



Issue Date: 19 November 2009 BALCA Case No.: 2010-TLN-00008

ETA Case No.: C-09251-46408

In the Matter of:

MARTHA SAIZ,
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 September 8, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application¹ for temporary labor certification from Martha Saiz ("the Employer").

¹ The Employer originally submitted an outdated ETA 9142 form on March 3, 2009. She supplemented the original form on July 1, 2009, with attachments outlining her recruitment. On August 4, 2009, the Chicago National Processing Center sent the Employer a letter outlining the deficiency in the first form along with instructions for obtaining the correct form.

AF 43-55.² The Employer requested certification for one “Home Attendant/Domestic Service” from January 1, 2010, until January 1, 2015.³ The Employer also included the word “unlimited” next to the end date. AF 43. On the application, the Employer failed to indicate in the boxes provided whether her need qualified as a seasonal, peakload, one-time occurrence, or “intermittent or other need.” *Id.* Instead, the Employer noted in the section “statement of need” that “the nature of the Employer’s need for the services or labor to be performed is other than seasonal, peakload, one-time occurrence or intermittent.” *Id.*

On September 11, 2009, the CO issued a *Request for Further Information* (“RFI”). AF 36-42. In the RFI, the CO identified multiple deficiencies, including a failure to establish that the need was temporary. *Id.* In the RFI, the Employer was instructed to submit an explanation of the Employer’s business as well as an explanation of why the Employer’s need was temporary. *Id.*

On September 18, 2009, the Employer submitted a response to the RFI. AF 14-35. In the application, the Employer amended its statement of need to include the following: “[the] nature of the Employer’s need for the services or labor to be performed is other than seasonal, peakload, one-time occurrence, or intermittent, but other temporary needs. The nature of the employment need is temporary for the following reasons if the employee does not perform satisfactorily or an extreme, unusual hardship develops.” AF 23. In an attached letter, the Employer also wrote, “The nonagricultural services or labor certification is temporary in nature for the following reasons: If the employee does not perform satisfactorily, that employee can’t remain on the job, Or if an extreme, unusual financial hardship develops, the employee can’t remain on the job. In my opinion, these are valid reasons for hiring any employee in [sic] temporary basis.” AF 15. On the application, the Employer also checked “intermittent or other temporary need” as the “nature of temporary need.” AF 23.

On October 9, 2009, the CO issued a *Final Determination* denying the Employer’s application on multiple grounds, only one of which requires discussion here. AF 5-14. Citing 8 C.F.R. §

² Citations to the 125-page appeal file will be abbreviated “AF” followed by the page number. As the Employer observed in a letter to BALCA on November 6, 2009, the record on appeal mistakenly does not include the Employer’s request for review.

³ In the initial application, the Employer stated the temporary period of need would end on January 1, 2005. In response to a subsequent Request for Further Information, the Employer corrected this error to reflect an end date of January 1, 2015.

214(h)(6)(ii)(B), the CO noted that employment is of a temporary nature “when the employer needs a worker for a limited period of time.” AF 9. Specifically, the CO found that the Employer’s end date of January 1, 2015, “indicate[d] that the employer has a permanent need.” *Id.* Further, the CO wrote, “The employer’s response fails to provide an adequate explanation as to how the job opportunity and number of workers reflected indicates a temporary need.” *Id.*

In the October 9, 2009, *Final Determination*, the CO explained that the Employer had 10 calendar days from the date of the letter to file an appeal. BALCA received the Employer’s request for review on October 26, 2009.⁴

Discussion

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*. As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year.⁵

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

⁴ The CO raised the issue of timeliness in his brief, but because I will affirm his decision on the merits regardless, I will not address the issue.

⁵ The Employer does not allege in her application that her need for temporary labor is extraordinary. 8 C.F.R. § 214.2(h)(6)(ii)(B) also allows for a temporary need to last up to 3 years, provided that the need is a one-time occurrence. Since the Employer stated her need was intermittent, the 3 year time limit is also inapplicable here.

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 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)).

Further, the regulations require the Employer to provide a statement of temporary need:

(a) *Statement of temporary need.* Each *Application for Temporary Employment Certification* must include attestations regarding temporary need in the appropriate sections. The employer must include a detailed statement of temporary need containing the following:

- (1) A description of the employer's business history and activities (*i.e.* , primary products or services) and schedule of operations throughout the year;
- (2) An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need;
- (3) An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need under §655.6(b).

20 C.F.R. § 655.21. If the Employer fails to provide this information to the CO following an RFI, the CO may deny the application. *Id*

The period of need given by the Employer spans five years. AF 43. On the application, the Employer also indicated that the placement might be for an “unlimited” amount of time. AF 43. In her response to the RFI, the Employer failed to adequately explain how her need for an attendant that spanned an indefinite amount of time qualified as temporary under the regulatory standards. This alone is cause for the CO to deny her application.

According to the Employer’s request for review, the domestic attendant is needed to help with the Employer during her retirement. By the Employer’s own admission, this retirement is indefinite and certainly has the possibility to last for more than one year. The Employer’s request for review indicates that the need is permanent, but that the Employer seeks a temporary alien labor certification because she is unsure of whether or not she will be compatible with the employee, and therefore would like the opportunity to test the attendant out before making the position permanent. While it may be perfectly

acceptable to hire attendants on a temporary basis before making the position permanent, the H-2B program is not designed to accommodate such a need. Rather the program is designed to provide an employer with temporary workers for a short duration. Moreover, the program is not designed to allow temporary workers to become permanent after a trial run.

The Employer bears the burden of proving her need for the labor is temporary. *See Easter Seals Central California*, 2009-TLN-00072 (July 10, 2009). Because the Employer failed to establish 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