



Issue Date: 25 May 2011

BALCA Case Nos.: 2011-TLN-00026

ETA Case No.: C-11073-54439

In the Matter of:

ARIZONA LOTUS CORPORATION,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Roberto Salazar, Esquire
Tucson, Arizona
For the Employer

Gary M. Buff, Associate Solicitor
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Office of the Solicitor
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Washington, DC
For the Certifying Officer

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, as

defined by the Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.33(a). The scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e).

STATEMENT OF THE CASE

On March 14, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Arizona Lotus Corporation ("the Employer") for one radio announcer from April 20, 2011 to April 21, 2012. AF 109-116.¹ The Employer stated that that it had an intermittent or other temporary need, which it explained as follows:

We need the service from Milton Calderon Mercado, for two years upon a [reevaluation] of activities and results that he may [provide] to the company. If during this period Milton Calderon Mercado provided sufficient facts that he is an asset to the company we will request the service of Milton Calderon Mercado for other period of time.

AF 109, 120. On March 17, 2011, the CO issued a *Request for Further Information* ("RFI"), notifying the Employer that it was unable to render a final determination for the Employer's application because the Employer did not comply with all requirements of the H-2B program. AF 99-108. Among the eight deficiencies identified, the CO informed the Employer that it did not establish that the nature of the Employer's need is temporary, given that the Employer's requested dates of need exceed ten months. AF 101. The CO notified the Employer that the Employer's temporary statement failed to explain why the nature of the job opportunity reflects a temporary need. AF 102.

The CO required the Employer to submit additional information and documentation to establish that the nature of the Employer's need is temporary. AF 101-

¹ Citations to the 153-page appeal file will be abbreviated "AF" followed by the page number.

102. The CO instructed the Employer to provide a detailed statement of temporary need containing: 1) a description of the Employer's business history and activities and schedule of operations through 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; and 3) an explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need. *Id.* In addition, the CO required the Employer to submit supporting evidence and documentation to justify the chosen standard of temporary, including: 1) signed work contracts and/or monthly invoices from previous calendar years clearly showing work will be performed for each month during the requested period of need on the application; 2) annualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of service and clearly showing work will be performed for each month during the requested period of need; or 3) summarized monthly payroll reports for a minimum of one previous calendar year, identifying the total permanent and temporary employees, total hours worked, and total earnings received. AF 103.

The Employer responded to the RFI on March 28, 2011, amending its dates of need to April 20, 2011 to February 20, 2011. AF 27-98. Additionally, the Employer submitted a revised statement of temporary need, which provided, in pertinent part:

It is not proper at this time for our company to have a permanent position, at this point we need a temporary position to analyze, practice and to know how the applicant is going to interact with our audience. We have learn[ed] from past experiences that it is better for our company to have a temporary person until we all [adapt] to each other.

[...]

The nature regarding why Arizona Lotus Corporation is requesting a temporary work permit visa (H-2B) is due to the increase in market share on their Spanish radio station KCMT-FM "La Caliente 102.1 FM" and the lack of individuals capable to be positioned and identified with the job opening. The intermittent need as mentioned before is due [to] the [recent] increase [of] market share against competitors and popularity of the radio station, [led] Arizona Lotus Corp., to develop a current [...] programming area, ideal for a temporal work of 10 months.

AF 36-37. Additionally, the Employer explained that its need is temporary because it is unknown how “the Hispanic market that we are trying to approach with the applicant [...] is going to respond, so we need to address all the issues in a short period of time so we can improve, modify, and [adopt] a strategy for a long period if needed.” AF 37. In support of its statement of temporary need, the Employer submitted an Employment Agreement stating that the agreement shall commence in April 2011 and continue until February 2012. AF 70-74.

On April 14, 2011, the CO denied the Employer’s application on five grounds. AF 11-22. One of the reasons for denial was that the Employer failed to establish that the nature of the Employer’s need is temporary, as required by 20 C.F.R. §§ 655.6 and 655.21(a). AF 14. Specifically, the CO found that the Employer failed to explain how the intermittent temporary need standard applies to this application and failed to provide the requested supporting documentation. AF 14-17. The CO determined that the Employer’s explanation that it believes it has a temporary need based on a growing market share and its desire to gauge whether or not this foreign worker will be right for the position is insufficient to meet the regulatory definition of temporary need. AF 16-17.

On April 25, 2011, the Employer appealed the denial, reiterating its argument that it only needs one radio announcer on a temporary basis in order to determine whether he is well-suited for the job. AF 1-10.

DISCUSSION

In order to establish eligibility for certification under the H-2B program, an employer 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 basis, as defined by the Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). The DHS regulations provide that 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.” 8 C.F.R. § 214.2(h)(6)(ii)(B). It is

well-established that when determining whether an employer has a temporary need for labor or services, “[i]t is not the nature or the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position.” *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982).

The Employer is a radio station seeking to hire a radio announcer on a “temporary” basis while it determines whether the particular foreign worker who it seeks to hire is well-received by its target audience. AF 36-37. However, it is readily apparent that the Employer has an ongoing and continuous need for the radio announcer duties to be performed, and there is nothing within the record that demonstrates that the Employer only needs the duties to be performed on a temporary basis. Rather, by the Employer’s own admission, “[i]t is not proper at this time for our company to have a permanent position to analyze, practice and to know how the applicant is going to interact with our audience.” AF 36. In other words, the Employer has an ongoing need for a radio announcer, but would like to test Milton Calderon Mercado, the foreign worker identified for this position, to see if audiences respond well to him. Indeed, the Employer’s brief states that it needs Mr. Mercado for two years, and that if he has proven that he is an asset to the company, they will request his service “for other period of time.” Employer’s Brief at 5. The Employer has lasting need for the job duties of the radio announcer to be performed, thereby precluding the Employer from establishing a temporary need for a radio announcer. As the Employer has not demonstrated that it has a temporary need for the radio announcer duties to be performed, the Employer has not demonstrated that the employment is temporary in nature.

Moreover, the Employer has failed to establish that it has an intermittent need for a radio announcer. In order to establish an intermittent need, the employer “must establish 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)(B)(4). The Employer failed to provide an explanation of how its request for temporary labor certification meets this regulatory standard, and it failed to provide any of the types of supporting documentation requested by the CO.

Accordingly, I find that the CO properly denied certification because the Employer has failed to demonstrate that it has a temporary need for labor or services to be performed.

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