



Issue Date: 01 November 2010

BALCA Case No.: 2011-TLN-00001

ETA Case No.: C-10250-50983

In the Matter of:

MARGARET PIROVANO,
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 3, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Margaret Pirovano ("the

Employer”). AF 110-168.¹ In her application, the Employer noted that her need was a seasonal. Additionally, the Employer stated:

1. Margaret Pirovano has been travelling to Florida since 1998 to train and compete in the horse show circuit.
2. The position is temporary due to the nature of the horse show season and circuit.
3. The employer seeks H-2B workers for the horse show season on a recurrent annual basis.
4. Employer is requesting the same number of employees (1) as in previous years.

AF 115.

On September 10, 2010, the CO issued a *Request for Further Information* (“RFI”). AF 105-109. In the RFI, the CO identified two deficiencies, only one of which will be addressed on appeal. Citing to 20 C.F.R. §§ 655.6, the CO stated that the Employer failed to establish a temporary need. AF 107. The CO noted that temporary labor certification, absent unusual circumstances, should not exceed more than ten months. *Id.* The CO went on to note that the Employer had received a previous labor certification from January 1, 2010 until October 1, 2010. *Id.* Accordingly, the CO noted that the Employer’s current dates of need were from October 1, 2010 until June 30, 2011. *Id.* The CO stated that when the two certifications were combined, they created a “continuous need covering 545 calendar days.” *Id.* As a result, the CO required the Employer to submit evidence that established the Employer’s temporary need. *Id.*

On September 20, 2010, the Employer submitted a response to the RFI. AF 18-104. In reference to her prior certification, the Employer stated that the Employer “requested an extension (continuation) of previously approved employment due to the fact that she was unable to utilize an H-2B worker as originally anticipated.” AF 18. The Employer noted that her original application had been “erroneously denied” and later reversed by BALCA. AF 19. As a result, the Employer stated that she was unable to obtain a visa and have the benefit of her H-2B worker until May 13, 2010. *Id.* As a result of the delay, the Employer noted that she planned to continue her stay in Florida through the 2010-2011 horse show season rather than return to New York as originally planned. *Id.*

¹ References to the 168-page appeal file will be abbreviated with an “AF” followed by the page number.

In a sworn affidavit, the Employer stated that “the delay in being able to commence operations in Florida as a result of the erroneous denial of the February, 2010 application . . . has caused great financial stress and created training issues for my horses.” AF 28. Because of the delay, the Employer stated that “it is unwise to move [the horses] to New York at this time. . . . If [the Employer were] to pack up and move them back to New York at this time[,] it would be months of wasted time, money and effort as we would have to go through the acclimation process again in New York.” *Id.*

The Employer also stated in her affidavit that it “was my intention to return to my facility in New York State in October, 2010. I have previously applied for and been granted, a temporary labor certification for an H-2B worker in New York. I was planning on filing a similar application for temporary labor certification for an H-2B worker in New York for the approximate period of January, 2011 to October, 2011.” *Id.*

On September 29, 2010, the CO denied the Employer’s application. Citing to 20 C.F.R. § 655.6, the CO found that the Employer failed to establish a temporary need. AF 14. The CO noted that when this certification was combined with the Employer’s last certification, the need was in excess of ten months and appeared to be permanent. AF 16. Because the “employer’s requested dates of need [were] back to back with a prior certification for the same job and work location,” the CO denied certification. AF 17. The Employer’s appeal followed.

Discussion

The time limitation for a seasonal need should “generally . . . be limited to one year or less.” 8 C.F.R. § 214.2(h)(6)(ii). Further, “the Secretary will, absent unusual circumstances, deny an [application] where the employer has a recurring, seasonal or peakload need lasting more than 10 months.” 20 C.F.R. § 655.6.

In its denial, the CO stated that the Employer’s application should not be approved because it was in excess of the ten month window as referenced in 8 C.F.R. § 214.2(h)(6)(ii)(B). However, the regulations cited by the CO actually refer to a period of “one year or less,” not ten months. Assuming that the CO was actually referring to 20 C.F.R. § 655.6, the Department of Labor regulations for the H-

2B program require that a seasonal need be limited to ten months where it is *recurring*. Nothing in the Employer's present application indicates that it is a recurring need. In fact, according to the CO's recitation of the Employer's filing history, the current application is only her second one. Therefore, the CO incorrectly classified the Employer's application as a recurring need lasting longer than ten months.

However, the CO correctly denied the Employer's application. According to the H-2B regulations, a seasonal need should generally be limited to one year. Even assuming the Employer is entitled to begin counting her period of need from the date she received her visa in May 2010, the Employer's current application would exceed the twelve months anticipated under the H-2B program by at least one month. In her brief, the Employer argued that the regulation "is silent as to the maximum length of an employer's temporary need when based upon a seasonal . . . need." However, the regulations specifically reference the one year mark.² Therefore, the Employer's combined need of more than thirteen months is in violation of the regulations.³ Because the Employer's combined need would exceed the one year allowed under the H-2B regulations, the CO properly denied the Employer's application.

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

² The regulations note that the limit for a temporary certification is "generally" twelve months. While the Employer attempts to use the term "generally" to assert that the regulations do not specifically impose a limit, the argument is unpersuasive. Approximately 13.5 months cannot be considered "generally" a one year certification, even under the most generous interpretation.

³ The Employer also argues that this case should be granted an extension under the same theory used in *Matter of Joseph W. Hill, II*, 2010-TLN-00022 (BALCA 2009). However, in *Hill*, the Employer had requested a one-time occurrence. Therefore, there was not a question as to whether the Employer violated the one year provision.

