



Issue Date: 29 March 2011

BALCA Case No.: 2011-TLN-00010

ETA Case No.: C-11010-53246

In the Matter of:

ROYAL HOSPITALITY SERVICES, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Jon Clark
Education World
North Port, Florida
For the Employer

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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 January 10, 2011, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary peakload labor certification from Royal Hospitality Services, LLC ("the Employer"). AF 62-81.¹ The Employer requested certification for 50 hotel housekeepers from February 1, 2011 to October 31, 2011. AF 62. The Employer checked the box in section C-17 of its application that it was a job contractor. AF 63. Within its statement of temporary need, the Employer provided the following description of its business:

Employer – Royal Hospitality Services, LLC – was registered in December 2007 as a hospitality management company to supplement hotels' permanent staff with unskilled employees on a temporary basis due to a seasonal or short-term demand. In January 2008 employer entered into [an] agreement with client – Beau Rivage Resorts Inc. – to supply temporary workers for their property Beau Rivage Hotel Resort and Casino in Biloxi, MS. This employment is temporary and the term of it is regulated by the client's request letter. The letter from Beau Rivage Hotel Resort and Casino for 2011 is attached – Attachment 1.

AF 62. The Letter of Intent is signed by Beau Rivage's Vice President of Human Resources and notes that "[w]e need the assistance of your company to obtain labor service with temporary H-2B workers since it is extremely difficult to find sufficient labor locally." AF 78.

¹ Citations to the 81-page appeal file will be abbreviated "AF" followed by the page number.

On January 13, 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 57-61. 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.² AF 60. The CO noted that the Employer identified itself as a job contractor on the application, 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)

² The CO also found an additional deficiency, not at issue on appeal. AF 12-14, 59.

- 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 60-61. The Employer responded to the RFI on January 20, 2011. AF 15-55. In its RFI response, the Employer stated that it is a job contractor working for Beau Rivage Hotel Resort and Casino ("Beau Rivage" or "client employer"). AF 30. The Employer indicated that Beau Rivage will have some control over the manner and means by which the work will be performed and that the extent of the control will be related to safety and the details of the work to be done. AF 31. The Employer added that the client employer will have some control on the training and skills needed, will control the tools and supplies necessary for the work, and will have limited authority over when and how long to perform the work within the parameters of the ETA Form 9142. *Id.*

Additionally, the Employer indicated that the client employer's control of the work location is limited by the locations listed on the ETA 9142. *Id.*

On February 8, 2011, the CO denied certification. AF 10-14. The CO determined the Employer meets the definition of a job contractor because it: 1) intends to have an employer relationship with respect to H-2B employees or related U.S. workers hired pursuant to the application; 2) contracted or intends to contract on a temporary basis to one or more employers the services or labor of the H-2B workers covered by the application; and 3) 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. AF 14. The CO determined that because the Employer is a job contractor and the client employer with whom it has contracted has not submitted a separate application for temporary labor certification, the Employer's application must be denied. *Id.*

The Employer appealed the denial, contending that while it is a job contractor, that the H-2B regulations provide that only one application for temporary employment can be filed for worksites within one area of intended employment for each job opportunity. Second, the Employer argues that the decision 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) only invalidated the Department's use of skill levels in establishing prevailing wage determinations, and does not affect the filing of applications by job contractors. The Employer argues that the Department of Labor has violated the Administrative Procedure Act ("APA") by not informing businesses about the change in rules surrounding job contractors. The CO filed an appellate brief, arguing that the Employer is a job contractor, and because its client employer has not also filed an application, the Employer's application must be denied according to the district court ruling in *CATA*.

DISCUSSION

The CATA Decision

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 provides that if an employer filing an application for temporary labor certification is a job contractor, it cannot place any H-2B workers with any other employer unless certain conditions are met.³ In practice, this regulation allowed a job contractor to file an application for temporary labor 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 the DOL’s practice of requiring only job contractors but not their client employers to file applications for labor certification violated the clear language of the Department of Homeland Security’s (“DHS”) governing regulations. *Id.* at *16. Specifically, the court found that taken together, the DHS regulations at 8 C.F.R. §§ 214.2(h)(2)(i)(C) and 214.2(h)(6)(iii)(A)⁴ 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

³ Section 655.22 establishes the obligations of H-2B employers. Section 655.22(k) provides:

(k) If the employer is a job contractor, it will not place any H-2B workers employed pursuant to the labor certification application with any other employer or at another employer’s worksite unless:

(1) The employer applicant first makes a written bona fide inquiry as to whether the other employer has displaced or intends to displace any similarly employed U.S. workers within the area of intended employment within the period beginning 120 days before through 120 calendar days after the date of need, and the other employer provides written confirmation that it has not so displaced and does not intend to displace such U.S. workers, and

(2) All worksites are listed on the certified *Application for Temporary Employment Certification*, including amendments or modifications.

⁴ 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.

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.

Under the applicable H-2B regulations⁵:

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 does not dispute that it is a job contractor and that Beau Rivage, its client employer, will have some control and supervision over the H-2B workers. Likewise, the Employer does not dispute that Beau Rivage has not filed an application for temporary labor certification.

Standard of Review

The H-2B regulations do not articulate a standard of review of a CO's determination, and neither of the parties have made arguments regarding the appropriate standard of review. BALCA has never articulated a standard of review in an H-2B case. Indeed, BALCA has only had jurisdiction to review H-2B determinations since January 18, 2009. See ETA, *Final Rule, Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agricultural or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes*, 73 Fed. Reg. 78020,

⁵ In *CATA*, Judge Pollock invalidated ETA's definition of job contractor as stated in the Final Rule as arbitrary, because ETA did not provide an explanation rationally connected to the changes from the proposed rule to the final rule. *CATA*, at *16. Under the definition proposed by ETA, a job contractor means

[A] person, association, firm, or a corporation that meets the definition of an employer and who contracts services on a temporary basis to one or more employers unaffiliated with the job contractor as part of signed work contracts or labor services agreements. A job contractor may be responsible for hiring, pay, and firing the foreign worker but then places that worker with one or more unaffiliated employers.

ETA, *Proposed Rule, Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agricultural or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes*, 73 Fed. Reg. 29942, 29961 (May 22, 2008).

78045 (Dec. 19, 2008). Prior to January 18, 2009, an employer was permitted to submit countervailing evidence to DHS following the DOL's denial of certification, and therefore, DHS's review of the DOL's determination was *de novo*. 8 C.F.R. § 214.2(h)(6)(iv)(D), (E) (2008). Unlike the administrative review process with DHS, the administrative review process within the DOL (through BALCA) does not permit an employer to submit additional evidence on appeal. 73 Fed. Reg. at 78045; 20 C.F.R. § 655.33(a), (e).

The Board has rarely articulated a standard of review for labor certification cases. In H-2A cases, an ALJ's review of the CO's determination is based on an "arbitrary and capricious" standard. See *Blondin Enterprises, Inc.*, 2009-TLC-56, slip op. at 3-4 (July 31, 2009); *Keller Farms*, 2009-TLC-8 (Nov. 21, 2008); *Bolton Springs Farm*, 2008-TLC-28, slip op. at 6 (May 16, 2008). This standard is based on regulatory language requiring an ALJ "to review the record for legal sufficiency." 20 C.F.R. § 655.115(a) (2009). Although this language was not retained in the 2010 amendments to the H-2A regulations, ETA noted that the "substance of [the appeals regulation] has remained the same since 1987." See ETA, *Proposed Rule, Temporary Agricultural Employment of H-2A Aliens in the United States*, 74 Fed. Reg. 45906, 45921 (Sept. 4, 2009); 20 C.F.R. § 655.171(a) (2010).

In permanent labor certification cases, BALCA has reviewed determinations under both an abuse-of-discretion standard and reviewed matters *de novo*. See *Hong Video Technology*, 1988-INA-202 (Aug. 17, 2001) (abused of discretion standard); *La Salsa, Inc.*, 1987-INA-580 (Aug. 29, 1988) (although Board declined to determine the standard of review, both majority and dissent engaged in *de novo* reviews of the evidence). BALCA has used a reasonableness standard in reviewing ETA's policy interpretations of its own regulations. See *HealthAmerica*, 2006-PER-1, slip op. at 12-13 (July 18, 2006) (en banc). In *HealthAmerica*, the Board adopted the Administrative Review Board's multifactor test in determining whether a programmatic agency's policy interpretation of its own regulations is reasonable.

The reasonableness of the agency's view is judged according to many factors, including the quality of the agency's reasoning, the degree of the agency's care, its formality, relative expertise, whether the agency is being consistent or, if not, its reasons for making a change, and the

persuasiveness of the agency's position. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944). See also *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *OFCCP v. Keebler*, ARB No. 97-127, ALJ No. 87-OFC-20, slip op. at 17 (ARB Dec. 21, 1999). "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evidence in its consideration, validity in its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. See also, e.g. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due.").

HealthAmerica, slip op. at 13 (quoting *United States Government Security Officers of America*, ARB No. 02-012 (ARB Sept. 29, 2003), USDOL/OALJ Reporter at 5). The ETA, including the Office of Foreign Labor Certification ("OFLC"), not the Board, has primary responsibility for implementing, interpreting, and enforcing the H-2B regulations. 20 C.F.R. § 655.4. Accordingly, I find that the reasonableness standard outlined by the Board in *HealthAmerica* is equally applicable to the Board's review of ETA's policy interpretation of an H-2B regulation.

I find that the DOL's policy of requiring both a job contractor and the client employers with which it contracts to file H-2B applications is consistent with the governing law and is reasonable. When Judge Pollock invalidated the DOL's interpretation of 20 C.F.R. § 655.22(k) in the *CATA* decision, the DOL essentially acquiesced and changed its interpretation. In order words, the DOL's requirement that both job contractors and their client employers must file applications with the DOL is an effort to comply with the *CATA* decision and the applicable DHS regulations. The DOL's policy is consistent with the regulations, and although the DOL has changed its previous policy, its reason for making the change – compliance with a district court ruling – is persuasive. Consequently, I find that the DOL's position that both job contractors and the client employers with whom they contract must file applications for temporary labor certification is reasonable based on the *CATA* decision and the applicable regulations.

The Employer argues that under 20 C.F.R. § 655.3, only one application for temporary employment may be filed for worksites within the area of intended employment for each job opportunity with the employer. Section 655.3 relates to special

procedures under the H-2B program and does not contain the language that the Employer suggests. It is possible that the Employer is referencing 20 C.F.R. § 655.20(e), which provides that except where otherwise permitted, “only one *Application for Temporary Employment Certification* may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer.” There is no conflict between this regulation and the DOL’s policy following the *CATA* decision to require both a job contractor and all client employers to file an application for temporary labor certification. Section 655.20(e) does not restrict the ability of separate employers (*e.g.* a job contractor and its client employer(s)) from each filing an application for temporary labor certification for the job opportunities that it has in each area of intended employment. Accordingly, I find that Section 655.20(e) does not render ETA’s policy interpretation unreasonable.

Administrative Procedure Act

Finally, I turn to the Employer’s argument that the Department of Labor’s policy change following the *CATA* decision to require both job contractors and their client employers to file applications for temporary labor certification violates the Administrative Procedure Act (“APA”). Because neither the Immigration and Nationality Act (“INA”) nor any implementing regulations grant the Board the authority to invalidate a rule, I lack the authority to determine if the Department of Labor’s new practice of requiring both job contractors and their client employers to file applications for temporary labor certification amounts to a change of a substantive rule, thereby requiring notice and comment rulemaking prior to any change.⁶ *See generally Dearborn*

⁶ Under the APA, an administrative agency must provide notice of a proposed rulemaking and an opportunity for public comment prior to a rule’s promulgation, amendment, modification, or repeal. 5 U.S.C. § 533. The APA provides, in relevant part:

- (b) General notice of proposed rule making shall be published in the Federal Register ... Except when notice or hearing is required by statute, this subsection does not apply --
 - (A) to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice...
 - (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

Public Schools, 1991-INA-222 (Dec. 7, 1993) (en banc). The proper avenue for such a legal challenge is in an Article III court.

Based on the foregoing, I find that the CO's determination was not improper because the Employer is a job contractor and its client employer has not filed an application for temporary labor certification.

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

5 U.S.C. § 553(b). The *Attorney General's Manual on the Administrative Procedure Act* (1947) provides the following definitions of substantive and interpretive rules and policy statements:

Substantive rules--rules, other than organizational or procedural under section 3(a)(1) and (2), issued by an agency pursuant to statutory authority and which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission pursuant to section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n). Such rules have the force and effect of law.

Interpretive rules--rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers...

General statements of policy--statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.