



**Issue Date: 28 October 2020**

BALCA CASE NO.: 2021-TLN-00003

ETA CASE NO.: H-400-20228-771141

*In the Matter of:*

**REDLAND VENTURES LLC.,**  
Employer.

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

This case arises from the Redland Ventures, LLC (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an application for temporary alien labor certification under the H-2B non-immigrant 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, peakload, 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); 20 C.F.R. § 655.6(b).<sup>1</sup> The issuance of a temporary labor certification is a determination by the Secretary of Labor that there are not sufficient qualified U.S. workers available to perform the temporary labor and that employment of the foreign workers “will not adversely affect the wages and working conditions of U.S. workers similarly employed.” 20 C.F.R. § 655.1(a); *see also* 8 C.F.R. § 214.2(h)(6)(i)(A).

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 Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142” or “Application Form”). 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. § 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).

BALCA docketed the appeal and received the Administrative File (“AF”) on October 5, 2020. The case was assigned to the undersigned on October 19, 2020. On October 20, 2020, the undersigned issued a *Notice of Docketing and Expedited Briefing Schedule*. On October 22, 2020, counsel for the CO submitted an email stating it would not be filing a brief in this matter.<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> This email was copied to the email address on file for Employer’s counsel.

Accordingly, this proceeding is now before the undersigned as a designated member of the Board of Alien Labor Certification Appeals. 20 C.F.R. § 655.61. This Decision and Order is based on the written record which consists of the AF and the Employer's request for review. The undersigned affirms the CO's denial.

## **I. Procedural Background**

On August 15, 2020, Employer submitted an application for temporary labor certification to the Department of Labor's Employment and Training Administration ("ETA"). (AF pp. 31-53.)<sup>3</sup> Employer stated "our company is engaged in the Christmas lights installation business in the Brazos County, Texas area. Our services include installation and removal of holiday decor [sic] and lighting." (AF p. 36.) Employer sought to hire ten workers to work between November 1, 2020, and February 28, 2021, to organize and prepare stock of holiday decor material, install and/or remove materials from jobsites, and load/unload materials and prepare for storage. (AF pp. 31, 33.) Employer attached to its application four letters of intent from individuals stating that they wished to hire "College Station Christmas Lights" to install Christmas lights. (AF pp. 43-46.)

The Office of Foreign Labor Certification issued a Notice of Deficiency on August 25, 2020. (AF pp. 22-30.) The CO cited four deficiencies in Employer's application. First, the CO cited a failure to establish the job opportunity as temporary in nature as required by 20 CFR § 655.6(a) and (b). The CO requested Employer to supply more detailed information on the nature of its business and the nature of the job opportunity, noting that the Employer's name as listed on the application ("Redland Ventures") did not match the name listed in the letters of intent ("College Station Christmas Lights"). (AF p. 26.) Second, the CO cited a failure to establish temporary need for the number of workers requested as required by 20 CFR § 655.11(e)(3)-(4). The CO requested that Employer submit certain personnel documents to justify the number of workers in its request. (AF p. 27.) The third and fourth deficiencies were apparently remedied by Employer's response, as they were not mentioned in the CO's Final Determination, and so I do not discuss them here.

On September 2, 2020, Employer submitted a response to the Notice of Deficiency consisting of a two page letter with no attachments. (AF pp. 20-21.) Employer explained that it was a new business established in 2020 "that provides clients (see attached Letters of Intent<sup>4</sup>) within the Brazos County area with holiday decor which are directly tied to the holiday season, from approximately November 1st through February 28th." (AF p. 20.) Employer also stated that, "As the holidays quickly approach, we anticipate that more contracts will come in and increase our workload." (AF p. 21.) Employer concluded its response by stating "Given the lack of temporary domestic workers and the fact that now [sic] seeks approval to hire *sixty* (60) temporary H-2B workers." (AF p. 21.) (Emphasis added.)

The Office of Foreign Labor Certification issued its Final Determination denying Employer's application on September 23, 2020. (AF pp. 11-19.) In its Final Determination, the CO stated that Employer had failed to remedy the first and second deficiencies listed in the Notice of Deficiency. (AF pp. 4-9.) As to the first deficiency, the CO noted that Employer had not provided any explanation of the discrepancy between its name ("Redland Ventures") and the name listed on the

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<sup>3</sup> References to the administrative file will be abbreviated with an "AF" followed by the page number.

<sup>4</sup> Employer refers to attached letters of intent and work contracts, however there is nothing attached to its letter. The CO also notes in its Final Determination, the "employer did not provide any contracts or letters of intent with its NOD response as the employer indicated in its written response." (AF p. 8.) For purposes of review, I will assume that Employer was referring to the four letters of intent attached to its application. (See AF pp. 43-46.)

letters of intent (“College Station Christmas Lights”). As to the second deficiency, Employer noted that the evidence justifying a need for ten workers was still lacking, and also pointed out that Employer had made a reference to 60 workers in its response, making the number of workers requested unclear.

Employer, through counsel, requested review in a letter filed September 29, 2020. (AF p. 1.) Employer stated that it “inadvertently did not include that Redland Ventures LLC dba College Station Christmas Lights.” (*Id.*) Employer provided no explanation for the discrepancy between the number of workers requested in the application and in the response to the notice of deficiency.

Employer did not file a brief with its request, but stated that it “reserves the right to fully articulate with legal authority in a brief in support of the appeal until after the Honorable Office of Foreign Labor Certification has the opportunity to deliver the administrative record to the court.” The governing regulation, however, provides that the request for review “[m]ust clearly identify the particular determination for which review is sought” and “[m]ust set forth the particular grounds for the request. 20 C.F.R. § 655.61(a)(2), (3). Further, the request for review “[m]ay contain only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued.” 20 C.F.R. § 665.61(a)(5).<sup>5</sup> Employer pointed to no authority to support its purported reservation of rights to file a brief after the AF is delivered to this tribunal. The request for review is the appropriate forum for an employer to identify the basis for their appeal and to submit legal argument in support thereof. There is no regulatory mechanism for an employer to simply state it would be submitting legal argument at a later time.

As noted above, the AF was docketed on October 5, 2020; the matter was assigned to the undersigned on October 19, 2020; the undersigned issued the *Notice of Docketing and Expedited Briefing Schedule* on October 20, 2020; counsel for the CO filed and served an email indicating they would not be filing a brief on October 22, 2020.

On October 27, 2020, Employer’s counsel emailed the undersigned’s law clerk and stated that he wished to attempt to reach an agreement with the CO to remand the case. The undersigned’s law clerk replied to Employer’s counsel, copying counsel for the CO, and stating that, pursuant to the *Notice of Docketing and Expedited Briefing Schedule*, the undersigned’s order in this matter was due to be issued on October 28, 2020. On October 28, 2020, counsel for the CO submitted an email to the proper OALJ electronic filing address, copying Employer’s counsel, and stated that the CO had no offers of settlement. Also on October 28, 2020, Employer’s counsel responded to the CO’s email with a number of comments about the case and also filed the *Applicant’s Opposed Motion for Remand* (the “Motion for Remand”) and two supporting documents. Later that day, the CO filed the *Certifying Officer’s Opposition to Employer’s Motion for Remand* (the “CO’s Opposition).

An ALJ’s review of the CO’s determination “must” be undertaken “only on the basis of the Appeal File, the request for review, and any legal briefs submitted”. 20 C.F.R. § 655.61(e). Following this review, the ALJ “must” affirm, reverse, or modify the CO’s determination or remand to the CO for further action. *Id.* Accordingly, the undersigned does not consider the documents submitted by Employer with its Motion for Remand,<sup>6</sup> as those documents constitute new evidence

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<sup>5</sup> The *Notice of Docketing and Expedited Briefing Schedule* also stated that, “The request for review must set forth ‘the grounds for the request and is the Employer’s sole opportunity to make ‘legal argument.’ 20 C.F.R. § 655.61(a)(3), (5).”

<sup>6</sup> Without considering the impact of Employer’s additional evidence on the outcome of this case, the undersigned notes that Employer’s counsel submitted a Form ETA-9141 (Form 9141) Application for Prevailing Wage Determination with the Motion for Remand which differed from the Form 9141 contained in the AF. The Form

not before the CO. The Motion for Remand and the CO's Opposition are considered in the context of my obligation to decide whether to affirm, reverse, or modify the CO's determination or to remand.

## **II. Standard of Review**

The Board's scope of review in the H-2B program is limited. When an employer requests review under Section 655.61(a), the Board considers "the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. § 655.61(e). The Board may not consider new evidence that was not before the Certifying Officer. *See* 20 C.F.R. § 655.61(a)(5). The Board's authority to act is similarly limited; the Board may either affirm the determination of the Certifying Officer, reverse or modify the determination, or remand the matter back to the Certifying Officer for further action. 20 C.F.R. § 655.61(e). Finally, Section 655.61(f) provides for expedited review of any request for administrative review by the Board. 20 C.F.R. § 655.61(f).

The regulations do not specify the deference that BALCA should accord to a CO's determination, nor is there a consensus in the cases as to the appropriate standard of review. Some members of the Board have applied an arbitrary and capricious standard. *See e.g., Jose Uribe Concrete Constr.*, 2019-TLN-00025 (Feb. 21, 2019) (collecting cases). Other members have rejected this standard and applied a less deferential standard. *Best Solutions USA, LLC*, 2018-TLN-00117 (May 22, 2018) (whether the basis for denial was legally and factually sufficient); *Saigon Restaurant*, 2016-TLN-00053 (July 8, 2016) and *Sands Drywall, Inc.*, 2018-TLN-00007 (Nov. 28, 2017) (*de novo* standard of review). In the present case, the undersigned need not reach this issue. The undersigned would affirm the CO's denial whether the undersigned applied an arbitrary and capricious standard or reviewed the matter *de novo*.

## **III. Discussion**

Under the regulations, a CO will review H-2B applications for completeness as well as four additional factors: 1) whether the job qualifies as non-agricultural; 2) whether the employer's need for services is temporary in nature; 3) whether "[t]he number of worker positions and period of need are justified;" and 4) whether "[t]he request represents a bona fide job opportunity." 20 C.F.R. 655.11(e). It is well-settled that the employer bears the burden of establishing it is entitled to temporary labor certification. *Putnam Brokers*, 2017-TLN-00008, at 5 (Dec. 21, 2016) (*citing* 8 U.S.C. § 1361); *Bassett Constr.*, 2016-TLN-00023, at 7 (Apr. 1, 2016) (*citing* 8 C.F.R. § 214.2(h)(6)(ii)(B)(1)). Employer has failed to show that the number of workers is justified.

### **A. Employer has established the job opportunity as temporary in nature**

Employer requested certification of workers for the time period November 1, 2020, to February 28, 2011, based on a need for seasonal labor to organize and install holiday décor during the holiday season. (AF p. 20.) Presumably, Employer would also be providing the service of taking down holiday décor, which would explain the need for workers in January and February. (*See* AF p. 42, "install and/or remove [holiday décor] materials".) This does appear to be a seasonal need, as such service is tied to the winter season because of the recurring holidays.

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9141 Employer's counsel submitted had a space labelled "Trade name/ Doing Business As (DBA)", at page 1 part C.2., filled in with "College Station Christmas Lights". In the Form 9141 contained within the AF, this space was blank. (AF p. 47.) Also, the "Trade Name/Doing Business as (DBA)" section on the Form ETA-9142B in the AF is left blank. (AF p. 31.) This inconsistency is troubling.

The CO provides no explanation for its denial of the application on this purported deficiency, pointing only to a discrepancy in the name of the business and whether Employer will perform duties at only four residential properties or additional job sites. Neither of these reasons addresses the temporary seasonal nature of the employment. The undersigned therefore concludes that the nature of the job opportunity is temporary in nature.

**B. Employer has not established temporary need for the number of workers requested**

In its Application Form, Employer stated that it sought to hire ten H-2B workers. (AF pp. 31, 36.) In its response to the Notice of Deficiency, Employer stated both that its documentation supports its need for ten laborers (AF p. 20) and that it was now seeking approval to hire sixty H-2B workers. (AF p. 21.) Employer did not clarify this inconsistency in its request for review. (AF p. 1.) However, the undersigned concludes that Employer has not established temporary need for either ten or sixty workers.

In its Notice of Deficiency, the CO requested that Employer provide documentation to support its request for ten workers, including payroll records from the previous calendar year. (AF p. 27.) Employer submitted no additional documentation with its response to the notice of deficiency, stating that it was a newly established business. (AF p. 20.) Thus, the only documentation to support Employer's request for ten workers are the four letters of intent that it submitted with its application. (AF pp. 43-46.) Three of these letters appear to be from private individuals who require Christmas light installation on their residences (mentioning "my house", "our kids", and "the hassle of installing the lights myself".) (AF pp. 43-45.) The last letter is on a business's letterhead, signed by an individual with the same last name as is on one of the homeowner letters. (AF p. 46.) Employer also asserts that it anticipates that "more contracts will come in and increase our workload." (AF p. 21.) This optimistic speculation about potential increases in business is not justification for the requested number of workers, either on its own or in combination with the four letters of intent.

Employer has not explained how the four projects necessitate a team of ten workers, as opposed to any other number of workers. Employer simply asserts that it has determined that it needs this number of workers (presumably ten, and not sixty) based on the four letters of intent it submitted with its Application Form. (AF pp. 43-46.) Initially, it is noted that these documents are general letters of intent, and not contracts with specified obligations about the extent of the work to be performed. Employer provides no information as to the size or scope of any of these potential projects and gives no objective rationale, other than its internal determination, as to the number of workers that would be required to perform these jobs.

Further, each one of the letters, purportedly signed by homeowners and a business owner, makes the surprising statement that, "To perform the required services will require a substantial number of workers, and it is difficult, if not impossible to find U.S. workers ready, willing and able to perform this work. (*Id.*) The undersigned has difficulty understanding on what basis the signatories of these letters feel qualified to make such a statement, or why it would be included in an arms-length business transaction between a business and customer. In addition, one of the letters refers to Employer being "extremely professional". (AF p. 45.) Given that the installation of holiday lights is a new business venture for Employer, it is difficult to credit this homeowner's assessment of Employer's services. The undersigned gives very little weight to these letters as evidence of Employer's need for ten workers.

Finally, the four letters of intent refer to “College Station Christmas Lights” and make no mention of Redland Ventures, LLC. (AF pp. 43-46.) Employer did not address this inconsistency in its response to the Notice of Deficiency. In its request for review, Employer simply states that it “inadvertently did not include that Redland Ventures LLC dba College Station Christmas Lights.” (AF p. 1.) But there is no evidence in the AF showing Employer’s relationship to the company named in the letters of intent. This discrepancy in Employer’s business name suggests that Employer may not be presenting a bona fide job opportunity. However, as there is ample reason to affirm the CO’s denial on the basis that the number of requested workers is not justified by the evidence, the undersigned need not reach the issue of whether to affirm the CO’s denial on the basis of failure to establish the bona fide nature of the job opportunity.

### **Conclusion**

For the above reasons, the undersigned concludes that Employer has failed to establish a temporary need for the number of workers it requested. Upon review of the record and relevant legal authority, the undersigned **AFFIRMS** the Certifying Officer’s denial.

**SO ORDERED.**

For the Board:

SUSAN HOFFMAN  
Administrative Law Judge