

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: 01 February 2011

BALCA Case No.: 2011-TLN-00006

ETA Case No.: C-10337-52129

In the Matter of:

MJC LABOR SOLUTIONS, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Michele Contreras, Esquire
Philadelphia, Pennsylvania
For the Employer

Gary M. Buff, Associate Solicitor
Vincent C. Costantino, Senior Trial Attorney
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 December 2, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary seasonal labor certification from MJC Labor Solutions, LLC ("the Employer"). AF 444-601.¹ The Employer requested certification for 47 landscaping and groundskeeping workers from March 10, 2011 to December 31, 2011. AF 444. In its statement of temporary need, the Employer described its business as follows:

MJC Labor Solutions LLC is a seasonal company and shuts down its landscaping operations for approximately 3 months and only carries its office staff and owners year round. It is imperative that we have this temporary/seasonal workforce available so that we can continue to service our valued customers and ultimately the end consumer. We have increased our number of workers we are requesting from last season because we anticipate more business as evidenced by our letters of intent. For the 2011 Landscape/Lawn Mowing season, we anticipate our landscape laborer job classification will require 47 workers. As per our enclosed, signed 2011 Seasonal Letters of Intent from our 26 wholesale customers, you will see that they have 3,000 plus landscaping contracts/customers that they perform landscaping services for.

[...]

MJC Labor Solutions LLC supplies seasonal landscapers/groundskeepers to its valued clients and they (our clients) in turn serve their valued clients. The services listed on the ETA 9142 will [be] performed at any time or in any order at our client's discretion during the labor certification period which begins on March 10, 2011 and ends on December 24, 2011 and as written in our service contract MJC does not control the work schedule of operations or landscaping projects throughout the season. However, our service agreement does explicitly state what types of work projects are permissible and that they must comply with all of the terms and conditions of the contract.

AF 444. (emphasis added). The Employer checked the box in section C-14 of its application that it was a job contractor. AF 445. Additionally, in describing the job duties of the position, the Employer

¹ Citations to the 601-page appeal file will be abbreviated "AF" followed by the page number.

stated that the “[t]emporary landscapers will be performing these tasks for our commercial/wholesale clients who use our job contract labor service.” AF 446. The Employer’s application for a prevailing wage determination (“PWD”) noted that “[the Employer’s] clients provide transportation from their workshops or pick up @ our yard in Upper Darby, PA to sites listed in part C- page 3.” AF 454.

On December 8, 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 440-443. Specifically, the CO informed the Employer that it 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 441. 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 previous ETA Form 9142), the applicant must change the Section to correctly describe its employer type.

AF 441-442. The Employer responded to the RFI on December 15, 2010 and changed its application to indicate that it was an individual employer, rather than a job contractor. AF 22-437. Additionally, the Employer submitted, among other documentation, a response to the questions posed in the RFI regarding the Employer's status as a job contractor. AF 56-95. With respect to question 1 from the RFI ("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?"), the Employer stated the following:

MJC Labor Solutions does meet the requirements to have an employer relationship with the H-2B workers. MJC manages insurance for all employees and conducts regular safety meetings at their office for its employees. MJC has a roving field supervisor to check in on workers. The supervisor acts as a liaison between MJC and the client, makes sure the workers are safe and are using proper safety procedures. The supervisor would get reports and feedback on workers. The roving field supervisor will also be required to meet with our clients to get feedback about the workers' punctuality, work ethic,

reliability, attitude, safety awareness of themselves and others to avoid injury, and any other pertinent work related matters. The roaming supervisor, ultimately, will limit work related accidents and increase job site safety. The supervisor will give MJC management a very accurate assessment of what is going on in the field.

[...]

MJC is a full service individual employer that provides a multitude of bilingual services and supervision to all the H-2B workers.

- a. MJC has a physical place of business and means by which they can be contacted. Their office is located at 1720 South State Rd. Rear Lot #201, Upper Darby, PA 19082. This office is staffed during all regular business hours and is the point of contact for all H-2B employees.
- b. MJC has an employer relationship with the H-2B employees and related U.S. workers. MJC hires the H-2B workers as “employees” as defined by 20 CFR 655.4. MJC has the right to control the manner and means by which the work is accomplished. MJC determines the skill required to perform the work, the location of the work, and has discretion over when and how long the employees will work.
- c. MJC possesses a valid FEIN.

AF 56-58. Further, the Employer stated that it provides many bilingual services for the H-2B workers and assists the workers with their housing issues and arranging their air travel. AF 56-57. The Employer stated that it does intend to contract on a temporary basis to one or more employer clients for the services or labor of the H-2B workers that are the subject of its application for temporary labor certification, and the Employer provided the requested information for each of the 28 employers with which it intends to contract the H-2B workers. AF 58-93. The Employer indicated that none of these employer clients with which it contracts will have any authority to control or supervise the manner and means by which the work will be performed. AF 58-93. Additionally, the Employer stated:

MJC has the authority to supervise all H-2B employees. The roving field supervisor that visits each worksite throughout the week will perform most of the supervision. As the employer, MJC will exercise the sole right to discipline, suspend or terminate their employees who do not perform their job duties or do not represent their company in the best possible manner. The roving field supervisor will be making sure that MJC’s workers are not being used outside of their labor certification.

[...]

[T]he employer client will not have the authority to control the location of the work performed. MJC will have the authority to control the location of the work to be performed so that all workers only work within the area allowed by the labor certification. The roving field supervisor will be making sure that H-2B workers are not being used outside of their labor certification.

[T]he employer client will not have any authority over when and how long to perform the work. MJC will have the authority over when and how long to perform the work. MJC's roving supervisor will be required to go over the work schedule with the client before the workweek begins. The supervisor will then communicate the workweek to the seasonal workers so that they will have [an] idea [of] what they will be doing and will be able to prepare accordingly for the week.

The supervisor will also be required to cancel any and all workdays due to inclement weather, drought conditions or economic reasons. Weekend work will also be communicated and coordinated through the field supervisor.

AF 58-93. In addition, the Employer stated that none of the employers with which it contracts filed temporary labor certification applications. AF 58-93.

On December 30, 2010, the CO denied certification. AF 11-16. 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 employer clients for the services or labor of H-2B workers covered by this application for temporary labor certification. AF 16. Additionally, the CO found that the Employer's statement in response to the RFI that the employer clients will not have any authority over when and how long the H-2B workers perform the work contradicted the Employer's statement in its application that it does not control the work schedule of operations or landscaping projects. Therefore, the CO determined that because the Employer meets the definition of a job contractor but its employer client(s) did not submit applications for temporary employment certification with respect to the particular services or labor to be performed, the Employer's application must be denied.

The Employer appealed the denial, arguing that it does not meet the definition of job contractor under 20 C.F.R. § 655.4 because it exercises supervision and control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers. The Employer argues that it provides many bilingual services to the H-2B workers. The Employer adds that although it is an individual employer and not a job contractor, it is too great of a burden on employer-clients to require them to conduct the same job market test as the job contractor. The Employer argues that this burden is so great that it will either put the clients out of business or force them to hire workers who are not legally authorized to work in the United States. The CO filed an appellate brief, arguing that the

Employer does not exercise any significant supervision or control of the H-2B workers and that the Employer's clients control and maintain the H-2B workers' work assignments and their duties. 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

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.

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 441.

Based on the Employer's response in its application that it was a job contractor (AF 445), 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. When the Employer filed its application for temporary labor certification, it declared under penalty of perjury that it had read and reviewed its application and that to the best of its knowledge, the information contained in the application was true and accurate. AF 452. Not only did the Employer state in its application that it was a job contractor, but it also stated that “[t]he services listed on the [application] will be performed at any time or in any order *at our client's discretion.*” AF 444. (emphasis added). Moreover, the Employer stated that “as written in our service contract *MJC does not control the work schedule of operations or landscaping projects* throughout the season.” AF 444. (emphasis added).

The evidence in the record clearly demonstrates that the Employer is a job contractor as defined by 20 C.F.R. § 655.4, and I find the Employer's argument that it only identified itself as a job contractor on its application because it misunderstood the definition under the regulations to be unpersuasive, at best. Although the Employer attempts to show that it exercises supervision and control over the workers because it has “a roaming field supervisor,” the Employer's description of this supervisor demonstrates that the supervisor's primary purpose is to ensure the workers' safety. AF 56. The description of the roaming field supervisor does not give any indication that this supervisor would control or supervise the employees on any type of regular basis. Indeed, it is difficult to imagine that this single, roaming field supervisor could maintain daily supervision and control over the 47 workers at 28 different work sites throughout Pennsylvania. Even more difficult to imagine is that the 28 golf courses, lawn care, and landscaping companies with whom the Employer contracts would relinquish control over their own operations to the Employer's roaming supervisor.

Moreover, that the Employer provides many bilingual services away from the work sites to the H-2B workers (*i.e.* assisting with housing issues, filing workers' compensation claims, and arranging airline tickets) is unrelated to the determination of whether the Employer exercises supervision or control of the workers' labor on the work sites. It is the Employer's burden to establish eligibility for temporary labor certification. 8 U.S.C. § 1361. The Employer's assertion that it alone controls and supervises the H-2B workers is unsupported by documentation in the record.³ *See generally 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 has not demonstrated that it exercises supervision in the performance of the H-2B workers' labor, and I give substantial weight to the Employer's attestations in its application that it does not control the H-2B workers' work schedule or the employers' clients' landscaping projects. Therefore, I find that the Employer meets the regulatory definition of a job contractor. Because only the Employer, but not its employer-clients, filed an application for labor certification, the CO properly denied certification under the *CATA* decision.⁴

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

³ Although the Employer has submitted a copy of an Agreement for Seasonal Labor Service with its request for administrative review, this is new evidence that was not part of the record upon which the CO based his denial, and therefore, is beyond my scope of review. 20 C.F.R. § 655.22(a)(5). Even if it was, however, it would be of little probative value given that it is not signed by any of the employer-clients with whom the Employer contracts.

⁴ I have no authority to address the Employer's policy argument that requiring both job contractors and their employer clients to file applications for temporary labor certification will force these employer clients out of business.

