

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 October 2012

BALCA Case No.: 2012-TLN-00048

ETA Case No.: C-12205-59463

In the Matter of:

INTERNATIONAL PLANT SERVICES, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary labor certification provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations at 8 C.F.R. Part 214 and 20 C.F.R. Part 655, Subpart A. These provisions, referred to as the “H-2B program,” permit employers to bring foreign nationals to the United States to fill temporary nonagricultural jobs when there are not sufficient domestic workers who are able, willing, qualified, and available to perform such services or labor. *See* 8 C.F.R. § 214(2)(h)(1)(ii)(D).

Prior to applying for a visa under the H-2B program, an employer must file an *Application for Temporary Employment Certification* with the Department of Labor’s Employment and Training Administration (“ETA”). 20 C.F.R. § 655.20. Employer’s applications are reviewed by a Certifying Officer (“CO”) within ETA’s Office of Foreign Labor Certification, who makes a determination to either grant or deny the requested labor certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, 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 Employer’s request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the Employer’s application. 20 C.F.R. § 655.33(a), (e).

BACKGROUND

On July 23, 2012, ETA received an *Application for Temporary Employment Certification* from International Plant Services, LLC (“the Employer” or “IPS”). AF 530.¹ In this application, IPS requested H-2B labor certification for twenty “Electrical Power-Line Installers and Repairers” from July 1, 2012 to May 1, 2013, based on an intermittent standard of temporary need. *Id.*

Under “Statement of Temporary Need,” IPS stated that it “provides nationwide engineering and skilled craft services to industrial clients for capital and maintenance work,” and “currently requires the temporary services of 20 foreign workers to fill the temporary, intermittent, need position of Electrical Lineman at our client, Chapman Construction’s, project site in Burkburnett, Texas.” AF 530. IPS supplemented its response in an attached statement signed by the company’s Operations Manager, Ed Sholes. AF 538-544. In this statement, Mr. Sholes stated that IPS “assists clients in recruiting highly qualified technicians and engineers for oil & gas and construction projects all over the United States.” AF 538. Mr. Sholes elaborated that the company is “often hired to provide hundreds of temporary workers at various skill levels to ensure successful completion of these industrial oil and gas projects.” *Id.* With respect to the positions at issue in this appeal, Mr. Sholes remarked that IPS had been “engaged to provide Chapman Construction with skilled craft workers to assist with a multi-million dollar project” that required IPS’ “involvement for approximately 10 months, or from July 1, 2012 until May 1, 2013.” AF 542. Mr. Sholes went on to explain:

It is common for a company like Chapman Construction to hire a third party vendor to supply the skilled laborers to complete every [*sic*] projects in the power services industry. IPS has been retained as such a vendor because of our ability to supply the requisite, qualified, skilled workers for projects of this size and scope. Chapman Construction was unable to locate such workers at each worksite through its own recruitment efforts, and accordingly has engaged IPS to assist them in locating temporary workers for this specific project.

IPS was unable to locate the requisite number of Electrical Lineman domestically, as evidenced by our recruitment efforts and results, and, as such, we would like to temporarily employ qualified foreign nationals who will enable us to fulfill our contractual obligations and allow Chapman Construction to complete this very important project in the United States.

...

[T]he temporary need for workers stems from our client, Chapman Construction’s, electrical power project that cannot be completed without these workers. Because the project is temporary in nature and has a definite projected completion date of May 1, 2013, and IPS has been retained to locate and provide such workers, IPS now has an intermittent need for short-term skilled foreign workers in the United States.

AF 542-543.

The CO issued a *Request for Further Information* (“RFI”) on July 30, 2012. AF 516-526. IPS responded to the RFI on August 6, 2012. AF 422-515. After reviewing IPS’ response, the

¹ Citations to the Appeal File will be abbreviated “AF” followed by the page number.

CO determined that IPS had corrected five of the six deficiencies identified in the RFI, but had nonetheless failed to establish that the nature of its need was temporary. AF 415. Accordingly, on August 29, 2012, the CO issued a Final Determination denying certification. AF 413.

IPS requested BALCA review by letter dated September 6, 2012. AF 1-398. The Board issued a Notice of Docketing on September 10, 2012, providing the parties an opportunity to submit briefs. The CO filed a brief on September 24, 2012; the Employer did not file an additional brief or statement of position.

DISCUSSION

IPS maintains that it has an intermittent temporary need for twenty electrical linemen based on the general services contract it entered into with Chapman Construction. In explaining this need, IPS stated that Chapman Construction “was unable to locate such workers at each worksite though its own recruitment efforts,” and thus “engaged IPS to assist them in locating temporary workers for this specific project.” AF 542. Such a statement indicates that IPS may in fact be a “job contractor,” as defined in 20 C.F.R. 655.4, even though IPS did not indicate its status as such on its *Application for Temporary Employment Certification*.

A determination regarding whether IPS is in fact a job contractor is necessary before the Board may determine whether or not IPS has adequately established an intermittent temporary need. The regulations provide that the “temporary nature of the work or services to be performed in applications filed by job contractors will be determined by *examining the job contractor’s own need for the services or labor to be performed in addition to the needs of each individual employer with whom the job contractor has agreed to provide workers* as part of a signed work contract or labor services agreement.” 20 C.F.R. § 655.5(d) (emphasis added). The record contains very little evidence regarding the temporary nature of the work to be performed by the workers assigned to Chapman Construction. Moreover, following the federal 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 may not accept an *Application for Temporary Employment Certification* filed by a job contractor under the H-2B program unless the job contractor’s employer-client submits an application as well. Here, the record contains no indication that Chapman Construction ever submitted an *Application for Temporary Employment Certification* for the requested positions.

Accordingly, this matter must be remanded to allow IPS to present evidence and argument regarding its status as a job contractor, and to provide the CO an opportunity to determine whether or not IPS is in fact a job contractor, and if so, whether IPS followed the mandatory steps required of job contractors.

ORDER

In light of the foregoing, it is hereby **ORDERED** that this matter is **REMANDED** for further proceedings consistent with this Decision.

For the Board:

WILLIAM S.COLWELL
Associate Chief Administrative Law Judge