U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 July 2009

BALCA Case Nos.: 2009-TLN-00070
2009-TLN-00071

ETA Case Nos.: C-09093-44988
C-09093-44987

In the Matter of:

HUTCO, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

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

DECISION AND ORDER

These cases arise 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, 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 April 3, 2009, the United States Department of Labor's Employment and Training Administration ("ETA") received applications for temporary labor certification from Hutco, Inc. ("the Employer" or "Hutco"). *See* AF 106.[2] The Employer, a job contractor, requested certification for 180 production workers and 150 welder-fitters from May 18, 2009, through November 30, 2009. *See* AF 107. The application materials included, *inter alia*, a letter from one of the Employer's clients, payroll summary reports for 2007, and a letter from the Employer's vice president. Joseph Badeaux, Vice President and General Manager of Quality Shipyards, LLC, ["Quality"] wrote in a December 15, 2008, letter, "Once again, we are requesting Hutco, Inc., to begin your work on February 1, 2009 and continue through November 30, 2009. The bulk of our requirements are identical to past years: as you know, we depend on both your welding and production services in order to meet our customer's needs on a timely basis." AF 120.[3] One payroll report indicates that, during 2007, the Employer maintained a permanent staff of between 172 and 243 production workers in Houma, LA. AF2 94. The report also indicates that the Employer supplemented this staff with between 184 and 321 temporary workers from February through November of 2007. *Id.* The other payroll report indicates that, during 2007, the Employer maintained a permanent staff of between 68 and 96 welders, which it supplemented with between 69 and 121 temporary workers from February through November of 2007. AF 119.

In his March 27, 2009, letter, Hutco vice president Scott Hutchison wrote to explain the Employer's temporary need. AF 117-18. Mr. Hutchison contended that the Employer actually required temporary workers earlier than the Employer's application indicated, "While our original date of need is still February 1st, we are starting the process extremely late at this time, so we are applying for May 18, 2009 as our starting date for this year. Normally, these temporary seasonal peakload workers would be employed from February 1 to November 30, 2009 . . . ." AF 117. Mr. Hutchison explained that the Employer has a peakload need for these workers because, "[d]uring the bad weather and cold temperatures, our business slows down considerably." *Id.* The Employer's "activities resume fully after the winter winds and rains cease, allowing our employees to service our customer's oil rigs." *Id.* While operating year round, the Employer "experience[s] a significant spike that starts when the harsh weather subsides and this spike continues through the spring, summer and fall." *Id.*

On April 16, 2009, the Certifying Officer ("the CO") issued a *Request for Further Information* ("RFI") that concerned issues unrelated to these appeals. AF1 97-100; AF2 79-82.[4] On April 23, 2009, the CO received the Employer's response. AF 94. On May 5, 2009, the CO issued a second pair of RFIs.

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[2] These appeals have been consolidated for decision because they involve the same dispositive facts and issues. ETA prepared and submitted appeal files for each case. As the file for 2009-TLN-00070 is incomplete, I will primarily cite the appeal file for 2009-TLN-00071 using the abbreviation "AF" followed by the page number. Where necessary, I will cite the appeal file in 2009-TLN-00070 using the abbreviation "AF2" followed by the page number.

[3] The Employer submitted a letter from another client, but later indicated that it would only supply workers requested in these applications to Quality. *See* AF 65.

[4] The CO actually issued two RFIs relating to the Employer's application for 150 welder-fitters and did not address the Employer's application for certification of 180 production workers. In its response, the Employer noted that the CO had issued two RFIs relating to the former but nevertheless responded as though the same RFI had been issued in both cases. *See* AF 96.

AF 88-93.[5] The RFI identified several deficiencies requiring corrective action, only one of which requires discussion. Specifically, the CO found that the Employer "did not submit adequate supportive documentation justifying that . . . the need for services or labor to be performed is temporary in nature based on a seasonal peakload standard." AF 91-92. The CO explained that the letters of intent submitted by the Employer "are inadequate to establish temporary need." AF 91. The letters failed to "provide sufficient information to support the employer's claim that the nature of its temporary need is due to dramatic variations in weather conditions and fails to substantiate that the total number of workers needed represents bona fide job opportunities at the customer's worksite(s)." *Id.* The CO also found that the letters did not contain "sufficient information that the underlying need of the employer-clients themselves for [workers] is temporary in nature based on a seasonal peakload standard." *Id.* The CO requested that, pursuant to 20 C.F.R. §655.6, the Employer provide additional evidence and documentation of its and each of its customers' temporary seasonal peakload need for the production workers. *Id.*

The Employer's May 12, 2009, response included, *inter alia*, a second statement of temporary need. AF 84-86. Therein, Mr. Hutchison provided the following "general information":

> Hutco is a labor contractor that supplements both Quality Shipyard LLC's domestic labor as well as its own. Oil and Gas boat operators are looking to <u>*repair*</u> their aged fleets, stretch them (make them longer/ more efficient) or just pass coast guard inspection. These operators[']workload increases significantly as the weather permits their boats to handle more jobs due to the more stable weather (Feb-Nov). All boats are required to be coast guard approved which means that in order for them to work; they must undergo inspection which usually requires the boat to be repaired in order to be sea worthy. The supply boats assist the oil and gas industry in the following ways:
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> - Installation of new offshore oil/gas platforms – only done when the seas are calm
> - Maintenance on existing platforms – salt water is tough on these steel structures; when a Hurricane enters the Gulf of Mexico; the damage to these platforms/ rigs is devastating. These platforms are destroyed and need lots of repairs or need to be replaced.
> - Assist drilling rigs that are drilling for oil/ gas.
>
> Note: The more work these platforms needs the more boats are needed to tend to them.
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> There are two types of shipyards, repair yards and new construction yards. Repair yards are seasonal, dirty jobs and new construction yards are steady, clean jobs. Due to the boom bust of the oil and gas industry, most fleets are aged. The older the boats, the more rusty/ dirty they are, the more repairs needed. Repair work is not the preferred job by local workers who are in the shipyard industry. Most locals prefer new construction work. This work is year round, consistent hours, and working with new material. There is currently a boom in the ultra deepwater Gulf of Mexico for oil and gas. These projects are so large and expensive that it requires an investment and planning 10+ years into the future. The boats that are capable of handling these jobs are very large (260ft+) which provides steady,

[5] The first few pages of the May 5, 2009, RFI only appear in the appeal file for 2009-TLN-00070 among the documents filed with the Employer's request for BALCA review. *See* AF2 20-23.

> clean, long term work for the local labor force. The boom in boat building for ultra deepwater Gulf of Mexico is putting a strain on the local labor force, taking away these workers who were at one time willing to perform repairs.

AF 84-85. To justify the Employer's claim of a peakload need, Mr. Hutchison explained that, during December and January, "the Gulf Coast experiences extremely strong north winds and cold weather" that "make it hard for supply boats to perform maintenance to offshore platforms" because "[t]he winds makes the seas very rough, and the cold weather makes it hard for outside construction work." AF 85. Mr. Hutchison asserted that the Employer's staffing charts support this argument. *Id.* Mr. Hutchison further explained that Quality "provides new vessel construction, conversion and repair services on the Gulf intra-coastal Waterway near Houma, Louisiana." AF 85. Quality's Houma facility includes "four floating dry docks capable of repairing marine vessels up to 15,000 horsepower and a full service machine shop with specialty equipment and supplies best suited to the needs of the marine and oil industry." *Id.*

In its response, the Employer also provided a graph and payroll summary report showing that, during December and January 2008, Hutco employed 601 and 589 "Non-Administrative Workers," respectively, at its Lafayette, Louisiana, home office. AF 74-75. From February through November, Hutco employed between 650 and 1185 workers. *Id.* The response also contained a graph and payroll summary report indicating that, from April through November 2008, the Employer supplemented its permanent staff of production workers employed in Houma, Louisiana, with between 96 and 156 temporary workers. AF 76-77.[6]

On June 1, 2009, the CO denied the Employer's applications on three bases, only the first of which warrants discussion. AF 57-63. Specifically, the CO found that the Employer failed to justify a temporary peakload need for the workers. AF 59-62. The CO explained that the Employer did not comply with the May 5, 2009, RFI's requirement to "present evidence justifying how its need is 'directly affected by seasonal or harsh climatic conditions and that such conditions are customary to other businesses in the Gulf Coast area employing welding services.'" AF 59. Observing that the Employer only provided an amended statement of temporary need, the CO found that the Employer did not satisfy its burden of proof to present "evidence that the weather conditions in December and January are so consistently severe and harsh as to substantially affect the scheduling of repairs (in Houma, LA) for supply vessels to perform maintenance for offshore platforms by its employer-client(s)." AF 60. The CO added that "[b]ased on the facts presented, the Department is not convinced that the employer has less of a need for [these workers] during the months of December and January when these are the very months that supply vessels find it difficult to perform maintenance on offshore platforms and, consequently, should be scheduled or located on-shore/dry docked for repairs in Houma, Louisiana, by the workers." *Id.* The CO independently conducted Internet research on weather conditions in Houma and reported, contrary to the Employer's assertions, that the average high temperature is the same in January and February, that the average precipitation from February through September is higher than December's average, and that the average wind speeds and gusts are higher in February, March, and April than they are in January. AF 60-61. The Employer's appeal followed. On June 15, 2009, I issued a *Notice of Docketing* setting the briefing deadline. On June 17, 2009, the CO transmitted the appeal files. On June 24, 2009, the CO filed his brief.

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[6] The Employer submitted a May 8, 2009, agreement to provide production workers to Quality that does not appear in the appeal file. *See* AF2 62.

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). 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." § 655.6(d).[7] An applicant must maintain documentation evidencing the temporary need to submit in response to an RFI. §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 requested evidence or documentation substantiating the employer's need "may be grounds for the denial of the application." § 655.21(b).

In the instant case, the Employer attempted to establish a peakload temporary need based on a seasonal demand. To establish a peakload need, the 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). Skeptical of the Employer's claim that its need for temporary workers peaks from February through November because weather conditions cause a slowdown in "its operations" during December and January, the CO reasonably requested substantiating documentation.

While the Employer's response contained additional explanation of its theory, the Employer did not provide sufficient documentation. The payroll summary reports established that Hutco did not employ any temporary production workers in Houma, LA, during January and December of 2007 and 2008, or any welders in Houma during January and December of 2007.[8] They did not establish that the employer only needed these workers during those months due to weather conditions. Rather, they merely suggested that the Employer previously obtained certification for the same ten-month period—the maximum allowed under the program—during those years. *See* § 655.6(c). Likewise, in its letter of intent, Quality only "once again" requested temporary workers during this period, which merely suggested that the Employer has historically provided Quality with temporary workers under the H-2A program during the same ten-month period. The letter did not address the reason why Quality only requested workers for this period.[9]

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[7] 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.

[8] It is unclear why the Employer also provided a payroll summary report for non-administrative employees rather than welder-fitters. Likewise, it is unclear why the report provided information for workers employed at Hutco's office in Lafayette rather than Houma, LA.

[9] Although the record does not appear to contain a copy of the Employer's May 8, 2009, agreement with Quality, neither party's references to the document indicate that it contained additional information relevant to this inquiry.

In his final determination, the CO also raised a valid concern about the Employer's temporary need theory. While not entirely clear from the record, it appears that the Employer seeks certification for temporary workers to work at Quality's ship-repair facilities.[10] Hutco claims that, due to weather conditions, the boats that Quality repairs cannot service off-shore installations during December and January. It follows that these vessels would be docked and therefore available for repairs during these months. Hutco has failed to explain or document why the repair work at Quality's facility instead declines during December and January. However, regardless of the apparent flaws in the Employer's theory of temporary need, or the weather data the CO independently obtained,[11] the Employer did not comply with the RFI's requirement to provide evidence or documentation supporting its claim of a peakload need due to a seasonal demand. Under § 655.21(b), denial was proper. Accordingly, I affirm the CO's denial of both applications.

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. VITTONE
Chief Administrative Law Judge

[10] I note that the Employer originally stated that the temporary workers would service the oil rigs themselves. AF 117.

[11] In its request for review, the Employer provided information not considered by the CO in order to, *inter alia*, counter the weather data quoted in the final determination. The regulations preclude me from considering evidence not before the CO. 20 C.F.R. § 655.33(a), (e). Accordingly, to the extent the Employer's request for review contained new information, I must disregard it.