DECISION AND ORDER REMANDING
CERTIFYING OFFICER’S 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 twenty temporary nonagricultural workers at a hotel in Miami Beach, Florida.\(^2\) Certification was denied, and Employer now seeks administrative review of the denial pursuant to 20 C.F.R. § 655, Subpart A.\(^3\)

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\(^2\) It is apparent from the overall context of the Appeal File (AF) that “MB Florida, Ltd., LLC” operates a hotel. It is unlikely that the public recognizes “MB Florida, Ltd., LLC” as a local hotel name. In this regard, however, see AF p. 2, which states that MB Florida, Ltd., LLC is a hotel in the Miami Beach area. Certain submissions by Employer and by the CO intimate that MB Florida, Ltd. LLC may be “doing business as” (i.e., “d/b/a”) Grand Beach Hotel. Yet, nowhere in any of the parties’ submissions is there a definitive statement linking the two names. But see AF, p. 50 (stating that “three separate applications [were filed] for each Grand Beach location”). Therefore, the undersigned will not simply assume that “Grand Beach Hotel” and MB Florida, Ltd. LLC encompass the same entity. Instead, this decision will equate “Employer” only with “MB Florida, Ltd. LLC.”

\(^3\) On April 29, 2015, the Department of Labor (DOL) and the Department of Homeland Security (DHS) jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A established by the “2008 Rule” found at 73 Fed. Reg. 78020. See 80 Fed. Reg. 24042, 24109 (2015 IFR). The procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR, and apply to this appeal.
2. Procedural History and Background.

a. On July 3, 2021, MB Florida Ltd., LLC (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 twenty housekeepers (Occupational Title: “Maids and Housekeeping Cleaners”) to perform work for Employer in Miami Beach, Florida from October 1, 2021 to July 1, 2022.4

b. On July 15, 2021, the Office of Foreign Labor Certification (OFLC) issued a Notice of Deficiency (NOD) which stated 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.”5 The NOD stated that “[t]here are several other applications for Temporary Employment Certification pending with this office where the details of employer are substantially the same as on this application.”6 The NOD further found that Employer shared the same contact information, including the phone number and email address to apply, as on pending applications from Beach House Hotel LLC7 and Bay Harbor Hotel LLC.8

The NOD instructed Employer to explain in detail the differences in business operations between MB Florida Ltd. LLC, Beach House Hotel LLC, and Bay Harbor Hotel LLC.9 Employer was instructed to submit documents or otherwise respond to the following inquiries:

1. Documents describing the corporate and/or management structure for each entity.
2. Names of directors, officers, owners, and/or managers, and managers’ job descriptions for each entity.
3. Incorporation documents, if applicable.
4. Documents identifying whether the same individual(s) has ownership of each entity and/or control and management of the various entities even if not the sole owner of all the entities.
5. Does the same person have the authority to submit applications for certification on behalf of multiple entities; if so, explain that person’s role in each entity.
6. Explain the entities’ complementary or overlapping dates of need.
7. Explain workers’ performance of similar or complementary duties.
8. Explain shared use of office space.

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4 AF, p. 82. References to the Appeal File are denoted by the abbreviation “AF” followed by the applicable page numbers.
5 AF, p. 80.
6 AF, p. 80.
7 Application number H-400-21184-443384; see AF, p. 8.
8 Application number H-400-21184-443367; see AF, p. 8.
9 AF, p. 80.
equipment, and storage.

9. Do the entities share housing facilities for temporary workers (excluding common commercial housing like hotels, etc.)?

10. Are there shared payroll and insurance programs. If not, who is responsible for securing these services?

11. Do the entities share use of managers and personnel?

12. Do the entities produce unique products or have distinct business purposes?

13. Do the entities share a common product list, price list, catalog, or list of products or services offered?

14. Do workers move freely from one entity to another? Are employees transferred between the entities and/or promoted between them?

15. Is money intermingled between the businesses?

16. Are bank accounts shared? If not, which person or persons control the accounts for each entity?

17. Are bills paid by the employer on this application or by an affiliated entity?

18. Is one entity the source for development of personnel policy? Are common HR materials used by both entities (including but not restricted to, a common employee handbook or personnel handbook)?

19. Does one entity maintain personnel records and screen and test applicants for employment?

20. Do the same people (or person) make employment decisions for both [sic] entities (e.g., has the power to hire and fire workers, or supervises or directs the work of the employees)?

21. Have the entities retained the same attorney or agent in the filing of the application for temporary labor certification, or the same labor recruiter? If so, does each entity have a separate contract/retention agreement with the attorney/agent/labor recruiter?10

c. On July 27, 2021, Employer responded to all twenty-one questions posed in the NOD. Employer also contended in its response that the three entities operated independently; therefore, it was appropriate to classify the properties as separate businesses for the purpose of considering their temporary labor certification applications. Employer’s response focused on the CO’s use of the Single Employer Test and advanced four arguments regarding the purportedly independent nature of the properties: (1) ownership of the separate entities is comprised of investment companies and trusts with independent interests;11 (2) upper-level managers12 are not responsible for day-to-day operations of each entity;13 (3) each entity operates autonomously,14 and (4) only

10 AF, pp. 80-81.
11 AF, pp. 50-51.
12 Emmanuel Sebag, Frederic Marq, and Joel Simmonds. See AF, p. 52.
13 AF, p. 52.
top-level management is shared among the three entities.  

**d.** On September 28, 2021, the CO issued a Final Determination denying certification on the basis that Employer had filed multiple applications for temporary labor certification despite appearing to be one, single employer. The CO noted the “OFLC uses the Single Employer Test to determine whether two or more nominally separate entities are sufficiently intertwined such that they should be treated as a single employer.” After analyzing Employer’s evidence using the Single Employer Test criteria, the CO denied certification on the grounds that Employer failed to provide sufficient evidence to overcome the deficiencies noted in the NOD. 

**e.** On October 4, 2021, pursuant to 20 C.F.R. § 655.61, Employer requested administrative review of the CO’s denial. In its administrative review request, Employer first asserted that the CO had approved the applications for its two other properties and had recognized the properties as different entities with different job opportunities. Second, Employer stated the CO erred in applying the Single Employer Test because the test has not been formally adopted by the agency. Employer asserted in the alternative that, if the Single Employer Test was the correct test, the evidence was sufficient to classify the entities as separate. 

**f.** On October 4, 2021, the Board of Alien Labor Certification Appeals (BALCA) docketed Employer’s appeal. On October 8, 2021, this matter was assigned to the undersigned Administrative Law Judge (ALJ), and a Notice of Case Assignment and Order Establishing Brief Filing Deadlines was issued the same day. The CO transmitted the Appeal File (AF) to BALCA on October 15, 2021. The Solicitor’s Office was provided seven (7) business days from that date to file an optional brief in support of the denial of certification. 

**g.** On October 19, 2021, Employer’s counsel filed a Notice of Appearance. 

**h.** On October 26, 2021, Employer’s counsel filed a Motion to Amend Scheduling Order and to Accept Employer’s Merits Brief. The motion sought leave to file substantive legal argument in addition to the arguments included in its Request for Review. 

**i.** Also on October 26, 2021, counsel for the CO filed a brief in support of the decision to deny Employer’s certification application. 

**j.** On October 27, 2021, the undersigned ALJ denied Employer’s Motion to Amend Scheduling Order and to Accept Employer’s Merits Brief. 

**k.** Also on October 27, 2021, the undersigned ALJ issued an Order Authorizing Reply Brief. 

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14 AF, p. 53 (stating that “Each is a standalone hotel”).
15 AF, p. 52.
16 AF, p. 18. The same Single Employer Test and associated criteria were discussed in the NOD. See AF, pp. 80-81.
17 AF, p. 17.
18 AF, pp. 1-4.
19 Employer did not provide evidence of the two other certifications or applications in its request for administrative review.
20 AF, pp. 1-4.
The order provided Employer until Friday, October 29, 2021 to file a reply brief that would be limited to addressing any new arguments raised in the CO’s October 26, 2021 brief in support of affirming the final determination.


3. Findings of Fact.

a. MB Florida Holdings, Inc. owns 100% of Bay Harbor Hotel LLC, 89% of Beach House Hotel LLC, and 68% of MB Florida Ltd. LLC.21

b. MB Florida Holdings, Inc. manages Bay Harbor Hotel LLC and Beach House Hotel LLC.22

c. MB Florida Holdings, Inc. manages, and owns 100% of, MB Management Florida LLC which, in turn, manages MB Florida Ltd. LLC.23

d. Jacques Gaston Murray and Jean-Jacques Murray are Directors of MB Florida Holdings, Inc.24

e. Joel Simmonds is an officer of MB Florida Holdings, Inc.25

f. Jacques Gaston Murray, Jean-Jacques Murray, and Joel Simmonds are the only officers in MB Florida Ltd. LLC, Beach House Hotel LLC, and Bay Harbor Hotel, LLC.26

g. Jacques Gaston Murray, Jean-Jacques Murray, and Joel Simmonds are the only officers in MB Management Florida LLC.27

h. Joel Simmonds has “master control” over all bank accounts of Bay Harbor Hotel LLC, Beach House Hotel LLC, and MB Florida Ltd. LLC.28

i. Erica Gonzales is the Human Resources director for MB Florida Ltd. LLC, Beach House Hotel LLC, and Bay Harbor Hotel LLC.29

21 AF, p. 56.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 AF, p. 54.
29 AF, p. 53.
Erica Gonzales “is not directly responsible for” each hotel’s lower-level employees; however, she supports each hotel’s General Manager (GM) regarding decisions for those lower-level employees.  

Erica Gonzales is authorized to submit temporary labor applications on behalf of MB Florida Ltd., LLC, Beach House Hotel LLC, and Bay Harbor Hotel LLC.  

The worksite address for MB Florida Ltd. LLC is listed as 4835 Collins Avenue, Miami Beach, FL 33140.  

The principal office address for Beach House Hotel LLC is 4835 Collins Avenue, Miami Beach, FL 33140.  

The principal office address for Bay Harbor Hotel LLC is 4835 Collins Avenue, Miami Beach, FL 33140.  

MB Florida Ltd. LLC, Beach House Hotel LLC, and Bay Harbor Hotel LLC use the same recruitment contact information, such as the same phone number, email address, and point of contact.  

MB Florida Ltd. LLC, Beach House Hotel LLC, and Bay Harbor Hotel LLC share a centralized accounting department.  

The centralized accounting department reports to a “group financial controller.”  

Departmental and general managers have the ability to hire and fire employees at their respective properties.  

The general managers of Bay Harbor Hotel LLC, Beach House Hotel LLC, and MB Florida Ltd. LLC are responsible for the day-to-day operations of their subordinate employees.  

Employees can be transferred among Bay Harbor Hotel LLC, Beach House Hotel LLC, and MB Florida Ltd. LLC.

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30 AF, p. 53.
31 AF, p. 53.
32 AF, p. 85.
33 AF, p. 72.
34 AF, p. 74.
35 AF, p. 80.
36 AF, p. 54.
37 AF, p. 54.
38 AF, pp. 54-55.
39 AF, p. 53.
u. MB Florida Ltd. LLC, Beach House Hotel LLC, and Bay Harbor Hotel LLC share the same website landing page.41

v. MB Florida Ltd. LLC, Beach House Hotel LLC, and Bay Harbor Hotel LLC share at least some warehouse space,42 purchases of common supplies,43 insurance purchases,44 sales and marketing,45 and information technology.46

4. 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.47 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 or Department).48

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. 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;

40 AF, p. 54.
41 AF, p. 51.
42 AF, p. 53.
43 See AF, pp. 53-54 (stating there is shared management over some common purchases, which are made for the sake of cost saving).
44 AF, p. 54.
45 AF, p. 53.
46 AF, p. 53.
48 See 20 C.F.R. § 655.20.
(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.

iii. 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.

iv. Joint employment means that where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker. 20 C.F.R. § 655.5.

c. Scope and Standard of Review.

1. Scope 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 contain only its legal arguments and such evidence as was actually submitted to the CO in support of the employer’s application.49

After considering the evidence, BALCA must take one of the following actions in deciding the case: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand to the CO for further action.50

2. Standard of Review.

Neither the Immigration and Nationality Act (INA) nor the regulations applicable to H-2B temporary labor certifications identify a specific standard of review to be applied to an employer’s request for administrative review. BALCA has fairly often applied an “arbitrary and capricious” standard to its review of a CO’s determination in a labor certification case.51 Conversely, in a number of other decisions, either a quasi-hybrid deference standard or a de novo standard have been used.52

49 20 C.F.R. § 655.61(a).
50 20 C.F.R. § 655.61(e).
51 Brook Ledge, Inc., 2016-TLN-00033 (May 10, 2016).
52 See Best Solutions USA, LLC, 2018-TLN-00117 (May 22, 2018).
In 2011, a BALCA panel closely reviewed and considered the regulatory history regarding the proper standard of review.\textsuperscript{53} The panel’s decision noted that “neither the regulations nor the regulatory history expressly state BALCA’s standard of review.”\textsuperscript{54} The decision further noted that as a matter of practice, BALCA routinely applied a \textit{de novo} standard of review without any explanation regarding the authority for such a standard.\textsuperscript{55} The panel looked to Section 8 of the Administrative Procedure Act (APA) for clarification. That section of the APA stated that “[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”\textsuperscript{56} The panel regarded this language as implicitly indicating that \textit{de novo} would be the proper standard of review, at least when a hearing was conducted.\textsuperscript{57} Thus, the decision ultimately held that “BALCA’s review of the CO’s legal and factual determinations when denying an application for permanent alien labor certification is \textit{de novo}, limited in scope by [the applicable regulations relating to permanent labor certification].”\textsuperscript{58}

Essentially, then, the panel decision in \textit{Albert Einstein Med. Ctr., et al.} concluded after consulting the APA that \textit{de novo} review of the CO’s legal and factual determinations is proper in an appeal of denial of an application for permanent alien labor certification.

Beginning in 2016, however, an “arbitrary and capricious” standard began to appear more prominently in BALCA decisions.\textsuperscript{59} The “arbitrary and capricious” standard that was applied in many of those decisions apparently also stems from the APA. Judicial review under the APA provides that an agency’s actions, findings, and conclusions shall be set aside when they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”\textsuperscript{60} This standard of review operates to prevent a reviewing court from substituting its judgment for that of the agency, especially in factual disputes involving substantial agency expertise. As the panel decision in \textit{Albert Einstein Med. Ctr., et al.} noted, however, these concerns are not implicated during an intra-agency tribunal’s administrative review of another adjudicator’s decision within the same agency.\textsuperscript{61} Here, as in \textit{Albert Einstein Med. Ctr., et al.}, the undersigned ALJ is conducting an intra-agency administrative review of the decision made by another adjudicator (the CO) within the same agency (DOL).

Additionally, in \textit{Best Solutions USA, LLC},\textsuperscript{62} Judge William T. Barto reconsidered the correctness of applying an “arbitrary and capricious” standard to temporary labor certification
appeals. Judge Barto interpreted the regulation at issue here—20 C.F.R. § 655.61(e)—to mean BALCA should consider a denial of certification by determining whether “the basis stated by the CO for the denial is legally and factually sufficient in light of the written record provided.”

Judge Barto acknowledged that other decisions have adopted a more deferential standard of review (i.e., “arbitrary, capricious, or otherwise not in accordance with applicable law”); however, he declined to apply that standard on the basis that an arbitrary and capricious “standard of review is not appropriate for administrative review under Part 655.”

Moreover, exhaustive research failed to uncover any binding authority on the applicability of the “arbitrary and capricious” standard as it relates to administrative review. As such, the judicial “arbitrary and capricious” standard will not be applied in this administrative review.

Based on the above analysis, the undersigned will determine whether the CO’s stated basis for denying Employer’s application is legally and factually sufficient. In so doing, the undersigned adopts the standard of review defined in Best Solutions USA, LLC for the reasons stated therein.

d. Discussion. The issue under review is whether the CO properly denied certification to Employer on the basis that, by filing a separate application from those of Beach House Hotel LLC and Bay Harbor Hotel LLC, 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.

The CO denied Employer’s application solely on the basis that the same “employer has filed three applications for the same job opportunity” in derogation of 20 C.F.R. § 655.15(f) and, therefore, Employer’s separately-filed application had to be denied. The remaining requirements for a separate application under section 655.15(f)—worksites, area of intended employment, job opportunity, and period of employment—are not in dispute. As such, this decision addresses only the issue of whether the CO’s final determination was legally and

63 Id. at 3.
64 Id.
65 See Best Solutions USA, LLC, 2018-TLN-00117, 3 n. 2 (ALJ Barto May 22, 2018).
66 AF, p. 17.
67 AF, p. 11.
68 Employer mentioned in its Request for Review that the CO found the applications for Beach House Hotel, Bay Harbor Hotel, and MB Florida, Ltd. were filed by “a single employer and offered only one job opportunity.” See AF, p. 2. This single mention of “job opportunity,” however, is not an argument and does not raise the issue as one to be considered on appeal. Similarly, the CO’s brief mentions “job opportunity” only in two contexts: first in restating the requirements of the applicable regulation, and second in restating the CO’s findings in the final determination. Here again, no argument is made that “job opportunity” was an issue to be considered on appeal. Rather, the focus of both Employer’s Request for Review and the CO’s brief were on the issue of single versus multiple employers. “Job opportunity” was not raised in argument until Employer filed its Reply Brief on October 29, 2021. See Reply Brief, pp. 8, 12. Employer’s reply brief, however, was only authorized to address any new issues raised in the CO’s brief that had not already been addressed in the Request for Review. Employer’s “job opportunity” argument raised for the first time in its Reply Brief need not be addressed, therefore, because it (i) exceeds the scope of the Order Authorizing Reply Brief and (ii) raises an issue as to which the CO has no opportunity to respond.
factually sufficient with respect to whether MB Florida Ltd. LLC is a separate employer from Beach House Hotel LLC and Bay Harbor Hotel LLC.69

The “Single Employer Test”

The CO utilized a test termed the “Single Employer Test” to determine whether MB Florida Ltd. LLC was sufficiently intertwined with Beach House Hotel LLC and Bay Harbor Hotel LLC such that the three entities should be treated as a single employer. The CO’s decision stated that the test involves a fact-intensive consideration of four (4) factors:

1. Common ownership,
2. Common management,
3. Interrelated operations, and
4. Centralized control of labor relations or personnel practices.70

The decision further stated that “[n]o one factor is determinative. Whether two or more entities may be treated as a single employer depends on all the circumstances of the application, and is characterized by the absence of an arm’s length relationship among seemingly independent companies.”71

The CO argues in its brief that “[t]he Single Employer Test can be used in determining eligibility for the H-2B program.”72 In support of this statement, however, the CO merely cited a string of ten prior ALJ decisions and stated that “[t]he COs and BALCA have regularly applied variations of the single employer test since at least 2012.”73 “Regular application,” however, does not always equate to “proper application.”74

For its part, Employer cites two prior BALCA decisions as support for its argument that the CO improperly applied the Single Employer Test.

After a de novo hearing in Mid-State Farms LLC, ALJ Dan C. Panagiotis considered whether the CO correctly applied the “Single Employer Test” for an H-2A certification denial.75 More

69 Employer also contended the CO erred in denying its application because the applications for temporary employment certification at Beach House Hotel LLC and Bay Harbor Hotel LLC were approved. See, e.g., Request for Review, p. 2; Reply Brief, p. 6. The scope of this administrative review, however, is limited to the Appeal File, the applicable regulations, and the legal arguments of the parties. The record contains no evidence that the other two applications were certified. Employer’s uncorroborated argument alone is insufficient. Therefore, Employer’s assertion that the other two applications were approved cannot be considered.

72 CO’s brief, p. 7.
73 Id. at footnote 3.
74 The CO’s assertion that the Single Employer Test has been “regularly applied” since at least 2012 is another way of arguing that the practice should be continued because “we’ve always done it that way.” The “we’ve always done it that way” argument is too slender a reed on which to rest the weight of legal precedent.
75 Mid-State Farms LLC, 2021-TLC-00115, slip op. at 16 (ALJ Panagiotis Apr. 16, 2021).
specifically, the issue was whether BALCA should regard the Single Employer Test as departmental policy.

The Single Employer Test was established by the National Labor Relations Board (NLRB) for jurisdictional purposes. Specifically, the Board has informally adapted the test for the purpose of distinguishing separate employers from joint employers. Judge Panagiotis noted, however, that he could “find no published instance where the ‘Single Employer Test’ [had] been debated openly, subjected to public comment[,] or accepted as official Department policy.” Ultimately, Judge Panagiotis determined that the Single Employer Test was inapplicable to temporary labor certification matters because “[t]he concerns of the NLRB . . . are not the same as those under the INA.”

In *ATP Groves LLC*, an H-2A case that was decided on administrative review, Associate Chief ALJ Paul R. Almanza rejected the Single Employer Test based on the reasoning of *Mid-States Farms, LLC*.

The reasoning of the above two cases is persuasive. Additionally, U.S. District Court Judge Rosemary Collyer reached a similar result in *ITServe Alliance, Inc. v. Cissna*. In that case, certain consulting agencies that had applied for nonimmigrant visas on behalf of foreign workers brought a cause of action under the APA challenging the manner in which the workers’ applications were treated by the Citizenship and Immigration Service (CIS). Judge Collyer found that a 2018 CIS Policy Memo interpreting a 1991 Immigration and Naturalization Service (INS) regulation was “an erroneous effort to substitute the agency’s understanding of common law for the unambiguous text of the INS 1991 Regulation” and that the Policy Memo was inconsistent with the regulation. Judge Collyer found that, by employing a policy that was inconsistent with the regulation, “CIS [had] improperly avoided the rulemaking process and, therefore,” it had to apply the plain language of the applicable regulation rather than that of the Policy Memo.

The same result occurs here. The Single Employer Test utilized by the CO has not been formally adopted as Department policy by OFLC, nor has it been subjected to the APA rulemaking process. Moreover, the applicable regulations already contain definitional language identifying the criteria to be used in distinguishing single employers from joint employers. Those regulatory definitions differ significantly from the criteria set out in the Single Employer Test;

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76 See id. at 21 (citing *Family Laundry, Inc.*, 121 N.L.R.B. 1619 (Oct. 29, 1958) (employer contended that it did not meet the Board’s jurisdictional requirement); *Canton, Carp’s Inc.*, 125 N.L.R.B. 483 (Nov. 30, 1959) (employer urged dismissal because its gross volume of business did not meet the Board’s jurisdictional requirement); *Sakrete of Northern Cal., Inc.*, 137 N.L.R.B. 1220 (Jul. 10, 1962) (for jurisdictional purposes the Board often treats separate corporations as one employer).
77 Id.
78 Id. at 22.
81 See id.
82 INS was the predecessor agency to the current CIS.
83 *ITServe Alliance, Inc.*, 443 F. Supp. 3d at 37.
84 See id.
therefore, the CO should have applied the plain language of the regulations rather than that of the Single Employer Test.

**Single versus Joint Employer**

The applicable regulations relating to H-2B temporary labor applications specifically define both “employer” and “joint employment.” The explicit definitions for “employer” and “joint employment” control the inquiry regarding whether the entities under consideration here should be treated as joint employers.

To be considered an “employer,” the entity must have

(i) a place of business (physical location) in the U.S. and a means to contact it for employment;
(ii) an employer relationship with an H-2B worker, *i.e.*, the ability to hire, pay, fire, supervise, or otherwise control the work of the employees; and
(iii) a valid Federal Employer Identification Number (FEIN). 85

“Joint employment” exists when two or more employers each have sufficient definitional indicia of being an “employer” to be considered the employer of a worker. 86 Each employer in a joint employment relationship to a worker is considered a joint employer of that worker. 87

The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 88 Bare assertions without supporting evidence are insufficient to carry the employer’s burden of proof. 89 Consequently, Employer here had the burden of establishing that it properly submitted a temporary labor certification application as an “employer” that was separate from Beach House Hotel LLC and Bay Harbor Hotel LLC.

Examination of the record in this matter, however, establishes that Employer did not have a full and fair opportunity to meet its burden of proof. The NOD sent to Employer relied on the criteria for the Single Employer Test instead of applying § 655.5’s definitional “employer” criteria, and Employer responded to the NOD based on the CO’s application of the Single Employer Test. The outcome may or may not have been different after applying the correct definitions.

The record is incomplete and unclear regarding how application of § 655.5’s definitional “employer” criteria would have affected the CO’s final decision.

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85 20 C.F.R. § 655.5.
86 *Id.*
87 *Id.*
With regard to the first definitional factor, having a “place of business (physical location) in the U.S. and a means by which it may be contacted for employment,” the NOD and the CO’s final decision both note that the “employer point of contact” is the same for all three entities.\textsuperscript{90} However, the NOD did not address “place of business (physical location),” thereby depriving Employer of the opportunity to explain that aspect of the factor. Moreover, the final decision’s “Recitation from Notice of Deficiency” inaccurately incorporates a finding that is not present in the original NOD. Specifically, in supposedly reciting the NOD’s language, the final decision concludes that “MB Florida, Ltd. shares the same worksite address [and] employer address . . . as the pending applications” from Beach House Hotel LLC and Bay Harbor Hotel LLC.\textsuperscript{91} The italicized language in the preceding sentence is not present in the original NOD.\textsuperscript{92} Thus, with respect to the “physical location” factor, the CO made a finding in the final determination that was not discussed in the NOD and as to which Employer had no opportunity to respond.\textsuperscript{93}

With regard to the second factor, existence of an “employer relationship,” the CO did ask Employer whether “the same people (or person) make employment decisions for both [sic] entities (e.g., has the power to hire and fire workers, or supervises or directs the work of the employees)?”\textsuperscript{94} Employer responded that “[t]he hiring and firing decisions are made by the departmental managers and the General Managers in their respective worksites.”\textsuperscript{95} Yet, the question asked and the response given differ significantly from what is contained in § 655.5’s definitional criteria. The specific question to be answered under those criteria is whether more than one “employer” has the “ability to hire, pay, fire, supervise, or otherwise control the work of” the workers under consideration.\textsuperscript{96} The CO’s question, and therefore Employer’s response, did not adequately address this inquiry.

Importantly, in \textit{ITServe Alliance, Inc.}, Judge Collyer analyzed this exact language in the context of H-1B visa applications and found that

an employer-employee relationship is evidenced by some aspect of ‘control’ which may be shown in various ways, be it the ability to hire, to pay, to fire, to supervise, or to control in another fashion. The use of ‘or’ distinctly informs regulated employers that a single listed factor can establish the requisite ‘control’ to demonstrate an employer-employee relationship. This formulation makes evident that there are multiple ways to demonstrate employer control, that is, by hiring or paying or firing or supervising or ‘otherwise’ showing control.\textsuperscript{97}

\textsuperscript{90} Compare AF, p. 11 with AF, p. 80.
\textsuperscript{91} See AF, p. 8 (emphasis added).
\textsuperscript{92} See AF, p. 80.
\textsuperscript{93} Notably, the applications from Beach House Hotel LLC and Bay Harbor Hotel LLC were not a part of the Appeal File; therefore, the accuracy of the statement that “MB Florida, Ltd. shares the same worksite address [and] employer address . . . as” those entities’ applications cannot be verified.
\textsuperscript{94} AF, p. 81.
\textsuperscript{95} AF, p. 55.
\textsuperscript{96} See 20 C.F.R. § 655.5 (defining “employer”).
\textsuperscript{97} \textit{ITServe Alliance, Inc.}, 443 F.Supp.3d at 37.
Thus, per Judge Collyer’s analysis, each of the specific aspects of the phrase “‘hire, pay, fire, supervise, or otherwise control the work of employees’” must be considered in answering this aspect of the “employer” definition. Further, “[i]n context, ‘otherwise’ anticipates additional, not fewer, examples of employer control.”98 The CO did not conduct such an analysis in this case.

With regard to the last factor, possession of a FEIN, the record establishes that Employer has a FEIN, as required by the definition. However, Employer only provided a FEIN for MB Florida Ltd. LLC; it did not provide any evidence of whether Beach House Hotel LLC or Bay Harbor Hotel LLC have their own separate FEINs. A joint FEIN may suggest joint employers. Similarly, separate FEINs may suggest separate employers. Here, however, Employer was not asked to provide that information because it was not part of the CO’s considerations under the Single Employer Test.99

In ITServe Alliance, Inc., Judge Collyer remanded the challenged H-1B visa applications to CIS for that agency to “reevaluate its determinations about the existence of an employer-employee relationship.”100 Based on the evidence and argument presented in this case, it is appropriate to do the same with respect to the CO’s decision to deny Employer’s H-2B temporary labor certifications.

e. Conclusion. While Employer correctly asserted that the CO improperly applied the Single Employer Test in considering Employer’s labor certification application, the question under administrative review is not just whether the CO applied the wrong test. Ultimately, the issue is whether the CO’s reasons for denial of certification were legally and factually sufficient.

A full review of the record establishes that the CO’s final determination was legally insufficient because it was made using an inapplicable test (the Single Employer Test) that has never been formally adopted or subjected to notice-and-comment rulemaking. Whether the CO’s final determination was factually sufficient cannot be determined based on the record because the proper process was derailed by use of an improper test.

The CO’s Notice of Deficiency applied the Single Employer Test and instructed Employer to cure the deficiencies stated in the notice by responding to questions specifically tied to that test. Employer’s response was necessarily tailored, therefore, to the CO’s instructions to follow the criteria of the Single Employer Test.

What the CO’s concerns (if any) might have been regarding Employer’s application if it had been considered under the regulatory definitions of “employer” and “joint employment” cannot be determined on this record. Similarly, what Employer’s responses might have been to a Notice of Deficiency issued pursuant to those regulatory definitions also cannot be determined on this record. Consequently, it would be inappropriate for the undersigned to make a determination as
to the factual sufficiency of the CO’s final determination when properly viewed through the lens of the regulatory definitions. This matter will, therefore, be remanded to the CO for further action, pursuant to 20 C.F.R. § 655.61(e). In particular, on remand the CO shall reconsider Employer’s application by reviewing its sufficiency in conjunction with the regulatory definitions of “employer” and “joint employment” set forth in 20 C.F.R. § 655.5.

5. Ruling. The Certifying Officer’s denial of Employer’s Application for Temporary Employment Certification is REMANDED. On remand, the Certifying Officer shall reconsider Employer’s application by reviewing its sufficiency in conjunction with the regulatory definitions of “employer” and “joint employment” set forth in 20 C.F.R. § 655.5.

SO ORDERED this day at Covington, Louisiana.

JOHN M. HERKE
ADMINISTRATIVE LAW JUDGE