Issue Date: 19 April 2021

Case No.: 2021-TLN-00032
ETA Case No. H-400-21001-990571

In the Matter of:

PRESIDENTIAL HOSPITALITY, LLC,
d/b/a RAMADA

Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

1. Nature of Appeal. This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h)1 and 20 C.F.R. Part 655, Subpart A.

Employer submitted an Application for Temporary Employment Certification (Form 9142B) to the Employment and Training Administration (ETA) seeking certification for one (1) temporary nonagricultural worker. Certification was denied, and Employer now seeks an administrative review of the denial pursuant to 20 C.F.R. § 655, Subpart A.2

2. Procedural History and Background.

a. On January 1, 2021, Presidential Hospitality, LLC, d/b/a Ramada (Employer) filed an ETA Form 9142B Application for Temporary Labor Certification with the Certifying Officer (CO) at the Chicago National Processing Center (CNPC). The application sought certification for one (1) Front Desk Clerk (Occupational Title: Front Desk Clerk—Hotel, Motel, and Resort Desk Clerks) to perform work at the Ramada Inn in Keystone, South Dakota from April 1, 2021 to October 31, 2021.3

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3 AF, p. 10. References to the Appeal File are denoted by the abbreviation “AF” followed by the applicable page numbers.
b. On January 19, 2021, CNPC issued a Notice of Deficiency (NOD) which stated that “[t]he employer has submitted two applications for the same position during the same period of need in the same area of intended employment.” The reference to “two applications” included a previously submitted application for a Front Desk Clerk at another Presidential Hospitality, LLC hotel—the Baymont Inn & Suites—that is also located in Keystone, South Dakota. The Certifying Officer (CO) added in the NOD that Employer’s submission of two applications was “not permitted as 20 CFR 655.15(f) mandates that 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.” The graph below was included in the CO’s decision. It identifies Employer’s two applications for a front desk clerk for the same time period, but for separate locations.

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Workers Requested</th>
<th>Location</th>
<th>Occupation Title</th>
<th>Dates of Need</th>
</tr>
</thead>
<tbody>
<tr>
<td>H-400-2100-990571</td>
<td>1</td>
<td>Ramada 115 Swanzey St. Keystone, SD</td>
<td>Hotel, Motel, and Resort Desk Clerks</td>
<td>4/1/2021 to 10/31/2021</td>
</tr>
<tr>
<td>H-400-21001-990530</td>
<td>1</td>
<td>Baymont Inn &amp; Suites 106 U.S. Hwy 16A Keystone, SD</td>
<td>Hotel, Motel, and Resort Desk Clerks</td>
<td>4/1/2021 to 10/31/2021</td>
</tr>
</tbody>
</table>

The NOD instructed Employer to

either withdraw one of the applications . . . or demonstrate that the job opportunities presented in each application are not the same. . . . If the employer chooses to seek to demonstrate that the job opportunities are not the same, it must provide:

1. A detailed explanation regarding the job opportunity covered by each pending filing, including a detailed discussion of the duties and requirements of the position(s);
2. A detailed explanation as to why the job opportunities are not the same;
3. A detailed explanation as to why the employer filed a single application in the prior year if the job opportunities are not the same, including detailed information and supporting documentation to demonstrate a change in the employer’s business causing this change; and
4. Other evidence and documentation as applicable that similarly serves to support the employer’s position that the

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5 Id.
6 See id. The graph has been modified for clarity.
7 The CO’s contention that Employer “filed a single application in the prior year” is not supported in the record. However, whether Employer did or did not file a single application in the prior year has no bearing on what the applicable regulation actually requires.
positions are different, if any.\footnote{AF, p. 26.}

c. Employer’s January 21, 2021 response to the NOD asserted the two applications cited by the CO were for “entirely different properties at two entirely different locations.”\footnote{AF, p. 20.} Employer acknowledged that both the Ramada and the Baymont Inn & Suites are owned by Presidential Hospitality, LLC, and that the two properties are “very close to one another geographically.”\footnote{AF, pp. 20-21.} Employer contended, however, that “it is not at all true to state that they . . . represent the same job opportunity.”\footnote{Id.} Employer explained that the two properties have “separate staff, separate management[,] and separate books,” as well as “entirely separate payroll systems.”\footnote{AF, p. 21.} Employer contended that the two applications were for “workers to be employed at two separate businesses and locations.”\footnote{AF, p. 20.} Employer also contended that CNPC has previously certified separate H-2B applications for these two properties since 2018 without any issue.

d. On March 4, 2021, the CO issued a Final Determination denying certification on the basis that Employer improperly filed two separate applications when “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.”\footnote{AF, p. 14.}

In the Final Determination, the CO acknowledged Employer’s contention that the two applications were for different properties with different payroll systems and different locations.\footnote{See AF, p. 16.} The CO stated, however, that because both the Ramada and the Baymont Inn & Suites are owned by the same entity—Presidential Hospitality, LLC—and have the same Federal Employer Identification Number (FEIN), “[t]he Department viewed these as a single employer.”\footnote{Id.} As a result, the CO denied certification on the basis that according to 20 C.F.R. § 655.15(f), Employer improperly “filed two applications for the same job opportunity, Front Desk Clerks, for worksite(s) within one area of employment, Keystone, SD, for the same period of intended employment, April 1, 2021 to October 31, 2021.”

e. On March 17, 2021, pursuant to 20 C.F.R. § 655.61, Employer requested administrative review of the CO’s denial of certification.\footnote{AF, pp. 2-3.} In its administrative review request, Employer stated that “the facts are not in dispute,” but that certification should have been allowed because “the CO’s interpretation of 20 C.F.R. § 655.15(f) is simply incorrect.”\footnote{AF, p. 2.} Employer again argued that in prior years, its separate applications had been approved without issue and that the previous applications had “never been treated as a single ‘job opportunity.’”\footnote{See id., pp. 2-3.} Employer also argued that the “‘job opportunity’ in question is a Front Desk Clerk at the Ramada Inn”; therefore, the Front
Desk Clerk position at the Baymont Inn & Suites should have no bearing on whether the Ramada’s Front Desk Clerk application is certified.\textsuperscript{20} Employer contended that “[c]ommon ownership is all that connects [the two properties]; . . . their workforces are truly separate and the two hotels are run independently.”\textsuperscript{21} As such, Employer contended, the two applications considered by the CO “are separate jobs, filed for separately, consistent with the H-2B regulations.”\textsuperscript{22}

f. On March 18, 2021, the Board of Alien Labor Certification Appeals (BALCA) docketed Employer’s appeal. On March 31, 2021, a Notice of Case Assignment and Order Establishing Brief Filing Deadlines was issued. The CO transmitted the Appeal File to BALCA on April 5, 2021. On April 7, 2021, Counsel for Employment & Training Legal Services (ETLS) notified the parties via e-mail that ETLS did not intend to file a brief in this matter.

3. Applicable Law and Analysis.

a. H-2B Program. The applicable section of the H–2B nonimmigrant visa program enables United States nonagricultural employers to employ foreign workers on a temporary basis to perform nonagricultural labor or services if unemployed persons capable of performing such service or labor cannot be found in this country.\textsuperscript{23} Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the Department of Labor (DOL).\textsuperscript{24}

b. Regulations at Issue.

i. 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. Except where otherwise permitted under §655.4, an association or other organization of employers is not permitted to file master applications on behalf of its employer-members under the H-2B program. 20 C.F.R. § 655.15(f).

ii. Area of intended employment means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). 20 C.F.R. § 655.5.\textsuperscript{25}

\textsuperscript{20} See id., p. 3.
\textsuperscript{21} See id.
\textsuperscript{22} See id.
\textsuperscript{23} 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 20 C.F.R. § 655, Subpart A.
\textsuperscript{24} See 20 C.F.R. § 655.20.
\textsuperscript{25} Portions of the definition of “area of intended employment” that are not relevant to the instant Decision and Order have been omitted.
iii. **Employer** means a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;

(2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H-2B worker or a worker in corresponding employment; and

(3) Possesses, for purposes of filing an *Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN). 20 C.F.R. § 655.5.

iv. **Job opportunity** means one or more openings for full-time employment with the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers. 20 C.F.R. § 655.5.

c. **Scope and Standard of Review.** BALCA’s scope of review for H-2B cases appealed under 20 C.F.R. Part 655, Subpart A is limited. Specifically, 20 C.F.R. § 655.61 provides that BALCA may only consider the Appeal File prepared by the CO, the employer’s request for administrative review, and any legal briefs submitted. The employer’s request for administrative review may only contain legal arguments and evidence that was actually submitted to the CO in support of the employer’s application.

Neither the INA nor the applicable regulations specify a standard of review. However, the Board has adopted the “arbitrary and capricious” standard in reviewing a CO’s determinations. Therefore, BALCA may only overturn a CO’s decision if it finds the decision to be arbitrary, capricious, or otherwise not in accordance with the law.

After considering the evidence of record, BALCA must: (1) affirm the CO’s decision to deny temporary labor certification; (2) direct the CO to grant certification; or (3) remand the case to the CO for further action.

d. **Discussion.** The issue under review is whether the CO properly denied certification on the basis that, by filing two separate applications, Employer failed to comply with the application filing requirements under 20 C.F.R. § 655.15(f). That regulation requires submission of a single application with respect to all (i) **worksite(s)** within one (ii) **area of intended employment** for each (iii) **job opportunity** with an (iv) **employer** for each (v) **period of employment.**

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26 See *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (March 14, 2017).
27 See *id.*; see also *Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016); *J and V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016).
28 20 C.F.R. § 655.61(e)(1)-(3).
(i) **Worksites.** Employer agreed with the CO that the Ramada and the Baymont Inn & Suites are separate “worksites.”29 Thus, this aspect of the regulation is undisputed.

(ii) **Area of Intended Employment.** Employer argued that its separate applications addressed different locations, but it did not argue that the locations were in different “area[s] of intended employment.” In this regard, an “area of intended employment” means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. Employer acknowledged that the Ramada and the Baymont Inn & Suites are both located in Keystone, South Dakota and that they are “very close to one another geographically.”30 Thus, the evidence in the Appeal File supports the conclusion that Employer’s two applications were directed to the same area of intended employment.

(iii) **Job Opportunity.** Employer argued that the Front Desk Clerk position at the Ramada was a different “job opportunity” from the Front Desk Clerk position at the Baymont Inn & Suites because the two hotels’ “workforces are truly separate and the two hotels are run independently.”31 As such, Employer contended, the two applications considered by the CO “are separate jobs, filed for separately, consistent with the H-2B regulations.”32

“Job opportunity” as defined in the regulations, however, contemplates “one or more openings for full-time employment with the petitioning employer within a specified area[] of intended employment.”33 Accordingly, a “job opportunity” may encompass more than one opening with an employer (as is the case here), and the focus of a “job opportunity” is on the “area of intended employment,” not on particular locations within an area of intended employment. Therefore, the CO reasonably applied the language of the regulation in concluding that the “job opportunity” encompassed “one or more” Front Desk Clerk positions in the same “area of intended employment.”

(iv) **Employer.** In conjunction with its argument regarding “job opportunity,” Employer argued that the Ramada and the Baymont Inn & Suites should be considered separate employers because the two hotels’ “workforces are truly separate and the two hotels are run independently.”34 Employer contended in this regard that the two properties have “separate staff, separate management[,] and separate books,” as well as “entirely separate payroll systems.”35 Thus, Employer contended, the two applications were for “workers to be employed at two separate businesses and locations.”36

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29 See AF, p. 3.
30 AF, pp. 20-21.
31 See id.
32 See id.
33 20 C.F.R. § 655.5 (emphasis added).
34 See id.
35 AF, p. 21.
36 AF, p. 20.
The CO noted “the two applications for Presidential Hospitality LLC DBAs Ramada and Baymont Inn & Suites have the same FEIN and the same ownership.” The CO concluded based on this information that both applications were submitted by the same employer. This conclusion is supported by the regulatory definition of “employer,” which in pertinent part states an employer “[p]ossesses, for purposes of filing an Application for Temporary Employment Certification, a valid Federal Employer Identification Number (FEIN).” The regulation’s definition of an employer as having “a” (i.e., only one) valid FEIN clearly supports a finding that Employer’s two hotels belong to a single employer because the two hotels have the same FEIN. Employer’s counter-argument that the two hotels are separately operated and managed does not overcome the fact of common ownership and common “employer identification number.”

Additionally, the Office of Foreign Labor Certification (OFLC) uses a multi-factor test to determine whether two or more entities are sufficiently distinguished such that they should be treated as separate employers. The test involves a fact-intensive consideration of four (4) factors:

1. Separate ownership,
2. Separate management,
3. Unrelated operations, and
4. De-centralized control of labor relations or personnel practices.

“No one factor is determinative. Whether two or more entities may be treated as [separate] employer[s] depends on all the circumstances of the application, and is characterized by the absence of an arm’s length relationship among [] independent companies.”

The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. A bare assertion without supporting evidence is insufficient to carry the employer’s burden of proof. Accordingly, Employer bore the burden to demonstrate that the Ramada and the Baymont Inn & Suites should be treated as separate employers. The record is void of any evidence related to management, officers, agents, directors, payroll, billing, insurance programs, bank accounts, documents, personnel policies, employment records, or employment decisions that might establish how the Ramada and the Baymont Inn & Suites may be considered separate employers. As such, Employer failed to establish that the two hotels are different employers.

37 AF, p. 9.
38 20 C.F.R. § 655.5 (emphasis added).
40 See id., p. 5.
(v) **Period of Employment.** Employer did not dispute that the anticipated period of employment for both Front Desk Clerk positions was the same. The evidence in the Appeal File establishes that the anticipated period of employment for both hotels was April 1, 2021 to October 31, 2021. Thus, this aspect of the regulation is undisputed.

As established above, only two of the five criteria in 20 CFR 655.15(f) were disputed: first, whether the Front Desk Clerk position at the Ramada was a different “job opportunity” from the Front Desk Clerk position at the Baymont Inn & Suites, and second, whether the Ramada and the Baymont Inn & Suites are separate “employers.” The CO concluded that both applications sought certification for the same job opportunity, and that both hotels belonged to the same employer.43

Two other recent BALCA cases considering an employer’s compliance with filing requirements under 20 C.F.R. § 655.15(f) are corroborative.

In the matter of **KDE Equine LLC**, the employer requested certification for forty-five (45) Nonfarm Animal Caretakers from May 1, 2020 to November 30, 2020.44 In a subsequent NOD, the CO noted that the employer had already filed an application for the same position and same period of need, such that the second application did not comply with the application filing requirements under 20 C.F.R. § 655.15(f). After the employer appealed, the District Chief ALJ affirmed the CO’s decision based in part on a finding that the two applications were for the same job opportunity.45

In the matter of **Sodaco, Inc. d/b/a Baymont Inn & Suites**, the employer sought certification for five workers to work as housekeepers at the Baymont Inn & Suites in Rapid City, South Dakota between April 1, 2021 and October 31, 2021.46 In a subsequent NOD, the CO noted that Sodaco, Inc. appeared to have already filed an application for certification of housekeeping workers at another Sodaco-owned property—the Comfort Inn & Suites—also located in Rapid City, South Dakota.47 On appeal, the ALJ discussed the fact that (as is the case here) the employer did not respond to the NOD with supporting documentation, instead relying on “a single, four-page letter” setting forth the employer’s position.48 Also similar to the matter under consideration here, the employer conceded that the two properties were commonly owned, but argued that they were separately operated and managed.49 After fully analyzing the application of the “single employer test” to the facts of the case, the ALJ concluded that the two hotels in that case were “a single employer, and the separate applications therefore did not comply with 20 C.F.R. § 655.15(f).”50

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43 AF, p. 9.
45 See id.
46 See 2021TLN00037 (ALJ Hoffman April 14, 2021).
47 See id.
48 See id., p. 3.
49 See id.
50 See id., pp. 3-7. Significantly, the employer in 2021TLN00037 provided much more information regarding the operation and management of its two hotels than did the employer in this matter.
In the case under consideration, the CO’s conclusion is not arbitrary or capricious. Black’s Law Dictionary defines an “arbitrary” decision as one founded on prejudice or preference rather than on reason or fact, and it defines a “capricious” decision as one that is contrary to the evidence or established rules of law.51 The CO’s conclusion was based on a reasoned application of the facts of the case to the relevant regulations. Similarly, Employer failed to establish that the CO’s decision was otherwise not in accordance with the law. Based upon the Appeal File and the applicable regulations, the CO’s decision was reasonable and in accordance with the regulations.

Finally, Employer’s argument that it successfully submitted separate applications for these same two positions in prior years is unsupported by any evidence in the record. Moreover, taking as true that such separate applications were accepted in the past, that fact would not establish that such acceptance complied with the regulations.

The scope of this administrative review is limited to the Appeal File, the applicable regulations, and the legal arguments of the parties. A full review of the record in this regard establishes that there is insufficient evidence to demonstrate either (i) that the Ramada and the Baymont Inn & Suites are separate “employers” as defined by the regulations, or (ii) that the Front Desk Clerk positions at the two hotels are different “job opportunities.”

Employer failed to meet its burden of proof to establish that it is entitled to submit separate applications for the Front Desk Clerk positions at the Ramada and the Baymont Inn & Suites. Further, Employer has not demonstrated that the CO’s decision was arbitrary, capricious, or otherwise not in accordance with the law. The CO’s denial of Employer’s temporary labor certification application for failure to comply with 20 C.F.R. § 655.15(f) was proper.

4. **Ruling.** The Certifying Officer’s denial of Employer’s Application for Temporary Employment Certification is **AFFIRMED.**

SO ORDERED this day at Covington, Louisiana.

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51 Black’s Law Dictionary (Eighth ed. 2004) at 112 (defining “arbitrary”) and 224 (defining “capricious”); see also *Lamar Advertising Co. v. Zurich Amer. Ins. Co.*, 473 F.Supp.3d 632, 641 (M.D. La. 7/20/2020) (characterizing an arbitrary act as one based on random choice or personal whim, rather than reason or system, and a capricious act as one based on sudden and unaccountable changes in behavior).