



Issue Date: 10 July 2009 BALCA Case No.: 2009-TLN-00072

ETA Case No.: C-09140-45174

In the Matter of:

EASTER SEALS CENTRAL CALIFORNIA,
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 ("the CO") 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).¹ Following the CO's denial of an application under 20 C.F.R. § 655.32, the applicant may request that the Board of Alien Labor Certification Appeals ("the Board" or "BALCA") review the CO's denial of certification. § 655.33. The administrative review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and "such evidence as was actually submitted to the CO in support of the application." § 655.33(a), (e).

¹ Citations to the regulations that became effective January 18, 2009, will contain only the provisions as they will appear when codified.

Statement of the Case

On May 20, 2009, the United States Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Easter Seals Central California. ("the Employer" or "Easter"). AF 134.² Easter is a non-profit organization that provides a variety of services to adults and children with disabilities. *See* AF 136. For example, Easter runs a residential summer camp, a child development center, an autism therapy program, an education program, and several social programs. AF 107. The Employer also offers respite services to families of children with disabilities or special needs. *Id.*; *see* AF 136. The Employer "often" places caregivers with families on a temporary basis "in response to a specific time-limited" demand. AF 102. The Employer explained that, after identifying the services required by a family requesting assistance, "we match the family and the special needs child/children with a suitable care-giver, provided we have a suitable qualified care-giver available for the temporary duration of any specific placement." AF 136.

Previously, the CO granted the Employer certification for a child care worker from October 1, 2008, through June 30, 2009. AF 92. The alien was to work in various locations that included several family residences. *See id.*; AF 103. In the instant application, the Employer requested certification to allow the same alien to continue working at one of those families' residences from July 1, 2009, to June 30, 2011. AF 136. The alien would provide respite care for two autistic children after school and on Saturdays. AF 138. Duties would include supervising behavior and personal care in the home as well as coordinating and supporting the children during outings into the community. *Id.* The Employer included with its application materials, *inter alia*, a letter from the children's father ("the Client") explaining that his family would not require the worker's assistance after his June 2011 retirement. AF 145. The Client wrote that "this is a temporary one-time occurrence" to tide over his family. *Id.* On the application, the Employer indicated that it has an intermittent need for temporary child care workers. AF 136.

On May 22, 2009, the CO issued a *Request for Further Information* ("RFI") that identified two deficiencies requiring remedial action, only one of which is relevant to this appeal. AF 132-133; *see*

² Citations to the 152-page appeal file will be abbreviated "AF" followed by the page number.

generally 20 C.F.R. §§ 655.21(a), 655.23(c).³ In particular, the CO wrote that Easter did not “adequately explain the nature of the temporary need based on the employer’s business operations.” AF 132. Quoting the Client’s letter, the CO stated that the Employer failed in its attempt to establish a temporary need under the one-time occurrence standard. *Id.* The CO also stated that the instant application “has the same job title, job duties, and work location” as the Employer’s prior application. *Id.* Since Easter has “a continuous need of OVER 32 months,” the CO found that its need appears to be permanent rather than temporary. AF 133. The RFI directed the Employer to submit a detailed statement of temporary need containing a description of the Employer’s business history and activities, an explanation regarding why the nature of the job opportunity and number of workers requested reflect a temporary need, and an explanation regarding how the request meets one of the aforementioned regulatory standards of temporary need. AF 132. The RFI also directed the Employer to resolve the apparent conflict between the Client’s letter, which contained the phrase “one-time occurrence,” and Easter’s application, which indicated that the Employer has an intermittent need. AF 132.

On May 29, 2009, the CO received the Employer’s response to the RFI. AF 94. Easter’s response included, *inter alia*, a statement of temporary need signed by Betsy Chapman (“Chapman”), Easter’s Vice President of Human Resources. AF 100-105. The statement clarified that the Employer claims an intermittent temporary need. The statement also provided additional information on Easter’s respite services. AF 102. In addition to reiterating that, after receiving a request, Easter attempts to match the client with a suitable caregiver who is available for the placement’s duration, Chapman noted that Easter recruits, hires, supervises, and fires workers for these temporary placements, controls the structure and hours of the assignments, and pays the salaries. *Id.* Chapman also explained that the Employer’s need for the worker (as opposed to the family’s) qualifies as intermittent—and not permanent—because “the need is only occasioned when services are requested by customers.” AF 103 (capitalization altered). She added that the Employer keeps “a roster of qualified available workers willing to work for temporary assignments.” *Id.*

The statement also addressed the CO’s concerns about the Employer’s prior application. Contrary to the CO’s assertion in the RFI, Chapman wrote that the job duties and locations listed on the

³ The appeal file does not contain the first several pages of the RFI at AF 131-133. A complete version appears among the documents the Employer submitted in response to the RFI. *See* AF 96-99.

applications differed. *See* AF 103-104. According to Chapman, the Employer previously required a child care worker to provide curriculum support for one family in addition to after-school and weekend care for the two others. AF 104. Chapman stated that the Employer filed the instant application because of a new need, implying that considering the previous application when evaluating the instant application would be inappropriate. *Id.* Finally, Chapman observed that, in a December 18, 2008, memorandum opinion, the Department of Homeland Security's Acting General Counsel discussed how, under a then-proposed rule, temporary employment could last up to three consecutive years, and how the Department of Labor has stated that, in performing its function under the H-2B program, it defers to the Department of Homeland Security's definition of "temporary need." AF 104-105; *see* AF 125-130. Chapman therefore concluded that the Employer had established a 24-month temporary need. *See* AF 105.

On June 5, 2009, the CO denied the Employer's application. AF 90. The CO explained that Easter did not establish an intermittent need because it failed to demonstrate that: "(1) It has not employed permanent or full-time workers to perform the services or labor **but** (2) occasionally or intermittently needs temporary workers to perform the services or labor for short periods." AF 92; *see* 8 C.F.R. § 214.2(h)(6)(ii)(B)(4). Observing that the Employer previously obtained certification for "the same job title and worksite address," the CO found that Easter "has not established that it has not employed permanent or full-time workers to perform the services or labor." *Id.* The CO also reasoned that the Employer has not established that it requires temporary workers to perform the services or labor for short periods. AF 92-93. After paraphrasing 20 C.F.R. §655.6(c) and acknowledging the December 18, 2008, memorandum opinion, the CO wrote, "However, the only extraordinary circumstance where temporary need can last more than 1 year under the H-2B program is under a one-time occurrence, **not** an Intermittent need, as defined by DHS under 8 CFR 214.2(h)(6)(ii)(B)." *Id.*⁴ The CO also found that the Employer "contradicted" itself in making the following statement: "Placements with families are often temporary, and in response to a specific time-limited NEED. Placements are not based upon a family's ONE-TIME OCCURRENCE because the fact of having a special needs child is a PERMANENT OCCURRENCE." AF 93. Ultimately, the CO concluded that the submissions indicate that the Employer has a permanent need. *Id.* The Employer's appeal followed.

⁴ 20 C.F.R. § 655.6(c) provides: "Except where the employer's need is based on a one-time occurrence, the Secretary will, absent unusual circumstances, deny an *Application for Temporary Employment Certification* where the employer has a recurring, seasonal or peakload need lasting more than 10 months."

Discussion

To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies as temporary under one of the four regulatory need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. § 655.6(b). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361. In the instant case, the Employer attempted to establish an intermittent temporary need. To establish an intermittent need, the petitioning employer must demonstrate that “it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform [the] services or labor for short periods.” 8 C.F.R. § 214.2(h)(6)(ii)(4); *see* 20 C.F.R. § 655.6(b) (requiring the petitioner to justify its need under one of the four standards defined by the Department of Homeland Security at 8 C.F.R. § 214.2(h)(6)(ii)).

Upon reviewing the record, I concur with the CO that the Employer failed to demonstrate that its need qualifies as intermittent under the first prong of the regulatory standard. Specifically, the record leaves open the question of whether the Employer has “employed permanent or full-time workers to perform the services or labor” at issue. The Employer’s promotional materials indicate only that Easter employs 50 full-time employees and 200 part-time employees in total. AF 106. Likewise, the Employer’s statements regarding its employment relationship with the caregivers it temporarily places with families are ambiguous. First, the Employer stated that it matches the requesting family with a suitable care-giver, provided Easter has “a suitable qualified care-giver available” for the duration of a temporary placement. Second, the Employer stressed that its “need [for these workers] is only occasioned when services are requested by customers.” Third, the Employer noted that it recruits and hires workers for these temporary placements. Fourth, the Employer wrote that it maintains “a roster of qualified available workers willing to work for temporary assignments.” Read together, these statements could mean that the Employer merely hires workers from its roster each time a temporary placement becomes available and then terminates the employment relationship at the end of each placement. Under this interpretation, it would seem that the Employer has not employed permanent workers for temporary placements. On the other hand, these statements could mean that the Employer permanently employs a stable of workers to assign to temporary placements, in which case the Employer would not qualify under 8 C.F.R. § 214.2(h)(6)(ii)(4)’s first clause.

Furthermore, it is not clear that the Employer has not employed full-time workers in this capacity. Section 214.2(h)(6)(ii)(4)'s first clause requires that the petitioner has employed neither permanent nor full-time workers to perform the labor or services at issue. The record contains no information about whether the caregivers Easter places with families are full-time or part-time employees. The job opportunity at issue is a full-time position. AF 136. Given that the Employer has not indicated that this would be an atypical placement, it seems likely that the Employer has employed caregivers in temporary placements on a full-time basis. Regardless, the record contains no statement from the Employer that it has not. Accordingly, the Employer has not established that its need qualifies as temporary under the intermittent standard, and the CO's denial of certification was proper.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

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JOHN M. VITTON
Chief Administrative Law Judge