



Issue Date: 03 December 2009

BALCA Case No.: 2010-TLN-00021

ETA Case No.: C-09272-46560

In the Matter of:

REWAL S. THIND d/b/a MONSOON FINE INDIAN CUISINE,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

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

DECISION AND ORDER

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 28, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Rewal S. Thind d/b/a Monsoon Fine Indian Cuisine ("the Employer" or "the owner") requesting certification for two "Restaurant

Cooks” from October 1, 2009, until September 30, 2012. AF 148.¹ The Employer listed its need as a one-time occurrence “due to the expansion of the business.” AF 148. In explaining its temporary need, the Employer further wrote:

The owner . . . with the help of his 28 year old son . . . had been performing the duties of a Chef . . . [however] the owner presently wishes to concentrate on management and other marketing functions. Therefore, he is unable to perform the duties of a chef, temporarily.

At this time, [the owner’s son] is not capable, ready and trained enough to take over the duties of a chef independently. Therefore, this temporary situation has now created a temporary need of a cook for a period of 3 years. [The Employer] estimates that at the end of the 3 year period, [the owner’s son] would be capable enough to take over the permanent duties of chef because he will continue to assist the new chef for this duration.

The above situation is a one time occurrence only. The employer . . . has not hired any worker for this position in the past and he will not need workers for this position in the future.

AF 148.

On October 6, 2009, the CO issued a *Request for Further Information* (“RFI”), citing three deficiencies. AF 143-147. The Employer corrected two of the deficiencies, so only the remaining one will be addressed on appeal. The CO found that the Employer had failed to establish a temporary need. AF 145. More specifically, the CO stated:

[The Employer’s statement of temporary need] identifies that Monsoon Fine Indian Cuisine operates currently with only two (2) Restaurant Cooks, or more specifically one (1) Restaurant Cook and one assistant (the owner’s 28-year-old son) to perform its business operations. Therefore, the request for two (2) cooks, in addition to the assistant (the owner’s 28-year-old son) is excessive, especially since the owner, “[the Employer] estimates that at the end of the 3 year period, Mr. Perdeep Singh Thind [alone] would be capable enough to take over the permanent duties of chef.”

AF 145-146. The CO also stated that the Employer is “requesting a chef for a duration of three (3) years, but fails to justify a need for this length of time . . . [by including] evidence, such as a training itinerary for [the owner’s son] that would support the need for a temporary chef for a three (3) year period.” AF 146. The CO requested that the Employer supply:

1. A description of the employer’s business history and activities (i.e. primary products or services) and schedule of operations through the year;

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

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. The employer must include evidence as to the need of two (2) Restaurant Cooks for a duration of three (3) years, especially since the owner estimates that the job duties of chef will be able to be fulfilled by only one (1) Restaurant Cook at the end of the third year;
3. A description of the employer's training itinerary for [the owner's son] for the entire three (3) year period.
4. An explanation regarding why the employer's son . . . will require three (3) years of training experience before taking over the permanent duties of the chef. The employer is only requiring interested applicants to have two (2) years of experience to perform the duties of the chef.

AF 145-146.

On October 10, 2009, the Employer submitted a response to the RFI, which included a response letter, and copies of the Employer's menu, business registration certificate, food handling license, electric and gas bill, grocery bills, excerpts of the business lease, various sales receipts, and restaurant reviews from newspapers and magazines. AF 86-142. The Employer explained in his letter that he needed two cooks because the Employer had been working double shifts and long hours. AF 92. Additionally, the restaurant had experienced an increase in business, and the owner "need[ed] to concentrate on other management issues. AF 93. The Employer further stated:

The restaurant definitely requires two cooks and the present work load cannot be fulfilled by one cook.

The owner intends to hire 2 Chefs. One Chef will replace him and the other will handle the additional work due to the increasing work load. To run the business successfully and handle the growth, the management needs to allocate and divide these duties between 2 cooks who will work in shifts. . . . Generally, every restaurant has more than one Tandoori Chef and they work in shifts due to the nature and demand of this particular industry. Restaurants open for long hours and seven days a week. . . . Additionally, 2 Tandoori Chefs are needed to supplement/replace their counterpart in case of emergencies, absences and to handle excessive/urgent orders.

AF 93. The Employer also explained that the need was only temporary because the owner's son "will be trained and will take over as a permanent Tandoori Chef." AF 93. Accordingly, the son would not be the only chef because the Employer would be training other local chefs. The Employer explains: "The business would have 2-3 local support staff personnel to be trained working along with 2 H-2B Chefs. When H-2B Tandoori Chefs complete their duration . . . [the son] and the trained local chefs

will be able to continue with their duties independently or with the supervision of [the owner].” AF 93-94.

The Employer described the son’s training itinerary: the owner’s son will spend the first year of training picking up the “basic nuances of the recipes,” the second year “acquainting himself with the actual cooking,” and the third year “perfecting his cooking [of] especially complicated dishes.” 94-95. In explanation of why the son needs three years of experience when the temporary workers need only have two, the Employer asserts that the son has no “vocational education in culinary art and cooking is not his forte. Therefore, he will need more time to learn and master the skill.” AF 95. Additionally, the son will only train part time because he will have to help the Employer with “new methods of management, marketing, designing new menu and décor of the restaurant as well as maintaining website of the restaurant.” *Id.*

In addition to its statement, the Employer also included in his response to the RFI two receipts for linens. According to the receipts, the Employer paid \$164.58 for the month of March 2008, while he paid \$1,361.79 for the month of August 2009. AF 111-112. The receipts do not provide a running tally for the year or a month-by-month breakdown. The Employer also included several food supply bills that showed an increase in the amount purchased, but the items on the list were different and varied in price. AF 113-116. The included sales receipts were from various patrons who purchased food at different times in September and October 2009. AF 132-133. The receipts, however, do not provide a daily total for sales, and the Employer did not include comparison receipts from the previous year.

On October 29, 2009, the CO issued a *Final Determination* denying certification. Citing to 20 C.F.R. § 655.21 (a)(1), the CO determined the Employer failed to establish a temporary need because:

[the Employer] operates currently with . . . one (1) restaurant cook and one assistant . . . [t]herefore, the request for two (2) cooks, in addition to the assistant (the owner’s 28-year old son) is excessive, especially since the owner, “estimates that at the end of the 3 year period, Mr. Perdeep Singh Thind [alone] would be capable enough to take over the permanent duties of chef.”

AF 83-84. (final bracket in original). The CO also stated that the “documents submitted by the employer fail to support the employer’s claim of the increasing work load of the restaurant.” AF 84. The CO found that the itinerary for the son’s training was “insufficient to be supportive of a three year

period of training. . . . [The owner’s son] has already been performing the duties of a Chef for more than a year, [so] it is not necessary for him to require a three year training.” AF 84. Finally, the CO notes that the “employer . . . is only requiring interest[ed] applicants to have two (2) years of experience to perform the duties of the chef” when the training of another chef will take three years. AF 84-85. The CO denied certification based on the Employer’s failure to establish a temporary need. The Employer’s appeal followed.

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*. 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.

An applicant must maintain documentation evidencing a temporary need. 20 C.F.R. §655.6(e). 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. 20 C.F.R. § 655.21 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 Employer bases his temporary need on an increase in workload. In the *Final Determination*, the CO identified four different issues regarding the Employer's ability to evidence a temporary need based on this increase. For the purpose of clarity, the single deficiency on appeal, whether the Employer can establish a temporary need, will be discussed following the CO's breakdown of the four issues.

Excessive Worker Requests

The CO's primary concern with the Employer's application seems to be that the Employer is requesting two cooks, but when the training is complete, the son will be the restaurant's only cook. The CO found the request for two cooks to be excessive. The CO quoted the Employer as saying "the owner . . . estimates that at the end of the 3 year period, Mr. Perdeep Singh Thind [alone] would be capable enough to take over the permanent duties of chef." AF 83 (final bracket in original). Yet on the application filed by the Employer, the word "alone" is not included. In fact, the Employer emphasizes throughout the record that his son would be one of several cooks in the restaurant. The Employer writes, "[the]business would have 2-3 local support staff personnel to be trained working along with 2 H-2B Chefs. When H-2B Tandoori Chefs complete their duration . . . [the son] and the trained local chefs will be able to continue with their duties independently or with the supervision of [the owner]." AF 93-94.

According to the statements made by the Employer, the restaurant has been operating with only the Employer as a chef, but he often worked long hours and double shifts. Moreover, under the Employer's theory, because of the increase in business, the Employer needs to focus on management duties and will have less time to spend cooking. According to the Employer's reasoning, one cook was already needed, but the Employer had been coping with the need by working longer hours. The second cook will be needed to replace the Employer while he focuses on management needs. Additionally, while the temporary cooks are present, the Employer has domestic workers who will be training along with his son. Ultimately, at the end of the three year period, the restaurant would not have one chef, as the CO believed, but multiple chefs. The Employer also persuasively asserts that more than one chef is needed in case of emergencies or absences, since the Employer currently has no one to replace him. Assuming that the Employer can substantiate his increase in business, the need for two chefs is not excessive.

Training Itinerary

The CO next faults the Employer's itinerary for the training of his son, noting that the itinerary is "insufficient to be supportive of a three year period of training." However, after a closer look at the RFI, the CO did not request a detailed itinerary for the training but rather a "description" of the itinerary. The Employer fully complied with this request by offering a summary or description of what the son would be doing for the next three years. Although the summary does not include week-by-week or day-by-day details, the CO did not request this information.

Further, the CO found that "since the owner's son . . . has already been performing the duties of a Chef for more than a year, it is not necessary for him to require a three year training, especially since the itinerary lists tasks that he would have already become familiar with." AF 84. However, the record is unclear about how long the son has helped the Employer as well as what duties the son performed. The CO makes the assumption that the son worked as a chef, yet the Employer emphasizes that he is the only chef, and only remarks that his son has helped him. Additionally, the Employer notes that his son has a business degree, and, during the training, will need to help out with "new methods of management, marketing, designing [a] new menu and décor of the restaurant as well as maintaining [the] website of the restaurant." AF 95. While the son's previous duties are unclear, I find the Employer adequately explains that it will require three years to train the son in the art of cooking, given that his son has little experience and will be helping to run other aspects of the business.

Experience Requirements versus Training Time

The CO also noted that the Employer is requiring three years to train his son but only requires the temporary workers to have two years' experience. AF 85. In addition to discussing his son's workload and his ability to only train part time, the Employer argues that "it is true that the employer required a minimum of two years full time experience as [a] professional cook from interested candidates. However, it does not mean that the selected candidate may/would not have more experience than the minimum requirement." AF 96. The CO found this statement unpersuasive in the *Final Determination*, stating "the employer's claim that an interested candidate may/would have more than 2 years of experience as a Chef does not justify the need to request more than 2 years of time to train an

individual.” AF 85. The Employer’s statement regarding the potential for chefs with more than two years experience is unpersuasive. Since the Employer only required two years experience, the assumption should be that qualified candidates with only two years of experience might apply, and candidates with more experience might not. However, this is unimportant for the sake of determining the Employer’s temporary need. The CO is confusing experience with training. A chef with two years experience would have presumably already spent considerable time training in order to obtain an additional two years cooking as a chef. The Employer has already adequately explained the amount of time the son needs to train, and I do not find the two-year experience requirement to change the Employer’s need for temporary labor.

Increase in Workload

The CO’s final contention is that the information provided by the Employer does not demonstrate increased workload. Ultimately, the Employer would need to show that he has a temporary need based on an increase in workload. I agree with the CO that the information provided does not fully address whether the Employer has seen such an increase in his workload so as to qualify for a temporary need. However, according to regulations, the Employer need not submit documentation of a temporary need until requested to do so, but must keep these records on hand. 20 C.F.R. § 655.21. In other words, if the CO requested the information documenting an increase in workload, and the Employer failed to provide the information, the CO should deny certification. However, in the present case, the CO did not request that the Employer establish an increase in workload, but asked instead for the Employer to provide “a description of the employer’s business history and activities (i.e. primary products or services) and schedule of operations through the year.” AF 145. The Employer quite literally complied. He provided a menu, food orders, various sales receipts, and information regarding his building and utility bills. The Employer also provided restaurant reviews which featured the Employer in a positive light. These items together explain the products, services, and business activities of the Employer.

While the CO may have ultimately wanted business records, such as tax returns or a statement from the Employer’s accountant that reflected a dollar amount or a percentage increase in business, the CO did not request this information. Although the burden of proving a temporary need is on the Employer and it must keep documentation of temporary need for review, the Employer cannot be

expected to send in information that was not requested. Based on the information in the appeal file, it is unclear whether or not the Employer's business has experienced such an increase so as to justify the need for two temporary cooks. Accordingly, I will remand this case to the CO. Upon remand, the CO should issue a second RFI requesting the documentation the Employer kept on file to show a temporary need.

Order

Accordingly, it is hereby **ORDERED** that the decision of the Certifying Officer is **REMANDED** for further proceedings consistent with this decision.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge