



Issue Date: 02 October 2009

BALCA Case No.: 2009-TLN-00093
2009-TLN-00094

ETA Case No.: C-09222-46124
C-09222-46129

In the Matter of:

EAST COAST LABOR SOLUTIONS, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Michael X. Hartofelis, Esq.
Loma USA, Inc.
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For the Employer

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Washington, DC
For the Certifying Officer

Before: **WILLIAM S. COLWELL**
Associate 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 ("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 (2009). Following the CO's denial of an application under 20 C.F.R. § 655.32, the applicant may request review by the Board of Alien Labor Certification Appeals ("the Board" or "BALCA"). § 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).

Because the same or substantially similar evidence is relevant and material to each of these appeals, I have consolidated these matters for decision. *See* 29 C.F.R. § 18.11. Unless otherwise noted, the following Statement of the Case is based on BALCA Case 2009-TLN-00093, which is representative of the issues in both cases. The cases are nearly identical in regard to the issues raised and dealt with by the CO, and the evidence and argument presented by the employer.

STATEMENT OF THE CASE

On August 10, 2009, the Employment and Training Administration ("ETA") received applications from East Coast Labor Solutions, LLC, ("the Employer") requesting temporary labor certification for 150 Poultry Deboners from October 1, 2009, through August 1, 2010, in Selbyville, Delaware, and Guntersville, Alabama, respectively. (AF 142-162; AF2 141-173).¹ The application contained the following statement of temporary need:

As a Temporary Staffing Management Company our staffing needs are contingent upon that of our clients. In this instance, we are experiencing pressure to enhance our temporary staffing levels of Poultry Deboners in order to accommodate a projected increase in production of poultry processing. We serve large poultry processing plants throughout the region and we are currently facing a shortage of poultry deboner

¹ Citations to the Appeal File for 2009-TLN-00091 will be abbreviated "AF" followed by the page number. Citations to the Appeal File for 2009-TLN-00092 will be abbreviated "AF2" followed by the page number.

positions to meet our contract periods. The employment of people to fill this type of position in the plants is getting harder each day. Lately, we have had a recurring problem with employees leaving on a weekly basis causing our company to lose contracts. Hence, this situation is affecting our company economically. East Coast Labor Solutions, LLC currently requires the services of Poultry Deboners to work on an assembly line for our client Mountaire Inc. Mountaire Corporation is one of the largest chicken companies in the United States and Mexico. The chicken is processed, packaged and shipped to retail, foodservice and institutional customers nation-wide and in 40 different countries. Due to the increased production and demand for poultry during the autumn, winter and spring periods will create a peak load need for additional foreign temporary workers. We regularly employ permanent workers; however there is a spike in business with increased production during the requested period of need.

In an attempt to meet this enhanced labor demand with workers from within the U.S. domestic labor market, East Coast Labor Solutions, LLC has taken great pains to recruit U.S. workers through extensive advertising in newspapers of general circulation and the use of flyers, job fairs and other job announcements. Unfortunately, due in a large part to significant demographic trends and shifts, East Coast Labor Solutions, LLC has not been able to accommodate these peak load staffing needs except through the utilization of temporary foreign workers.

(AF 142; 150).

On August 17, 2009, the CO issued a *Request for Further Information* (“RFI”), finding that the Employer failed to establish that the nature of its need is temporary. (AF 138-141). The CO stated that the Employer did not submit “adequate supportive documentation justifying that (1) the need for services or labor to be performed is temporary in nature based on a seasonal peak load standard, and (2) the number of worker positions being request for certification is justified and represents bona fide job opportunities.” *Id.* The CO noted, “Poultry processing production, including poultry deboning, is presumed to occur on a year-round basis, as is poultry production and related activities.” (AF 140). The CO observed that the Employer stated in its temporary needs statement that it “serve[s] large poultry processing plants throughout the region,” indicating that it provides this specific service to other clients in addition to Mountaire Inc. The CO contended that this suggested that its need is ongoing, and that the

Employer is “basing its temporary need on selected contracts rather than on its overall need.” (AF 141).

The CO directed the Employer to submit a revised, detailed statement of temporary need containing a description of the Employer’s business history, activities, and annual schedule of operations; 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 certification request meets one of the aforementioned regulatory standards of temporary need. (AF 140). The CO stated that the Employer must also “provide documentation to support its decision to base its temporary need on a selected contract, rather than on its business as a whole.” *Id.* In particular, the CO instructed the Employer to submit the following: signed work contracts; letters of intent from clients or previous monthly invoices showing work will be performed for each month during the requested period of need; annualized or multi-year work contracts or agreements, specifying the actual dates of work; and summarized and signed monthly payroll reports for a minimum of one previous calendar year, which indicate the total number of workers employed, the hours worked, and the total earnings received. (AF 141).

The CO received the Employer’s response to the RFI on August 24, 2009.² (AF 114-137). The Employer’s response contained an amended ETA Form 9142, which included a revised statement of temporary need. This statement included a brief description of the Employer’s operations:

Operating in West Virginia since 2007, East Coast Labor Solutions, LLC is committed to providing our clients with the highest quality workforce for the manufacturing industry by understanding our client’s specific needs and effectively communicating a realistic perspective with regards to exceeding expectations.

As a temporary staffing management company our staffing needs are contingent upon that of our clients. In this instance, we are experiencing pressure to enhance our temporary staffing levels of poultry deboners and are currently facing a shortage of employees in the area of

² The Employer’s response to the RFI is not dated and does not contain a cover letter. The August 24, 2009, date was indicated in the Index to the Appeal File prepared by the CO.

intended employment to fill these positions and meet our contract periods. ECLS provides managed staff for the manufacturing industry. The staff is trained to comply with the industry standards and to meet all OSHA and compliance requirements. In addition, when necessary, our services can include the provision of housing for temporary staff.

(AF 114, 122).

The Employer's statement of temporary need also described Mountaire, the company with which the Employer has a contract to provide employees. The Employer explained that Mountaire has a difficult time finding employees since its plants are in such remote locations. The Employer stated, "We have found that the number of people willing to commute from other areas is limited at best. We have attempted to hire local workers but have been unsuccessful in our endeavors." (AF 114, 122). The Employer asserted that its recruiting efforts included "DOL job postings, newspaper and internet advertising, and not-for-profit job corps recruitment." (AF 122). The Employer further explained, "The majority of residents are self-employed, students, or professionals. Additionally the local labor market has been dramatically reduced due to the large number of foreclosures." *Id.* In conclusion, the Employer stated:

ECLS's need for poultry deboners is linked to an increase in contracts with our client, Mountaire Farms, Inc. These workers are required to fulfill our contractual obligations to our client and ensure they are sufficiently staffed during this peak in business. These poultry deboners will be utilized during October through the end of July. Our client experiences a decrease in demand for their services of additional poultry deboners during the months of August and September.

(AF 122). The Employer also submitted a copy of an Agreement for Temporary Staffing Services, signed by both the Employer and the Employer's client, Mountaire Farms, Inc., and summarized monthly payroll reports for the calendar years 2009 and 2010. (AF 131-137). The payroll reports show that the Employer has employed 6 permanent workers since August 2009 and projects that it will employ 6 permanent workers through December 2010. (AF 136-137). It shows that the Employer has employed 150 temporary workers since October 2009 and projects that it will employ 150 temporary workers through December 2010, with the exception of August and September 2010. *Id.*

On September 4, 2009, the CO issued a Final Determination denying certification for the job opportunities. (AF 108-113). The CO found that the Employer failed to establish that the nature of its need is temporary under 20 C.F.R. § 655.6(d). The CO asserted that the Employer is “basing its temporary need on selected contracts rather than on its overall need.” (AF 110). Taking into consideration the Employer’s response to the RFI, the CO found that there was “insufficient documentation to prove a peakload need for 150 temporary workers at Mountaire Farms, Inc. two worksites.” (AF 112). The CO noted that the Employer was requested to provide “a description of their business history, activities and schedule of operations through the year, as a job contractor must prove a temporary need based on its business operations, in addition to that of its employer customers.” *Id.* The CO asserted that the Employer “did not provide this information, thus, failing to meet its burden to establish that its need was temporary.” *Id.* Specifically, the CO contended, “The employer failed to produce documentation to prove that the poultry deboning position is one with high and low seasons that would require peakload workers, specifically for the months of October through the end of July.” *Id.*

On September 15, 2009, BALCA received the Employer’s request for administrative review. (AF 1-107). In this request, the Employer asserted that it had received partial certification for another similar application it filed for poultry deboners in West Virginia and that it did not understand why there was such a disparity between the two cases. The Employer attached its applications for poultry deboners in West Virginia, including supporting documentation, as well as a copy of its partial certification.³

The Board issued a Notice of Docketing on September 18, 2009. The CO filed a brief on September 25, 2009, arguing that the Employer failed to submit information and documents that established a temporary need for Poultry Deboners. The CO contended, “Instead of addressing the CO’s legitimate concerns, the employer has focused on irrelevancies, such as its efforts to recruit domestic workers.” Regarding the Employer’s partial certification in West Virginia, the CO asserted, “Even if the Department made an

³ The Employer stated it received partial certification since it had already recruited and hired six U.S. workers.

error in awarding H-2B certification in West Virginia, that erroneous decision is not binding, nor a precedent for awarding certification here.”

The Employer did not file an appellate brief.

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 temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. § 655.6(b). An applicant must maintain documentation evidencing the temporary need to submit if requested by the CO. § 655.6(e). While an applicant need only submit a detailed statement of temporary need at the time of the application’s filing, failure to provide substantiating evidence or documentation in response to the CO’s RFI “may be grounds for the denial of the application.” § 655.21(b).⁴

In the instant case, the Employer attempted to establish a peakload temporary need. To establish a peakload need, an employer must demonstrate that “it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(3). To determine the temporary nature of work or services to be performed under applications filed by job contractors like the Employer, the CO must examine the “job contractor’s own need for the services or labor to be performed in addition to the needs of each individual employer with whom the job contractor has agreed to provide workers as part of a signed work contract or labor services agreement.”

⁴ Contrary to the CO’s statement in the RFI that the Employer should have initially submitted supportive documentation, § 655.21(b) does not require this documentation to be submitted until requested.

20 C.F.R. § 655.6(d).⁵ The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

Upon reviewing the record and the parties' legal arguments, I concur with the CO that the Employer failed to comply fully with the CO's reasonable RFI. The RFI provided the Employer clear notice of the required corrective action, but the Employer failed to submit an adequate response. The Employer did not provide the CO with an adequate description of its business history, activities, and schedule of operations through the year, as the CO requested in the RFI. Accordingly, I find that the denial was proper under 20 C.F.R. § 655.21(b).

Moreover, the documentation provided does not establish a temporary peakload need due to a seasonal demand. As the CO noted in the Final Determination, "The employer failed to produce documentation to prove that the poultry deboning position is one with high and low seasons that would require peakload workers, specifically for the months of October through the end of July." Thus, the Employer did not establish that it had a temporary, peakload need for workers due to a seasonal or short-term demand, as required by 20 C.F.R. § 655.6(b) and 8 C.F.R. § 214.2(h)(6)(ii)(3).

ORDER

Based on the foregoing, **IT IS ORDERED** that the CO's denial of certification is **AFFIRMED**.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

⁵ A job contractor is an employer that provides temporary services or labor to one or more unaffiliated employers but does not supervise or control the performance of the services or labor provided beyond hiring, paying, and firing the workers. 20 C.F.R. § 655.4. The Employer identified itself as a job contractor on its ETA Form 9142. (AF 143).