IFR”) to replace the regulations at 20 C.F.R. Part 655, Subpart A, established by the 2008 Rule, found at 73 Fed. Reg. 78020 (Dec. 19 2008). *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015). The process outlined in the 2015 IFR applies to applications filed after April 29, 2015 whose period of need begins after October 1, 2015. *See* 20 C.F.R. 655.4(e) (explaining transition procedures).

² *See* 8 U.S.C. §1101(a)(15)(H)(ii)(b); 8 U.S.C. §214.2(h)(6); 20 C.F.R. §655.6(b).

³ 8 C.F.R. §214.2(h)(6)(iii).

⁴ AF 5. Citations to the Appeal File are abbreviated as “AF”. For purposes of clarity, the “P” prefix on each page number of the Appeal File has been omitted.

(“Application”), with the CO.⁵ The Employer requested certification of 14 “cooks, restaurant” from November 16, 2019 through May 4, 2020 based on seasonal need.⁶ According to the Employer, the temporary peakload need is “because there are insufficient U.S. workers available and willing to do the job.”⁷

Notice of Deficiency (NOD)

On September 9, 2019, the CO issued a Notice of Deficiency (“NOD”).⁸ The CO listed four deficiency grounds: (1) failure to establish temporary need for the number of workers requested (20 C.F.R. § 655.11(e)(3) and (4)); (2) failure to submit an acceptable job order (20 C.F.R. §§ 655.16, 655.18); (3) failure to satisfy the obligations of H-2B employers (20 C.F.R. § 655.20(e)); and (4) failure to submit a complete and accurate ETA form 9142 (20 C.F.R. § 655.15(a)).⁹

As to the first deficiency ground, the CO explained that the Employer’s Application did not sufficiently demonstrate that the number of workers requested on the application is true and accurate and represents bona fide job opportunities. Specifically, the CO noted that in order to establish the number of workers requested is true and accurate and represents a bona fide job opportunity, the Employer must establish how it determined that it needs 14 Cooks during the requested period of need.¹⁰ The NOD requested that the Employer provide additional information including:

1. An explanation with supporting documentation of why the employer is requesting 14 Cooks for Olympic Valley, California during the dates of need requested;
2. Summarized monthly food/beverage gross sales report for a minimum of two previous calendar years for the employer’s worksite location, 1901 Chamonix Pl, Olympic Valley, California. 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;
3. Summarized monthly payroll reports for a minimum of two 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; and
4. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.¹¹

As to the second deficiency ground, the CO explained that the Employer’s Application contained two inconsistencies: there were an inconsistent number of openings listed and the

⁵ AF 16.

⁶ *Id.* at 4-5, 53-57.

⁷ *Id.* at 5, 19.

⁸ *Id.* at 16.

⁹ *Id.* at 42-46.

¹⁰ *Id.* at 42.

¹¹ *Id.*

Employer indicated that it would provide board, lodging, or other facilities to the workers on the ETA Form but did not do so on the job order.¹² The CO noted that in order to be in compliance with the applicable regulations, the Employer must submit amended job order language which indicated the total number of job openings the Employer intended to fill and indicated whether the Employer intended to provide the option of board, lodging, or other facilities.¹³

As to the third deficiency ground, the CO explained that the Employer did not include qualifications for its job opportunity that are normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.¹⁴ The CO stated that in order to cure this deficiency, the response to the NOD must include the following:

1. Documentation which demonstrates that the employer's requirements for the job opportunity are consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment; and
2. A letter detailing the reasons why 24 months of experience as a Cook is necessary for the specific occupation listed on the employer's ETA Form 9142.¹⁵

As to the fourth deficiency ground, the CO explained that the employer did not accurately complete its Application.¹⁶ In order to cure the deficiency, the Employer must Amend Section F.d., Item 6 to indicate the terms, costs, and "optional" for employer provided housing. If the employer does not provide housing provisions, Section F.d., Item 5 should indicate "No."¹⁷

Employer's Response to NOD

On September 19, 2019, the Employer submitted its response to the NOD.¹⁸ As to the first deficiency ground, the Employer clarified that it requested approval to hire 14 cooks with the title "Experienced Cooks."¹⁹ It noted that:

We have calculated this number based on our staffing workbooks that track the number of employees needed, by position and specific to each venue. We operate 14 Food & Beverage venues in the winter and we have 14 kitchens supporting these operations. Each kitchen has been short between 2-3 experienced cooks each year. We are hoping to fill all positions this upcoming season utilizing a combination of domestic and H2B workers to better support our kitchens, our staff, and our guests.²⁰

¹² *Id.* at 43.

¹³ *Id.*

¹⁴ *Id.* at 45.

¹⁵ *Id.*

¹⁶ *Id.* at 46.

¹⁷ *Id.*

¹⁸ *Id.* at 11, 18-34.

¹⁹ *Id.* at 18-19.

²⁰ *Id.*

The Employer also attached a document titled “Squaw Valley Alpine Meadows Food and Beverage Monthly Gross Revenue” summarizing gross food and beverage sales by month for the last two calendar years.²¹ It also attached a spreadsheet titled “Payroll Summary (Experienced Cook)” which summarized the Employer’s monthly payroll reports for the last two calendar years in the requested occupation.²²

As to the second deficiency ground, the Employer stated that it had made a mistake on its application and gave the CO written permission to make the necessary amendment on its application.²³ Regarding the third deficiency ground, the Employer modified its experience requirement for workers from 24 months to 12 months as set forth by O*Net as the normally accepted amount of experience for the occupation.²⁴ Lastly, as to the fourth deficiency ground, the Employer cited to its response to the second deficiency ground and reiterated that the CO had the Employers written permission to make changes to the application to show that the Employer does not provide housing to its workers.²⁵

CO’s Final Determination

On September 24, 2019, the CO issued a final determination denying the temporary labor certification.²⁶ The CO found the Employer’s response to the NOD unacceptable. The CO stated that the Employer’s explanation and documentation did not support the number of workers requested.²⁷ The CO wrote, “the employer did not provide a summarized payroll report, as requested in its NOD. Instead, the employer provided an unsummarized document that does not make clear the total number of permanent or temporary workers utilized or the hours worked in any given month.”²⁸ The CO found that the Employer did not overcome the deficiency ground stated in the NOD and denied certification.²⁹

Procedural History

The Employer filed a Notice of Appeal appealing the CO’s final determination, which was received by BALCA on October 16, 2019. On October 16, 2019, I issued a Notice of Docketing and Order Establishing Briefing Schedule. The Appeal File was received on October 30, 2019. Neither the CO nor the Employer filed a brief in this matter.

²¹ *Id.* at 9, 18-19, 29.

²² *Id.* at 6-8, 18-19, 21-28.

²³ *Id.* at 19-20.

²⁴ *Id.* at 20.

²⁵ *Id.*

²⁶ *Id.* at 14-17.

²⁷ The fourth and last page of the Final Decision is not included in the Administrator’s File sent to BALCA on October 30, 2019.

²⁸ *Id.*

²⁹ *Id.*

Applicable Law

BALCA's standard of review is limited in H-2B cases. 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 actually submitted before the CO. 20 C.F.R. § 655.61(a)(5). Upon 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). The employer bears the burden of establishing a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3)-(4); *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017).

Discussion

An employer's failure to comply with a NOD, including a failure to provide all required documentation, will result in a denial of the Application for Temporary Employment Certification.³⁰

In the NOD, the CO identified information and evidence that would provide a reasonable basis upon which to analyze the application.³¹ The Employer provided such information in its response to the NOD. In her Final Decision, the CO stated that, "the employer did not provide a summarized payroll report, as requested in its NOD. Instead, the employer provided an unsummarized document that does not make clear the total number of permanent or temporary workers utilized *or* the hours worked in any given month."³² However, I disagree. The Employer did in fact submit a summarized document that clearly shows *both* the total number of permanent and temporary workers utilized *and* the hours worked in any given month.³³ Accordingly, the Employer submitted the documentation requested and cured the first deficiency ground identified in the NOD.

I find the CO erred in denying certification because the CO's stated reason for the denial is false. The Employer provided the requested information and therefore, it is entitled to certification.

³⁰ 20 C.F.R. §655.32(a).

³¹ *Id.* at 42.

³² The fourth and last page of the Final Decision is not included in the Administrator's File sent to BALCA on October 30, 2019. Emphasis added to the original quotation.

³³ *Id.* at 6-9.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the CO's denial of labor certification in the above-captioned matter is **VACATED** and this matter is **REMANDED** to the CO for further proceedings consistent with this decision.

SO ORDERED.

FRANCINE L. APPLEWHITE
Administrative Law Judge