U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 June 2011

BALCA Case No.: 2011-TLN-00027

ETA Case No.: C-11084-54570

In the Matter of:

MARTENS PACKING COMPANY, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Juan Carbajal
Carbajal's Labor, Inc.
Sodus, New York
For the Employer

Gary M. Buff, Associate Solicitor
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Office of the Solicitor
Division of Employment and Training Legal Services
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 25, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Martens Packing Company ("the Employer") for 20 "grader and sorters, agricultural products" from June 6, 2011 to November 17, 2011. AF 46-59.[1] The Employer stated that that it had a seasonal need, but did not provide a statement of temporary need in its application. AF 46.

On March 29, 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 and failed to establish that its need for nonagricultural services or labor is temporary in nature. AF 39-45. The CO notified the Employer that it had identified five deficiencies with the Employer's application, and instructed the Employer to provide the requested supplemental information and modifications within seven calendar days from the date of the RFI. AF 39. Among the five deficiencies, the CO informed the Employer that it failed to include a statement of temporary need, and that it appeared that the Employer's need was not temporary in nature, given that the Employer had received certification on the basis of a seasonal need for the position of 20 graders and sorters, in the same area of intended employment, from January 10, 2006 to May 30,

[1] Citations to the 59-page appeal file will be abbreviated "AF" followed by the page number.

2007. AF 41. Therefore, the CO required the Employer to specify the periods of time during each year in which it does not need the services or labor. AF 42.

In addition, the CO required the Employer to include 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 need, 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. *Id*.

The CO also found that the Employer failed to provide information on its ETA Form 9142 regarding the placement of a job order with the State Workforce Agency ("SWA") and regarding its placement of newspaper advertisements, and therefore required the Employer to provide copies of the job order and newspaper advertisements to establish compliance with these pre-filing recruitment requirements. AF 42-43. The CO reminded the Employer that pursuant to 20 C.F.R. § 655.15(a), all recruitment, including the placement of the job order and newspaper advertisements, must have occurred prior to March 25, 2011, the date that the Employer submitted its H-2B application. AF 43. Lastly, the CO found that the Employer failed to submit a recruitment report, a copy of its ETA 9141 Prevailing Wage Determination ("PWD"), and failed to submit a complete and accurate ETA Form 9142. AF 44-45.

The Employer did not submit a response to the RFI, and on April 28, 2011, the CO denied the Employer's application based on the Employer's failure to correct the deficiencies listed in the RFI. AF 29-37. On May 13, 2011, the Employer appealed the denial, submitting an amended copy of its ETA Form 9142, a copy of its PWD, a copy of its SWA job order, which was received by the New York SWA on April 25, 2011, newspaper advertisements dated April 28, 2011 and May 1, 2011, and a recruitment report, identifying three U.S. workers who filled out applications. AF 1-28. The CO filed a brief, arguing that the CO properly denied certification based on the Employer's failure to comply with the RFI, and that the H-2B regulations do not permit an employer to submit the information requested in the RFI on appeal.

DISCUSSION

The H-2B regulation provide that failure to comply with an RFI, including not providing all documentation within the specified time period, may result in a denial of the application. 20 C.F.R. § 655.23(d). In this case, the Employer did not respond to the CO's RFI, and therefore, failed to correct the five deficiencies identified in the CO's March 29, 2011 RFI. Accordingly, the CO's denial of certification was proper.

On appeal, the Employer has attempted to respond to the RFI, more than a month after it was issued by the CO. However, the H-2B regulations prevent BALCA from considering any new evidence on appeal, and limit BALCA's scope of review to only legal argument and such evidence as was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a)(5), (e). As none of the documentation submitted by the Employer on appeal was timely submitted to the CO, and therefore not a part of the record upon which the CO based his denial, I cannot consider any of the evidence that the Employer submitted on appeal in an attempt to cure the deficiencies listed in the RFI.[2]

Based on the foregoing, I find that the CO properly denied certification under 20 C.F.R. § 655.23(d) because the Employer failed to timely respond to the RFI and failed to correct the five deficiencies identified in the RFI.

[2] Even if I could, however, the documentation provided is inadequate to overcome several of the deficiencies identified in the CO's RFI, because the SWA job order and newspaper advertisements were placed *after* the Employer filed its H-2B application in violation of 20 C.F.R. § 655.15(a). Additionally, the Employer's newspaper advertisements did not contain all of the information required under 20 C.F.R. § 655.17(a)-(h).

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