U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 03 April 2012

BALCA Case No.: 2012-TLN-00027

ETA Case No.: C-12012-57263

In the Matter of:

CROWN RESOURCE MANAGEMENT, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Travis Segura
President, Crown Resource Management, LLC
Houston, Texas
For the Employer

Gary M. Buff, Associate Solicitor
Clarette H. Yen, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **PAUL C. JOHNSON, JR.**
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).

BACKGROUND

On January 12, 2012, the Department of Labor's Employment and Training Administration ("ETA") received an application for 49 welder-fitters from Crown Resource Management, LLC ("the Employer"). AF 41-66.[1] The Employer requested the workers from October 1, 2011 to July 31, 2012, and classified the nature of its temporary need as "intermittent or other temporary need." AF 41.

The Employer stated that it is a contracting company, and that it has a contract with Proven Engineering and Technology (hereinafter "Proven Engineering"), a research and development firm, to process tar sands for oil recovery. *Id.* The Employer stated that pursuant to the contract, the Employer is to fabricate the units needed for processing the tar sands. *Id.* The Employer added that it does not hire permanent employees and that the requested workers would not become a part of the Employer's regular or permanent operations. *Id.*

With its application, the Employer submitted a copy of its contract with Proven Engineering. AF 60-63. The contract, which the parties entered into on July 18, 2011, states that the Employer will provide 49 fitter/welders to Proven Engineering for construction of remediation units from October 1, 2011 through July 31, 2012. AF 60. The contract provides that "Fitter Welders will flame cut metal from metal plates, steel beams, channel iron, angle iron and pipes to fabricate structures by welding flame cut

[1] Citations to the 66-page appeal file will be abbreviated "AF" followed by the page number.

metal components. Structures include skids, tanks, platforms, walkways and associated components to facilitate the process to complete the remediation units along with assemblers to assemble the manufactured components." *Id.* The contract also states that the work will be performed at Proven Engineering's facility in Houston, Texas. *Id.*

On January 19, 2012, 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 failed to satisfy all requirements of the H-2B program. AF 33-40. Among the seven deficiencies identified by the CO, the CO determined that the Employer failed to establish that the nature of its need is temporary, as required by 20 C.F.R. § 655.6(b). AF 35-36. The CO determined that the Employer failed to provide evidence that the job opportunity has a definitive end point. AF 35. Accordingly, the CO required the Employer to submit a statement of how its request meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need. AF 35-36.

The CO also required the Employer to submit supporting documentation, including: (1) signed work contracts and/or monthly invoices from previous calendar year(s) clearly showing work will be performed for each month during the requested period of need; (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 (3) summarized monthly payroll reports for a minimum of one previous calendar year that identify the total number of permanent and temporary workers employed in the requested occupation, total hours worked, and total earnings received. AF 36. Additionally, the CO required the Employer to demonstrate that its need for workers has a finite end point. *Id.*

The Employer responded to the RFI on February 2, 2012. AF 18-32. The Employer stated that its ending date of need is July 31, 2012, and that it has an intermittent need for workers because it does not employ permanent or full-time workers to perform the requested labor. AF 18. The Employer also submitted a modified version of its contract with Proven Engineering. AF 29-32. This contract also indicates that it was entered into on July 18, 2011, but states that the Employer will provide "24 Fitters and 25 Welders," rather than 49 "welder/fitters," as provided in the contract submitted

with the Employer's application. AF 29, 60. In addition, while the contract submitted with the Employer's application stated that any invoice submitted by the Employer to Proven Engineering shall be payable on "Net 21 terms," meaning that any invoices that are not paid within 21 days will be assessed a dollar per hour increase, the contract submitted with the Employer's RFI response states that any invoice submitted by the Employer to Proven Engineering shall be payable on "Net 7 terms." AF 29, 61. The Employer did not submit copies of the requested monthly payroll reports.

On March 8, 2012, the CO denied the Employer's application, finding that the Employer failed to establish that the nature of its need is temporary, as required by 20 C.F.R. § 655.6(b).[2] AF 13-17. The CO determined that the contract between the Employer and Proven Engineering did not sufficiently establish that the Employer has an intermittent temporary need, because the Employer did not explain its business operations outside of this contract. AF 15. The CO noted that because the Employer is in the business of accepting contracts and providing services, it would appear that the Employer has or will have a need for more welder/fitters in the future. *Id.*

The Employer appealed the CO's determination on March 20, 2012, contending that it will take nearly a year for the fitter/welders to manufacture the 40 machines used to recover oil from tar sands. The Employer argues that its ending date of need will be when the 40 machines are manufactured. The Employer also notes that it started its business in June 2011.

Counsel for the CO filed a brief, urging that the CO's determination be affirmed because the Employer failed to establish that the nature of its need is temporary. Counsel for the CO notes that the Employer failed to provide the documentation requested by the CO in the RFI, and that without any evidence confirming that the Employer does not employ any permanent employees, the CO cannot confirm that the Employer has a temporary intermittent need.

[2] The CO also identified two other grounds for denial of certification. Because I find that the Employer has not established a temporary need for 49 fitter/welders, I need not reach the other two grounds identified.

DISCUSSION

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: 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). The DHS regulations provide that employment "is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future." 8 C.F.R. § 214.2(h)(6)(ii)(B). To establish an intermittent need, the employer "must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods." 8 C.F.R. § 214.2(h)(6)(ii)(B)(4).

The Employer contends that it needs 49 fitters/welders to fulfill the terms of its contract with Proven Engineering. In the RFI, the CO specifically requested the Employer to provide certain supporting documentation, including summarized monthly payroll reports identifying the total number of employees in the requested occupation. In response, the Employer failed to submit a payroll report, stating that it began operations in June 2011. The Employer argues that it does not employ permanent or full-time workers to perform the labor that is the subject of this application.

However, from the Employer's application and request for review, it is clear that the Employer has at least two employees – the Employer's manager, Juan Gerardo Martinez, and the Employer's President, Travis Segura. Presumably, these two employees have been paid for their work, and as such, the Employer should have provided the payroll reports requested by the CO. Moreover, under the Employer's contract with Proven Engineering, the Employer was to provide 49 fitter/welders to Proven Engineering beginning on October 1, 2011. The Employer has provided no explanation of how it has provided 49 fitter/welders to Proven Engineering for the past seven months, nor has it asserted that it has not provided the fitter/welders to Proven Engineering.

In addition, the Employer failed to provide the requested information about the nature of its business and its other contracts. Even assuming that the Employer has only been in business since June 2011, it seems implausible that its contract with Proven Engineering is its only contract. Without evidence of the Employer's other contracts, it is impossible to have a full understanding about the nature of the Employer's business. Without a complete understanding of the nature of the Employer's business, the size of its staff, and the types of labor and services that the Employer performs, it is not possible to decipher the nature of the Employer's need. As the Employer has failed to provide the requested documentation, the Employer has not established that it meets the regulatory definition of temporary need.

Furthermore, it is odd that the Employer purportedly has no fitter/welders on staff, but entered into a contract in July 2011 to provide 49 fitter/welders to Proven Engineering. In light of the contract with Proven Engineering, I find the Employer's assertion that it has no fitter/welders on staff somewhat dubious.[3] Nevertheless, assuming its assertion is true, it would appear that Employer is in fact a job contractor.[4] *See* 20 C.F.R. § 655.4. It is worthwhile to note that following the district court's decision in *Comité de Apoyo a los Trabajadores Agricolas (CATA) v. Solis*, No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), the Department of Labor will not accept an H-2B application for temporary labor certification from a job contractor unless the job contractor's employer-client has also submitted an application for labor certification.[5] There is no indication that Proven Engineering has also submitted an application for labor certification for the H-2B workers that it will be supervising.

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[3] I am also troubled that the Employer submitted a different contract with its RFI response materials than with its application without any explanation of the discrepancy.

[4] It seems that Proven Engineering, rather than the Employer, will be supervising the 49 fitters and welders, as the work will be performed at Proven Engineering's facility.

[5] In *CATA*, the Eastern District of Pennsylvania found that the 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 DHS's governing regulations. 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) require *both* the job contractor and its clients to obtain a labor certification from DOL. Accordingly, the court vacated 20 C.F.R. § 655.22(k), which in practice had allowed a job contractor to file an application for certification without requiring the employer who used the H-2B laborers pursuant to the underlying contract to also file for certification. *See* 2010 WL 3431761, at *26.

Regardless of whether the Employer is a job contractor, the Employer failed to provide the evidence required to establish the nature of its need. Based on the foregoing, I find that the CO properly denied certification because the Employer has not established that its need for nonagricultural labor is temporary, as required by 20 C.F.R. § 655.6.

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

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PAUL C. JOHNSON, JR.
Associate Chief Administrative Law Judge