



Issue Date: 14 April 2009

BALCA Case No.: 2009-TLN-00035
ETA Case No.: C-09026-44404

In the Matter of:

FABULOUS FLAVORS, INC., d/b/a BASKIN ROBBINS,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **JOHN M. VITTON**
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from a request for review of a United States Department of Labor Certifying Officer's denial of 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. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2008) (effective until Jan. 17, 2009); 20 C.F.R. Part 655., Subpart A, available at 73 Fed. Reg. 78,020 (Dec. 19, 2008) (effective Jan. 18, 2009).

Statement of the Case

On December 31, 2008, the Mississippi Department of Employment Security ("MDES") received an application from Fabulous Flavors, Inc., d/b/a Baskin Robbins ("the Employer") requesting temporary labor certification for three servers from April 1, 2009, through December 1, 2009. *See* AF 96-97.¹ The Employer attached, inter alia, a statement from its corporate secretary that described its peakload need for full-time workers from April through November. AF 101-102. The statement included, in pertinent part, the following:

My work force consists primarily of high school age individuals with no previous work experience and who are only available to work a limited number of hours per week. The

¹ Citations to the 130-page Appeal File will be abbreviated "AF" followed by the page number.

average number of hours that these individuals work per week is 15 to 20, and the majority of these hours are in the evenings and on the weekends. This arrangement works fine during the months of December, January, February, and March, because business is slower during those months and I can usually help out when needed. However, during the peak work load months from April through November, I cannot handle the increase in business all on of my own. During these months, I need to supplement my part time workers with additional full time workers who can work 40 hours per week in order to assist me with the increased work load. These individuals need to be able to serve ice cream, decorate cakes, work the cash register, make cash deposits, etc. April through September are very busy months due to the huge increase in ice cream sales during the spring and summer. Not to mention the multitude of birthday parties, high school graduation parties, summer family reunions and a surge in the tourist industry during the summer months. Also, October and November are extremely busy because of Halloween themed parties and high school football themed parties. Since opening in 2006, I have been unsuccessful at finding individuals who can work a 40-hour week on a consistent basis. As a result, I have been forced to work more and more hours in order to make up for the lack of manpower.

AF 101. The file also contains the Employer's payroll worksheets from August 24, 2007 through October 4, 2007, October 19, 2007, through November 1, 2007, and November 30, 2007 through September 19, 2008. AF 104-129. The worksheets include each server's rate of pay as well as handwritten notations for the total hours each employee worked and the staff's combined hours worked for each two-week pay period. *Id.*

After submitting its application, the Employer underwent supervised recruitment of U.S. workers, and MDES transmitted the application to the Department of Labor's Employment and Training Administration ("ETA"). *See* AF 71-95. On February 11, 2009, the CO issued a *Request for Information* ("the RFI"). In issuing the RFI, the CO relied upon Training and Employment Guidance Letter No. 21-06, Change 1, Attachment A, Section V.B (June 25, 2007) ("the TEGL"). In the RFI, the CO identified a single deficiency requiring remedial action: the Employer's failure to differentiate between temporary and permanent employees in its payroll documentation. AF 70. Citing Section III.D.4.c of the TEGL as the policy violated, the CO directed the Employer to submit "summarized payroll reports for a minimum of one previous calendar year that identifies [sic], 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." *Id.* On February 18, 2009, the Employer filed a response to the RFI. *See* AF 65-67. The response included the Employer's nine employees' rates of pay and total hours worked per month from June 2008 through February 2009. AF 66-67.

On March 12, 2009, the CO denied the Employer's application. AF 61-64. The CO found that the Employer failed to submit supporting documentation to justify its temporary need because its payroll documentation did not contain "the collective earnings and the hours worked by month" or "distinguish full-time permanent from full-time temporary workers." AF 64. The CO added that the response to the RFI only contained payroll information from June 2008 to February 2009 and therefore did not "cover the requested dates of need." The Employer's appeal followed.

Discussion

The TEGL provides the procedures for processing the application at issue in the instant case. *See* 72 Fed. Reg. 38,621 (July 13, 2007). Sections III.D.3 and .4 of the TEGL require a petitioning employer to provide a detailed statement with supporting documentation and evidence in order to establish a temporary need for the specific job opportunity, number of workers, and dates requested. Section V.B permits the CO to issue one RFI to allow the employer to correct any deficiencies or provide additional documentation or evidence. In the instant case, the CO issued the RFI because the Employer failed to distinguish between permanent and temporary servers in the payroll documentation initially provided. Section III.D.4.c of the TEGL lists summarized monthly payroll reports as an example of supporting evidence or documentation that an employer may submit when attempting to establish a peakload or seasonal temporary need for labor. The same provision requires that such reports cover “a minimum of one previous calendar year” and 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.” In its statement of temporary need, the Employer made clear that all of its nine servers are permanent part-time workers. The Employer therefore had no temporary employees to distinguish from its permanent staff in its payroll documents. Furthermore, as the TEGL does not expressly require distinguishing between permanent *part-time* workers and temporary full-time additions, the Employer could not have violated the specific provision cited. Accordingly, I find that the CO erred in issuing the RFI based on the deficiency identified and in denying the application on the same basis.

That the CO appears to have denied the application due to additional deficiencies found in the Employer’s response to the RFI is problematic. By failing to list in the RFI the fact that the Employer did not tally “collective earnings and the hours worked by month” for its entire staff—figures the Employer also failed to include in the initial submission—the CO denied the Employer notice and an opportunity to address this issue. While strict compliance with the RFI’s instructions would have resolved the problem, the CO was ambiguous in failing to list it among the deficiencies found in the RFI.² Likewise, given the determination’s wording, it is unclear whether or to what extent the CO based his denial on the fact that the Employer’s response to the RFI contained payroll information only from June 2008 through February 2009. Nevertheless, the fact that the Employer submitted payroll information for the preceding eighteen months between its two submissions would undermine denying the application on that basis.³

In his brief, the CO urges affirmance by arguing that the Employer’s documentation was insufficient to establish a temporary need. When he issued the RFI, however, the CO identified only a single—and ultimately irrelevant—issue of form. As the Employer never received notice and an opportunity to address the CO’s newly expressed concerns about the quality of the documentation, affirming the denial on those grounds would be inconsistent with the Department’s policy of allowing an employer to correct deficiencies in its application by responding to the CO’s RFI. Accordingly, I will remand the matter to the CO in order for him to reconsider the Employer’s application in light of this decision. If he deems it necessary, he may then issue an additional RFI that should identify with

² I express no opinion about whether submitting payroll documents containing biweekly—as opposed to monthly—information would bar certification.

³ As implied above, the Appeal File lacks reports for a pair of pay periods in October and November 2007. It is unclear if the Employer omitted them when submitting the application or if the CO omitted them when preparing the file.

specificity all deficiencies found and the remedial action necessary to correct each deficiency.⁴ If the CO issues another RFI, the Employer should comply fully with each instruction contained therein regardless of how duplicative or obvious the Employer's responses would be. If the CO denies certification again, he should precisely explain his bases for denial.

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Certifying Officer for further action consistent with this decision.

For the Board:

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JOHN M. VITTON
Chief Administrative Law Judge

⁴ See generally *Tarmac Roadstone (USA), Inc.*, 1987-INA-701 (BALCA Jan. 4 1989) (en banc) (remanding permanent labor certification case based on due process and regulatory scheme where CO based Final Determination on ground not raised in prior Notice of Findings).