



Issue Date: 15 February 2011

BALCA Case No.: 2011-TLN-00008

ETA Case No.: C-10343-52218

In the Matter of:

COASTAL VENTURES MANAGEMENT, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: David A. Beach
Destin, Florida
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 December 7, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary seasonal labor certification from Coastal Ventures Management, LLC ("the Employer"). AF 45-73.¹ The Employer requested certification for 70 maids and hotel housekeepers from February 25, 2011 to October 31, 2011. AF 50. The Employer checked the box in section C-14 of its application that it was a job contractor. AF 51. Additionally, the Employer submitted a copy of its service agreement with Sandestin Beach Hotel, Ltd d/b/a Hilton Sandestin Beach Golf Resort and Spa ("the Company") in Destin, Florida, for 70 housekeeper/housemen positions from February 25, 2011 to October 31, 2011. AF 58-61.

The service agreement provides that the Employer ("the Agency" under the service agreement) will pay the employees \$8.30 per hour for 40 hours, with overtime at \$12.45 per hour, provide necessary benefits to the employees, maintain payroll records for the employees, provide liability and workers' compensation insurance, pay FICA, and provide transportation for the employees to and from work according to the schedule provided by the Company. AF 58-59. The service agreement also provides that the Agency "affirms that the employees assigned to the Company shall remain as employees of the Agency and that they are not entitled to Company's employee benefit plans, including pensions, insurance benefits, disability benefits, bonuses, vacation pay, severance pay, or any other similar plans, programs or agreements, whether in writing or

¹ Citations to the 73-page appeal file will be abbreviated "AF" followed by the page number.

not.” AF 58. The service agreement requires the Company to pay the Agency \$11.80 for every hour worked by each employee and \$14.00 for employees exceeding the 40 hour per week work hours, provide a minimum of 35 compensable hours work each week for each employee, and provide all necessary equipment, supplies, and tools to ensure the quality of job performance. AF 59-60. Additionally, the service agreement provides that the employees may function as housekeepers, housemen, stewards, banquet housemen, food servers, groundskeepers, and/or other related positions. AF 59. The agreement does not indicate whether the Agency or the Company will make the determination regarding which employee will perform which function. The service agreement also provides that that the Agency will at all times act in its capacity as an Independent Contractor and nothing in the agreement may be construed to make the Agency an agent or partner of the Company. AF 60.

On December 13, 2010, 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 40-44. Specifically, the CO informed the Employer that pursuant to *Comité de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis*, No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), a recent federal district court decision, DOL could no longer approve applications submitted by job contractors unless the employers contracting with the job contractor for H-2B workers also submit applications for labor certification. AF 43. The CO determined that the Employer was a job contractor, and requested the following information from the Employer:

1. Does the applicant intend to have an employer relationship with respect to H-2B employees or related U.S. workers hired pursuant to the Application for Temporary Employment Certification? An employer, as defined in 20 CFR 655.4, is an entity that meets the following criteria:
 - a. Has a place of business (physical location) in the U.S. and a means by which it may be contacted;
 - b. Has an employer relationship with respect to H-2B employees or related U.S. workers under this part (i.e., hires the H-2B employee or related U.S. worker as an ‘employee’ as defined in 20 CFR 655.4); and
 - c. Possesses, for the purpose of the filing of an application, a valid Federal Employer Identification Number (FEIN).

2. Has the applicant contracted or does it intend to contract on a temporary basis to one or more employers the services or labor of the H-2B workers covered by this Application for Temporary Employment Certification?
3. If the applicant responded yes to question 2, the applicant must provide the following information for each **client** employer:
 - a. Name and business location;
 - b. Indication as to whether the employer client is an affiliate, branch, or subsidiary of your business (Yes/No);
 - c. Indication as to whether the client employer or any person employed by the client employer who is not your employee will have any authority to control or supervise the manner and means by which the work will be performed (Yes/No);
 - d. Indication as to whether the client employer or any person employed by the client employer who is not your employee will have any responsibility for determining the skills and/or training required to perform the activities in the job opportunity (Yes/No)
 - e. Indication as to whether the client employer or any person employed by the client employer who is not your employee will have any authority to control the source of the instrumentalities and tools required for accomplishing the work (Yes/No);
 - f. Indication as to whether the client employer or any person employed by the client employer who is not your employee will have any authority to control the location of the work to be performed (Yes/No);
 - g. Indication as to whether the client employer or any person employed by the client employer who is not your employee will have any authority over when and how long to perform the work (Yes/No); and
 - h. Indication as to whether the work to be performed is a part of the regular business of the client employer or any person employed by the client employer who is not your employee (Yes/No).

For each client employer where the applicant responded yes to any one of the questions listed 3c through 3h, the applicant must explain: 1) the terms, conditions, and extent of such authority, power or control, including whether such authority, power or control is contractual; and 2) whether the client employer has also filed a separate Application for Temporary Employment Certification for the same job opportunity(ies) and time period as the instant Application for Temporary Employment Certification. If the client employer has done so, please provide the case number of the client employer's Application for Temporary Employment Certification.

If based on the responses to the above questions the applicant believes that it has incorrectly chosen the type of employer, in Section C. Item 17.

(Section C. Item 14. Of the pervious ETA Form 9142), the applicant must change the Section to correctly describe its employer type.

AF 43-44. The Employer responded to the RFI on December 17, 2010. AF 18-39. In its RFI, the Employer stated that the client employer will have authority to control or supervise the manner and means by which the work will be performed. AF 19. The Employer stated that while the employer client's housekeeping supervisor will supervise the H-2B workers, Coastal Ventures will also have a supervisor that is responsible for the supervision of each H-2B worker. AF 19. The Employer also stated that there are no tools or instrumentalities required for this position. AF 19. The Employer indicated that the client employer has not filed a separate application for temporary labor certification. AF 20. Additionally, the Employer noted that it changed its employer type from "job contractor" to "individual employer" on its application because it believes that it meets the definition of employer under 20 C.F.R. § 655.4. AF 20.

On January 3, 2011, the CO denied certification. AF 12-17. The CO determined the Employer meets the definition of a job contractor because the Employer stated that it intends to contract on a temporary basis with an employer client for the services or labor of H-2B workers covered by this application for temporary labor certification and that the employer client will have the authority to control or supervise the manner and means by which the work will be performed. AF 16. Additionally, although the Employer indicated that no tools or instrumentalities are required for the position, the CO determined that vacuums, mops, and other cleaning tools are needed, and that the Employer's service agreement with the client employer indicates that the client employer will provide all necessary equipment, supplies, and tools for performance of the job duties. AF 16. Further, the CO found that because the services in this application are being conducted at the worksite of the client employer, the decision of when and how long the work is performed is the client employer's. Based on the foregoing, the CO determined that the Employer meets the definition of a job contractor because it intends to have an employer relationship with respect to H-2B employees or related U.S. workers hired pursuant to this application for temporary labor certification, it intends to contract the services or labor of the H-2B workers covered by this application on a temporary basis to one or more employers, and it will not exercise supervision or control in the

performance of the services or labor to be performed other than hiring, paying, and firing the workers. AF 17. Because the employer client did not submit an application for temporary employment certification with respect to the particular services or labor to be performed, the Employer's application was denied.

The Employer appealed the denial, arguing that it has filed as a job contractor for five years and its employer client depends on its services to supplement its staff. The CO filed an appellate brief, arguing that the change the Employer made to the ETA Form to switch from a job contractor to an individual employer does not change the Employer's true character as a job contractor that does not exercise control or supervision of the H-2B workers that are the subject of this application. The CO argues that the denial of certification is consistent with the district court ruling in *Comité de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis*, No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010).

DISCUSSION

In *Comité de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis*, No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), the Eastern District of Pennsylvania found that the Department of Labor had violated the Administrative Procedure Act ("APA") by failing to provide a rational explanation for several of its H-2B regulations. One H-2B regulation at issue in *CATA* was 20 C.F.R. § 655.22(k), which provided that if an employer filing an application for temporary labor certification was a job contractor, it could not place any H-2B workers with any other employer unless certain conditions were met. In practice, this regulation allowed a job contractor to file an application for certification without requiring the employers who utilized the H-2B laborers pursuant to the underlying contracts to also file for certification. *Id.* at *3, 15-16. The district court found that DOL's practice of requiring only job contractors but not their employer clients to file applications for labor certification violated the clear language of the Department of Homeland Security's ("DHS's") governing regulations. *Id.* at *16. Specifically, the court found that taken together, the DHS regulations found at

8 C.F.R. §§ 214.2(h)(2)(i)(C) and 214.2(h)(6)(iii)(A)² require both the job contractor and its clients to obtain a labor certification from DOL. *Id.* Accordingly, the court vacated 20 C.F.R. § 655.22(k) “insofar as that provision permits the clients of job contractors to hire H-2B workers without submitting an application to the DOL.” *Id.* at *26. In response to the decision in *CATA*, the Department of Labor began requiring labor contractors and the employers with whom they contract to file applications for labor certification with the Department of Labor. AF 43.

Based on the Employer’s response in its application that it was a job contractor (AF 51), the CO required the Employer to submit additional information. Upon receipt of the RFI, the Employer amended its application and stated that it was not a labor contractor, but rather was an individual employer. Under the applicable H-2B regulations:

Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and who contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor, and where the job contractor will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.

20 C.F.R. § 655.4. The Employer has a service agreement to provide 70 housekeepers to the Hilton, and the service agreement shows that the Employer will pay the H-2B employees, provide liability and workers’ compensation insurance, and provide transportation to and from the Hilton. In the Employer’s response to the RFI, the Employer stated that its employer client’s housekeeping supervisor will have the authority to control or supervise the manner and means by which the work will be performed, as will a supervisor that is directly employed by Coastal Ventures. AF 19.

² Eight C.F.R. § 214.2(h)(2)(i)(C) provides:

Services or training for more than one employer. If the beneficiary will perform nonagricultural services for, or receive training from, more than one employer, each employer must file a separate petition with USCIS as provided in the form instructions.

Eight C.F.R. § 214.2(h)(6)(iii)(A) provides, in pertinent part:

Prior to filing a petition with the director to classify an alien as an H-2B worker, the petitioner shall apply for a temporary labor certification with the Secretary of Labor for all areas of the United States, except the Territory of Guam.

I find that the Employer's assertion that one of its supervisors will be authorized to control or supervise the manner and means by which the work at the Hilton will be performed to be unsupported by any evidence in the record. *See generally Cajun Constructors, Inc.*, 2011-TLN-4 (Jan. 10, 2011) (citing *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof)). The Employer's service agreement with the Hilton makes no mention of Coastal Ventures Management maintaining a supervisor that will co-supervise employees, and nothing in the service agreement indicates that the Employer is retaining some authority to determine what type of work the employees will be performing. Because the services that are the subject of this application will be conducted at the employer client's worksite, absent any documentation to the contrary, it is most reasonable to presume that the employer client will supervise and exercise control over the H-2B workers. Moreover, although the Employer stated in its response to the RFI that the H-2B workers will not need any tools or instrumentalities, the service agreement provides that the Hilton will provide all necessary equipment, supplies, and tools needed to ensure quality performance by the employees. AF 59.

Based on the foregoing, I find that the substantial weight of the evidence in the record demonstrates that the Employer is a job contractor as defined by 20 C.F.R. § 655.4, because it does not exercise any supervision or control in the performance of the services to be performed. Because only the Employer, but not its employer-client, filed an application for labor certification, the CO properly denied certification under the *CATA* decision.

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