



Issue Date: 08 March 2010

BALCA Case No.: 2010-TLN-00034

ETA Case No.: C-09352-47708

In the Matter of:

THOMAS & XEMBRELYN MANGRUM d/b/a AQUINO,
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

On November 30, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Thomas & Xembrelyn Mangrum

d/b/a Aquino, (“the Employer”) requesting certification for one “Child Care Worker” from January 1, 2010, until January 1, 2011. AF 142-175.¹ The application indicated that the Employer’s need was an intermittent standard and wrote:

Xembrelyn delivered a baby boy on October 6, 2009[,] and because of our successful working career, schedule and start[-]up business development[,] we are seeking a live[-]in nanny/caretaker for our baby to assist in the most challenging times of a successful working mother and father.

AF 142. The Employer also discussed that it wanted a nanny who was bi-lingual and would be able to help teach the infant the mother’s Filipino culture. AF 150-151. Additionally, the Employer noted in its application under the category of job description that the nanny would need to “[help] children with schoolwork . . . [transport] children to and from school/activities . . . [and] assist with the teaching and reading of books.” *Id.*

On December 23, 2009, the CO issued a Request for Further Information (“RFI”).² AF 134-141. Citing to 20 C.F.R. § 655.21, the CO found that the Employer had failed to establish that the nature of its need was temporary. AF 84. As a result, the CO requested that the Employer provide a revised statement of temporary need. AF 136.

On December 30, 2009, the Employer submitted its response to the RFI. AF 110-112; AF 122-124. Regarding the CO’s request for an additional statement of temporary need, the Employer explained that if the temporary nanny fit the Employer’s needs, it wanted to “request an extension of the Visa . . . to continue [the nanny’s] responsibilities hopefully converting it to a permanent visa.” AF 120. The Employer further noted that it had been unable to fill this position from the domestic workforce, and if the Employer was able to find a Filipino nanny, it would allow the Employer to “travel back to the Philippines in May of 2011 and do a more detailed search and file the necessary paper work for a permanent live[-]in nanny position.” *Id.*

On January 29, 2010, the CO issued a *Final Determination* denying the Employer’s application for temporary labor certification. AF 76-87. Citing to 20 C.F.R. § 655.21(a), the CO found that the

¹ Citations to the Administrative File will be abbreviated “AF” followed by the page number.

² Both the RFI and the Final Determination identified multiple issues with the Employer’s application, but only one will be addressed on appeal.

Employer failed to establish a temporary need. AF 79-80. Specifically, the CO stated that “the Employer’s revised statement of temporary need failed to address how the job opportunity [wa]s temporary in nature and also how the request for temporary labor certification me[t] the regulatory standard of an intermittent need.” AF 80. The CO denied certification, *inter alia*, based on the Employer’s inability to establish a temporary need. The Employer’s appeal followed.

In its request for review, the Employer reiterated that it had difficulty finding anyone who met the job qualifications and would also be willing to travel to the Philippines. AF 1. With respect to the CO’s denial based on the failure to establish a temporary need, the Employer wrote:

We are unable to find someone in the USA with our recruitment efforts and we have been able to find a person in the Philippines willing to work temporary for a year until we travel back to the Philippines in May of 2011 and do a more detailed search[,] and file the necessary [paperwork] for a permanent live[-]in nanny position. . . . If the person selected does meet the standards and fit into our family lifestyle[,] we would request an extension of the Visa to continue her responsibilities[,] hopefully converting it to a permanent visa.

AF 3.

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)).

The Employer admits in its statement of temporary need, in its response to the RFI, and in its request for review that it has a permanent need for a live-in nanny. Rather than the Employer having an intermittent need, it attempts to use the temporary labor program as a bridge to a permanent visa, or alternatively, as an attempt to screen potential nannies. Based on the Employer's response, it wants a nanny to help the child with homework and school related functions, certainly not tasks for an infant. This implies that the Employer plans on hiring a nanny indefinitely, with no real end date other than the child's eventual maturity, but at the very least, longer than the year allowed under the regulations. An Employer may not use the H-2B program as a way to test out a potential employee. *See Martha Saiz, 2010-TLN-00008, slip op. at 5 (November 19, 2009).* Nor may it use the program as a gateway to a permanent visa. Rather, the Employer must demonstrate a current, temporary need in order to obtain temporary labor certification. Because the Employer did not evidence a temporary need, the CO properly denied certification.

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