



Issue Date: 26 April 2010

BALCA Case No.: 2010-TLN-00057

ETA Case No.: C-10041-49295

In the Matter of:

IORIO RACING STABLES,
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 February 10, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Iorio Racing Stables, ("the

Employer”). AF 83-108.¹ The Employer requested certification for 15 “Stable Attendants” from April 1, 2010, until November 30, 2010. AF 83. The Employer indicated on its application that it had a peakload need. *Id.* Attached to the Employer’s application was the Employer’s 2007/2008 Payroll Report. AF 87. According to the report, the Employer utilized seven permanent employees and three temporary employees during its period of need in both 2007 and 2008. *Id.*

On February 16, 2010, the CO sent a *Request for Further Information* (“RFI”). AF 78-82. Citing to 20 C.F.R. § 655.22(n), the CO found that the Employer failed to “provide adequate documentation to establish [a] temporary need for [the] number of workers requested.” AF 80. The CO noted that the Employer had requested and received certification for 15 temporary workers during the 2009 year, but it had only included payroll information for the 2007 and 2008 years, which do not support the need for 15 workers. *Id.* The CO wrote that “the lack of a submitted 2009 summarized monthly payroll report creates a concern as to the temporary need for the fifteen [temporary workers] in 2010.” AF 80-81. The CO requested that the Employer submit evidence and documentation that “justified . . . the number of worker positions being requested for certification.” AF 81. Accordingly, CO also requested that the Employer submit, *inter alia*, its signed contracts or work agreements as well as summarized monthly payroll reports for the 2009 year. *Id.*

The Employer responded to the RFI on February 24, 2010. AF 59-77. In its response, the Employer stated that it was submitting “payroll records for one previous calendar year (already submitted to you on January 19, 2010) [and] . . . work contracts signed by [the] employer and employees clearly showing work will be performed.” AF 64. However, while the response to the RFI contained signed contracts between the Employer and some of its employees to perform work as a stable attendant from April 1, 2010 until November 31, 2010, the Employer did not include a payroll report. AF 66-77.

On March 22, 2010, the CO certified the Employer’s application for three workers. AF 48-50. The CO stated that the number of workers had been reduced because the Employer “failed to establish its need for the total number of [workers] requested.” AF 48. Specifically, the CO asserted that the Employer “submitted payroll information for 2007 and 2008, and during these years, the Employer did not utilize more than three temporary workers. . . . The 2007 and 2008 summarized monthly payroll

¹ References to the 108-page appeal file will be abbreviated “AF” followed by the page number.

reports do not support the number of positions being requested in the current application and, the employer failed to submit a summarized monthly payroll report to support the number of positions certified in 2009.” As a result, the CO only certified three temporary workers. The Employer’s appeal followed.

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). 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).

In the present case, the Employer attempted to establish a peakload need. To establish a peakload need, “the petitioner must establish 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 staff will not become part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

The documentation provided by the Employer failed to establish a peakload need. The payroll reports provided established that the Employer had a need for only three workers, and despite the CO’s request, the Employer failed to include a copy of its 2009 payroll report. As a result, the CO was forced to determine the amount of the Employer’s need based solely on the 2007/2008 payroll reports. The failure to produce the 2009 payroll records is especially troubling given that the Employer was granted certification for 15 workers during the 2009 period of need.² The Employer asserted in its request for review that the signed contracts evidenced a temporary need, and the CO should have granted certification based on these documents alone. Contrary to the Employer’s assertion, however, the

² The Employer stated in both its request for review and in its RFI that it furnished 2009 payroll summaries, but a close inspection of the record reveals that the Employer only submitted payroll records from 2007 and 2008.

contracts only evidenced that the Employer intended to hire the temporary workers during the period of need, not that the Employer has an actual need for these workers. Ultimately, it is the Employer's burden to establish a temporary need, and the evidence before the CO falls short of this burden. Because the Employer failed to submit adequate documentation to evidence a temporary need, the CO properly denied certification.

Order

In light of the foregoing, 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