



Issue Date: 11 December 2009

BALCA Case No.: 2010-TLN-00022

ETA Case No.: C-09282-46634

In the Matter of:

JOSEPH W. HILL, II,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: William W. Hamilton, Esquire.
Law Office of Rajiv S. Khanna, PC
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For the Employer

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For the Certifying Officer

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

DECISION AND ORDER
REVERSING 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

Joseph W. Hill, II, (“the Employer”) originally filed an application for a child care worker under the one-time occurrence temporary need standard, and the CO granted certification for the period November 3, 2008, until October 8, 2009. On October 7, 2009, the CO received a second application for temporary labor certification requesting certification for the same position for the period October 10, 2009, until April 30, 2010. AF 176-249.¹ On the application, the Employer indicated that the “[b]asis for the visa classification supported by this application” was a “[c]hange in previously approved employment.” AF 177.² The Employer again indicated its need qualified under the one-time occurrence standard and stated:

[The Employer] is required to travel extensively throughout the globe to meet with existing and prospective clients on a weekly basis. It should be noted that the [Employer’s] employment involves intercontinental travel that sometimes requires leaving on a Saturday or Sunday and not returning home until Friday or Saturday. [The Employer] travels an average of two to three days per week.

[The Employer’s wife] often [needs to travel for work] to conduct on site interviews, travel to Washington, D.C. for political interface and travel to promote her books. [The Employer’s wife] travels an average of one to two days per week.

[The Employer and his wife] travel extensively together between their home in Greenwich, CT and Austin, TX where they have a working cattle ranch that requires their supervision. Clearly, the need for a live-in Child Care Attendant is emphasized by the continual travel of [the Employer]. The children, ages 5 and 6, require constant supervision and cannot be left unattended. The live-in requirement will allow [the Employers] to continue fulfilling their employment responsibilities while providing their children with appropriate supervision and care, as they have no family members locally to assist with caring for the children.

AF 194.

On October 16, 2009, the Certifying Officer (“CO”) issued a *Request for Further Information* (“RFI”). AF 171-176. The CO found the Employer failed to establish a temporary need. AF 173-174. More specifically, the CO stated:

¹ Citations to the 256-page appeal file will be abbreviated “AF” followed by the page number.

² The Employer did not indicate that this application was filed for a “[c]ontinuation of previously approved employment without change with the same employer.” AF 177.

The definition for a one time occurrence says an employer must establish that either (1) it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future; or (2) it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker(s).

Specifically, on November 03, 2008, the employer was granted certification . . . for one (1) Child Care Attendant for the period of November 03, 2008, through October 08, 2009, under a one time occurrence. Furthermore, on October 09, 2009, the employer requested certification for the period of October 01, 2009 to April 30, 2010 for (1) Child Care Attendant under a one time need occurrence. The current application failed to demonstrate the nature of the employer's need for the services or labor to be performed as a one-time occurrence.

AF 174.

On October 20, 2009, the Employer responded to the RFI. AF 146-169. In its response, the Employer wrote:

[The Employer's wife] already resigned from her employment at FOX TV and intends to scale down her book signing and speaking engagements systematically to ensure that it will not extend beyond June 1, 2010. The contract entered into with her publishers, requires [the Employer's wife] to travel extensively all over the United States for book signing and speaking engagements. . . . It is anticipated that [the Employer's wife] would have fulfilled her book signing and speaking engagement, for which she is under contractual obligation, no later than June 1, 2010. . . . It should furthermore be noted that the need to request an extension arose due to the fact that the petitioner received an approval from USCIS for the H-2B classification with an effective date of April 2009 instead of from November 3, 2008 as certified by Dept. [of] Labor. As a result of this delayed effective date, [the Employer's wife] had to postpone her book signing tours and speaking engagements for a period of 6 months, while she stayed at home to care for the children before the childcare assistant could begin employment. As the start date of her book signing and speaking engagements were delay[ed], so was the original anticipated end-date of these engagements. Hence the further need of this temporary employment based on a one-time need.

AF 168-169.

The CO issued a *Final Determination* on November 5, 2009, denying the Employer's application. AF 141-145. The CO found the Employer failed to establish "that the nature of the employer's need is temporary." AF 143. The CO found:

This is the same explanation used in its previous application. Furthermore, it appears that the employer met the one-time need standard and established dates of need as November 2008 through October 2009. The employer is claiming that USCIS approved the beneficiary for 6 months instead of the full certification period, but this does not negate the definition and established standard of one-time occurrence.

AF 145. The CO denied certification based on the Employer's failure to establish a temporary need. The Employer's appeal followed.

In the Employer's Request for Review, it reiterated the argument contained in the October 20, 2009, letter. AF 3. In his appellate brief, the CO stated:

The CO indicated that the employer met the one-time occurrence need standard for the services of a Child Care Attendant for the period of November 3, 2008 to October 8, 2009 based, in part, on his assertion that, after this period, his wife intended to stop work and, if that option was not possible, the children would be enrolled in an extended day school program. Obviously, the employer did not choose either of these proposed voluntary actions, since it filed the application in question. . . . However, since this event is based on the voluntary action of the employer, and not some certain event like the fact that his children have reached a certain age to be eligible to enter elementary school, means that the likelihood of this event occurring is no more certain than his wife's termination of her work asserted in his previous application.

CO's Brief at 3 (citations omitted).

Discussion

In his determination, the CO erred in denying the instant petition on the ground that the Employer did not establish a one-time occurrence temporary need as defined by the first clause of 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). The Labor Department's H-2B regulations refer to the Department of Homeland Security regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B) for the definition of temporary need. 20 C.F.R. § 655.6(b). That regulation provides:

(ii) *Temporary services or labor--(A) Definition.* Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the

duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) *Nature of petitioner's need.* Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

(1) *One-time occurrence.* The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

The CO found that, since Mr. Hill employed the alien at the time of his second petition, the Employer's need could no longer qualify as temporary under the one-time occurrence standard because he had "employed workers to perform the services or labor in the past."³ In effect, the CO found that the alien's current employment constituted "past" employment, thereby rendering the Employer ineligible for the certification requested in his second petition.

Based on a review of the record, however, I find that the Employer was simply requesting a six-month extension of the original certification period due to the fact that he was unable to employ the alien on the date permitted by the original certification.⁴ I note that the total length of the Employer's period of need has not changed. Rather, the Employer has requested a new end date to reflect the fact that his wife had to reschedule her book signings and speaking engagements due to the administrative delay in securing the alien's visa from USCIS. In mechanically applying the regulatory definition, the CO did not view the Employer's second petition in its proper context and treated it as though it were an application for new employment. However, both petitions relate to the same continuous employment

³ Since Mr. Hill's employment situation is not "otherwise permanent," his need could not qualify under the second clause of 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

⁴ Twenty-nine C.F.R. Part 655, Subpart A does not address extensions of previously granted certifications. However, I note that, in requiring employers to state whether they seek a "[c]ontinuation of previously approved employment without change with the same employer," the application form suggests that the CO will entertain extension requests. Likewise, under the regulatory environment at the time the Employer filed his original application, the CO had published guidance on how an employer may "extend its period of need" in certain situations involving "unforeseen circumstances." See *Constructor Services, Inc.*, 2009-TLN-00066, slip op. at 5-6 (June 12, 2009) (discussing TEGL 21-05, Change 1, Attachment A, Section II.C and the Department's published Frequently Asked Questions); see also *Cajun Constructors, Inc.*, 2009-TLN-96 (Oct. 9, 2009) (affirming denial of second extension request under the current regulations when, *inter alia*, employer's delayed project was not "of short duration" and did "not have a clear end date"), *recon. denied* (Dec. 8, 2009).

relationship, thereby precluding a finding that the Employer has “employed workers to perform the services or labor in the past.”⁵ The CO’s interpretation would effectively bar extensions in one-time occurrence cases regardless of the petitioner’s circumstances. Accordingly, I find that the CO erred in denying the petition on the ground that Mr. Hill’s need did not qualify as temporary under the one-time occurrence standard.

Having found that the CO erred in denying the Employer’s petition on the ground stated, I also find that the CO should have granted the Employer’s reasonable extension request based on the documentation submitted and explanation provided. First, since the Employer lost the benefit of approximately half of his certification period due to factors beyond his control, granting the request would not extend the length of the original period of *employment*. Second, the Employer has established that his original temporary need will actually continue through the requested extension period due to his wife’s rescheduled signings and appearances. Third, while the CO did not address the sufficiency of the Employer’s second test of the labor market, the record reveals that the Employer did conduct some unsuccessful domestic recruitment prior to filing the instant petition. *See* AF 96-118. Fourth, while the CO’s brief reflects a concern that the Employer will need a child care worker in perpetuity, nothing in the record contradicts the Employer’s assurances that his need will terminate once his wife meets her contractual obligations. Should the CO’s concern manifest in a future petition, perhaps the result would be different. However, based on the record in the instant case, I will reverse the CO’s denial of the petition.

Order

Accordingly, it is hereby **ORDERED** that the decision of the Certifying Officer is **REVERSED**.

For the Board:

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JOHN M. VITTON
Chief Administrative Law Judge

⁵ Moreover, the record does not reflect that Mr. Hill employed child care workers prior to his 2008 application.