U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 05 January 2010

BALCA Case No.: 2010-TLN-00027

ETA Case No.: C-09300-46841

In the Matter of:

EAST COAST LABOR SOLUTIONS, LLC,
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 October 26, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from East Coast Labor Solutions,

LLC, ("the Employer"). AF 111-135.[1] The Employer requested certification for 100 "Laborers and Freight Stock, and Material Movers" from November 1, 2009, until June 15, 2010. The Employer also included the word "unlimited" next to the end date. AF 111. On the application, the Employer indicated that the nature of its temporary need was seasonal. *Id*. The Employer explained that its need was temporary because "as a staffing company[,] our staffing needs are contingent upon that of our clients." *Id.* The Employer went on to note that the current request for temporary labor was due to "a shortage of employees in the area of intended employment to fill these positions and meet our contract period for our seasonal need." *Id.*

The Employer also explained that its current temporary need was based on a new contract with Lumber & Things. AF 127. The Employer wrote:

> In this particular case our client is Lumber & Things. We are requesting 100 pallet assemblers on a seasonal need. Our client, Lumber and Things, has requested 100 additional assemblers to assist in satisfying their large seasonal contract with Hershey's foods for shipping pallets. These additional pallets are needed during Hershey's peak shipping season of November (Christmas Holidays) through May (Mother's Day) for large candy orders. Our client, Lumber and Things has been unable to secure enough workers to satisfy their annual seasonal contract with Hershey's foods. . . . The labor being performed is tied to this season from November through mid June of each year and reoccurs annually. During the time frame of the end of June through October we do not need the services of these pallet assemblers thus creating a seasonal need.

AF 127.

On November 3, 2009, the CO issued a *Request for Further Information* ("RFI"). AF 106-110. In the RFI, the CO identified two deficiencies, including a failure to establish that the need was temporary. AF 108. The CO stated that the Employer did not submit "adequate supportive documentation justifying that (1) the need for services or labor to be performed is temporary in nature based on a seasonal peak load standard, and (2) the number of worker positions being request for certification is justified and represents bona fide job opportunities." *Id* The CO wrote:

[1] Citations to the 135-page appeal file will be abbreviated "AF" followed by the page number.

> The employer [stated] that [the Employer] targets and fills positions in the winter months, primarily providing labor to manufactures such as pallet mills, whose demand dramatically rises due to goods sold for the holidays. As well, East Coast Labor Solutions, LLC, works with poultry companies for the increased demand of product during the physical year due to holiday and institutional sales. During the spring and summer months [the Employer] primarily works with lumber companies who have an increased demand due to building contracts.
>
> The employer indicated that it staffs workers during winter, spring, and summer months during the year, it suggests that the employer has a year round permanent need for workers as opposed to a seasonal need.

AF 109.

The CO directed the Employer to submit a revised, detailed statement of temporary need containing a description of the Employer's business history, activities, and annual schedule of operations; an explanation regarding why the nature of the job opportunity and number of workers requested reflect a temporary need; and an explanation regarding how the certification request meets one of the aforementioned regulatory standards of temporary need. *Id.*. The CO instructed the Employer to submit the following: signed work contracts; letters of intent from clients or previous monthly invoices showing work will be performed for each month during the requested period of need; annualized or multi-year work contracts or agreements, specifying the actual dates of work; and summarized and signed monthly payroll reports for a minimum of one previous calendar year, which indicate the total number of workers employed, the hours worked, and the total earnings received. *Id.*

On November 12, 2009, the Employer submitted a response to the RFI. AF 79-105. In its addendum to its statement of temporary need, the Employer asserts:

> Because [the Employer] provides labor to diverse industries, the need for workers throughout the year varies depending on the category of worker being requested. Starting in the fall, pallet manufacturing and poultry processing plants have an increased demand for their products due to a rise in goods sold for the holidays. This demand begins to subside in the spring. Whereas, lumber yards and saw mills boost their operations in the spring in anticipation of the construction season.
>
> [The Employer] realizes that the Department of Labor considers the need or our request as well as that of our client. In this particular case our client is Lumber & Things, a wood processing plant located in Keyser, West Virginia who provides wood pallets to fulfill

> their own clients' shipping needs. [The Employer] has never provided permanent or temporary pallet assemblers to Lumber & Things. This is the first instance in which Lumber & Things has requested workers from [the Employer]. Our need for stock laborers has decreased from previous years because the need for our temporary workers in lumber facilities providing building materials has decreased and our clients' core staff is sufficient to maintain the workload. However, the need for shipping pallets and workers who assemble them has remained the same.

AF 88. The Employer also supplied "summarized monthly payroll reports for the calendar years 2008, 2009, and 2010 specific to the area of intent." AF 87. On the actual report, the columns, which provide the total number of workers, hours, and earnings, all listed zero for the 2008 year. AF 95. For the year 2009, the columns also contained a zero, except for the months of November and December, which contain a "projection" under the Temporary Workers columns of 126,080 for total earnings and 16,000 for total hours. *Id.* The chart listed similar projected numbers for the 2010 year. AF 96. Finally, the response included a copy of the staffing contract between the Employer and Lumber & Things. AF 99-100.

On December 2, 2009, the CO issued a *Final Determination* denying the Employer's application on a single ground. AF 74-78. Citing 20 C.F.R. § 655.6, the CO noted that "the temporary nature of the services or labor to be performed in applications filed by job contractors will be determined by examining the job contractor's own need for the services or labor to be performed in addition to the needs of each individual employer with whom the job contractor has agreed to provide workers." AF 76. Accordingly, the CO noted that the Employer must satisfy the following conditions:

> (1) that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature; (2) the petitioner must specify the period(s) of time during each year in which it does not need the services or labor; (3) the employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change.

AF 76. The CO also noted that based on the Employer's filing history, the employer has changed its date of need from previous years. AF 77.

In reviewing the Employers response to the RFI, the CO found that the Employer had failed to establish a temporary need. The CO noted that the Employer's response was deficient because it

"suggest[ed] that its own need is solely based on selected contracts throughout the year rather than its overall need and that its temporary need is unpredictable or subject to change. Furthermore, the employer failed to provide a context discussing how the employer experiences a need during the period stated on the application." AF 78. Furthermore, the CO noted that the Employer had failed to provide adequate contractual information, including staffing or business activity information, making it impossible for the CO to determine if the Employer has a seasonal need for the dates requested. Since the CO could not determine if the Employer had a temporary need, the CO denied certification. *Id.*

On December 10, 2009, BALCA received the Employer's request for administrative review. AF 1-73. In its request for review, the Employer asserted that "the payroll records reflect that this is the first time we have been asked to provide pallet assemblers at this location." AF 9. The request also included the Employer's original response to the RFI. 40-73. The Employer did not submit a brief.

The CO filed a brief on December 28, 2009. In its brief, the CO argued that the Employer had focused on irrelevancies, such as recruitment efforts, in its response to the RFI, rather than focusing on its temporary need. Further, the CO argued that the information submitted did not comply with the requested information, and it failed to establish a temporary need. The CO wrote, "Without the information requested by the RFI, the CO could not determine that [the Employer] needed temporary H2-B workers, much less 100 of them, based on a seasonal need."

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). An applicant must maintain documentation evidencing the temporary need to submit if requested by the CO. § 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." § 655.21(b).

In the present case, the Employer attempted to establish a seasonal need. To establish a seasonal need, "the petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change" 8 C.F.R. § 214.2(h)(6)(ii)(B). To determine the temporary nature of work or services to be performed under applications filed by job contractors like the Employer, the CO must examine the "job contractor's own need for the services or labor to be performed in addition to the needs of each individual employer with whom the job contractor has agreed to provide workers as part of a signed work contract or labor services agreement." 20 C.F.R. § 655.6(d). 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 seasonal need. In order to determine the Employer's need, the Employer needed to supply not only information about its contract with Lumber & Things but about its own business as well. Although the Employer relies on its payroll summary as support for its temporary need, the summary is either incomplete or focuses exclusively on the Employer's contract with Lumber & Things. Further, the Employer noted that it has not requested workers for Lumber & Things in the past, since this is a new contract. However, the CO noted that the Employer had requested workers for the same job last year. While these workers may have been for a different contract or under a different context, the record before me is unclear.

A seasonal need requires the Employer to demonstrate that its need is tied to a particular time of the year. Yet the Employer in the present case has failed to demonstrate anything more that its need is tied to a particular contract. Moreover, the Employer has failed to evidence that its need, rather than the need of the contractor, is tied to a season or time of year. Rather, the Employer's evidence suggests that the Employer's time of need is dependent exclusively on the contracts it undertakes, and those may or may not be seasonal. The record does not provide definitive information on the Employer's other contracts.

Had the Employer provided, as the CO suggested, a copy of the Employer's payroll records which included all of the Employer's business, then it would have been possible to determine whether the Employer's needs revolve around a particular season. If, as the Employer suggested, many of its contracts revolve around the holiday season, then the payroll report would have evidenced an increase in the need for workers during a set period over the last years. Yet the Employer did not provide this information, or any other evidence that demonstrated the Employer consistently has an increase of business tied to a specific season. While the Employer may actually have a seasonal need for temporary workers, the record before me is unclear and the burden of proof rests squarely on the Employer. The CO could not properly establish whether or not the Employer had a seasonal need, so he properly denied certification.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

A

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge