

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 22 December 2009

BALCA Case No.: 2010-TLN-00020

ETA Case No.: C-09132-45143

In the Matter of:

TAMPA SHIP, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

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 (2009).

Statement of the Case

The present case involves a second appeal of a *Final Determination* denying temporary labor certification following the Employer's first appeal and a subsequent remand. On December 29, 2008,

the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Tampa Ship, LLC, ("the Employer") requesting certification for 80 "Ship Fitters" from April 2, 2009, until February 1, 2010. AF 13.¹ At the same time, the Employer had submitted multiple other applications for different job positions. *Id.* On March 13, 2009, the CO denied certification, and the Employer appealed. AF 16. At issue in the first appeal was whether the Employer had established a temporary need, and whether the Employer satisfied the regulatory requirements for recruiting domestic workers. *Id.* The Board of Alien Labor Certification Appeals ("BALCA") issued a decision reversing the CO's decision in part and remanding for further proceedings.² AF 13-19. Specifically, BALCA found that the Employer had established a temporary need. AF 16. However, the original appeal "inexplicably contain[ed] documents from the Employer's other applications and lack[ed] documents that the Employer actually submitted." AF 18. Therefore, the board remanded the case in order for the CO to "identify the correct recruitment report and then review it in conjunction with the Employer's application." *Id.* BALCA required the CO to issue a Request for Further Information ("RFI") before rendering an unfavorable determination. *Id.*

Upon remand, the CO issued an RFI, requesting that the Employer submit "a written, detailed recruitment report for the Ship Fitters (Welder Fitter)." AF 81. The report had to include, *inter alia*, "the dates for all recruitment *activity to date* and method(s) used by the employer to contact the applicants; and provide the results (hired, not hired, pending) of that contact." *Id.* On June 1, 2009, the Employer responded to the RFI. AF 61-80. In its response, the Employer stated:

Tampa has an ongoing recruitment program involving newspaper advertisements in the *Tampa Tribune*, however, that still does not obviate the need for these ship fitters. As well, Tampa has training programs for the permanent workforce of local employees who we hope will be the foundation of our growth for the benefit of the region.

AF 61.

On September 30, 2009, the CO issued an additional RFI. AF 58-60. The CO stated that he had "learned that the employer has published additional advertisements and a job order for 80 temporary Ship Fitters in Tampa, FL. The job order number is JSK07QD011." AF 60. The CO wrote that he

¹ Citations to the 525-page Administrative File will be abbreviated "AF" followed by the page number.

² *See Tampa Ship, LLC*, 2009-TLN-00048 (May 8, 2009).

could not issue certification because “there may be an additional source of qualified and available U.S. workers for the positions.” *Id.*

The Employer responded to the subsequent RFI on October 7, 2009. AF 44. In its response, the Employer stated:

We believe that your request for information is untimely because it came four months after we submitted a response to your request for evidence.

Moreover, the documentation of additional recruitment activities, which the Department requests, is outside the scope of the remand by BALCA. Under 20 C.F.R. [§] 655.33, BALCA cannot entertain new evidence in its decision.

The decision from BALCA requests that the Department review preexisting recruitments which was subject of the appeal. BALCA made no mention that the Department review future recruitments. We ask that the Department respects the decision of BALCA, and decide our case based on the evidence which BALCA [h]as requested the Department to review.

AF 44.

On October 26, 2009, the CO issued a *Final Determination* denying certification. AF 39-43. The CO found that the Employer failed to adequately respond to the RFI and noted that the “purpose of the H-2B Program is to ensure that there are not sufficient U.S. workers available who are capable of performing the temporary services or labor.” AF 41. The CO reasoned that since the Employer had “additional recruitment sources, [the CO] was unable to issue a certification, as there may be an additional source of qualified and available U.S. workers for the positions. Therefore, the [CO] requested the employer submit an updated report to detail results of its recruitment based on the additional job order.” AF 42.

The CO also stated that “the RFI was not issued for the purpose of providing new evidence to BALCA in order for a decision to be reached” but rather to determine if there were “sufficient U.S. workers available.” *Id.* The CO acknowledged that BALCA had determined the Employer had a temporary need but noted that the RFIs did not request information regarding the Employer’s temporary need but rather about the Employer’s recruitment. *Id.* Because the CO could not determine if additional

U.S. workers were available for the job, the CO denied certification. The Employer's second appeal followed.

Discussion

The Labor Department's H-2B regulations require the CO to determine if there are available U.S. workers "based on the results of the employer's . . . recruitment efforts." TEGL 21-06, Change 1, Attachment A, IV.I.³ Section IV.F. of the TEGL requires employers to "document that . . . recruitment sources . . . were contacted and either unable to refer qualified U.S. workers or non-responsive to the employer's request. Such documentation must be signed by the employer." Further, the CO shall "determine whether to grant or deny temporary labor certification . . . based on whether or not . . . [q]ualified U.S. workers are available for the temporary job opportunity." TEGL 21-06, Change 1, Attachment A, V.A.2.

In both its Request for Review and its brief, the Employer asserts that the CO did not have the authority to issue a second RFI because of the "limited instructions of the Remand." Employer's Brief 7. However, I find that the Employer is mistaken. The original appeal only determined that the Employer had met its burden for establishing a temporary need. As the order in the original appeal makes clear, BALCA could not determine if the Employer had properly complied with the recruitment requirements because of the disarray of the appeal file. As a result, the board instructed the CO to "identify the correct recruitment report and then review it in conjunction with the Employer's application." AF 18.

In both of the RFIs issued following the remand, the CO's request involved the Employer's recruitment activity. In the first RFI, the CO issued a generic request for the Employer's recruitment report. However, after the CO learned additional information regarding the Employer's recruitment, it issued a second RFI in order to determine if the recruitment report adequately reflected both the Employer's recruitment and the availability of domestic workers. Not only did the remand not limit the CO to issuing a single RFI, the instructions specifically required the CO to identify the correct

³ The Department of Labor published new regulations for the H-2B program with an effective date of January 18, 2009. *See* 73 Fed. Reg. 78,020 (December 19, 2008). However, the new regulations are not applicable to the in the present case because the original application was filed prior to the effective date.

recruitment report and then compare the report to the application to determine if certification was appropriate. Once the CO learned that the Employer had placed additional job postings that had not been reflected in the recruitment report, the CO was required to determine if the new postings reflected that additional domestic workers were available for the position.

Even assuming *arguendo* that the CO incorrectly determined that the Employer had additional job postings that were not listed in the recruitment report, the Employer should have responded to the RFI and informed the CO that additional recruitment had not taken place. However, when the Employer failed to provide adequate documentation to support its recruitment report, and it refused to respond to the CO's second RFI, the CO had little choice but to deny certification. *See TGL Management Inc.*, 2009-TLN-00010 (March 31, 2009) (discussing that the Employer's failure to submit documentation to support its statement in response to an RFI was grounds for the CO to deny certification). While the Employer cannot simply refuse to respond to the CO's RFI, it should be noted that the CO took more than four months to issue the second RFI. The Employer's complaints over the delay are certainly reasonable, although that issue is not properly before me. It should also be noted that the CO asserted that the Employer was also late in submitting certain responses to the RFIs, which also contributed to the ongoing delay of processing the application on remand. In any event, the Employer failed to provide adequate information regarding its recruitment efforts, and the CO properly denied certification because he could not determine if there were available U.S. workers to fill the positions.

Order

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

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

