



Issue Date: 09 August 2012

BALCA Case No.: 2012-TLN-00043

ETA Case No.: C-12180-59346

In the Matter of:

NORTH COUNTRY WREATHS,

Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: E. Gaither
USA Works, Inc.
Lake Park, Georgia
For the Employer

Gary M. Buff, Associate Solicitor
Jonathan R. Hammer, 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
PARTIAL CERTIFICATION

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 U.S. employers to bring foreign

nationals to the United States to fill temporary nonagricultural jobs when there are not sufficient workers who are able, willing, qualified, and available at the place where the alien is to perform such services or labor. *See* 8 C.F.R. § 214(2)(h)(1)(ii)(D).

STATEMENT OF THE CASE

On May 23, 2012, North Country Wreaths (the “Employer”) filed an *Application for Temporary Labor Certification* with the U.S. Department of Labor (“the Department”), Employment and Training Administration (“ETA”) for 28 floral designers from October 1, 2012 to November 20, 2012. AF 100-130.¹

On July 5, 2012, ETA issued a *Request for Further Information* (RFI), informing the Employer that its attestations failed to justify the number of requested workers. AF 95-97. Specifically, the CO stated:

To substantiate its temporary need, the employer submitted along with its application, a Staffing Levels and Compensation report for the year 2011. The report shows that in the year 2011, the employer hired five H-2B workers. The employer states that in October 2011, “twenty-three (23), U.S. workers who had worked for us in prior years showed up to work which brought our staff to twenty-eight, which include all workers in relation to our participation in the H-2B program.” Additionally, in previous certification C-11172-55060, the employer provided an Amended Staffing Levels and Compensation report for 2010. The employer again states 23 American workers returned to work. The employer did not include the 23 workers on its recruitment report so it appears the workers are a regular staff for its temporary need. It is unclear what the true need for temporary foreign workers is if there are 23 returning U.S. workers yearly or if there is an actual need for 28 H-2B workers as requested by the Employer.

AF 97. To remedy this deficiency, the CO instructed the Employer to submit, *inter alia*, “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 “an explanation of the 23 returning U.S. workers and what is the actual need for H-2B workers.” AF 98 (emphasis added). The CO additionally instructed the Employer to

¹ Citations to the appeal file will be abbreviated “AF” followed by the page number.

submit evidence and documentation to justify the above attestations, including but not limited to the following:

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 ETA Form 9142, Section B., Items 5. And 6;
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 on ETA Form 9142, Section B., Items 5. And 6.;
3. Summarized monthly payroll reports for a minimum of one previous calendar year that identifies, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system.

Id.

The Employer responded to the RFI on July 9, 2012, submitting an amended statement of temporary need and the supporting documentation, including the following: a brochure listing its products; photographs of its worksite; a summarized 2011 payroll report for the months of October and November; six invoices for October and November 2011; a monthly sales statistics graph; and copies of two order forms submitted by its clients in 2011. AF 72-92. In explaining its need for 28 H-2B workers, the Employer stated:

We do have some U.S. workers that work for us each year and that we have come to expect to return year after year. We only request the number of workers to be certified that we expect to fall short of availability in the U.S., but in addition to those workers we have a need for an additional twenty-eight temporary workers.

We can determine the number of workers needed because we have a time frame to get the wreaths and garlands out to our customers so that they can shelf them before they become brittle and being losing needles and over the history of the company know how much the production line, on average is able to assemble. We know the approximate average amount of time it takes to make one wreath of any given size, and likewise garlands of a certain length. From years of experience handed down by my

predecessors we can determine how many workers are needed to fill our orders on a timely basis.

...

In 2011, we had twenty-three (23) returning U.S. workers. These twenty-three (23) workers return to us (historically) for our temporary jobs. In addition to these twenty-three (23) workers we have a need for an additional twenty-eight (28) temporary workers which we have been hopeful we will be able to locate all twenty-eight (28) foreign guest workers we need but we have fallen short of locating them every year. Nevertheless we have work for all of them as we cannot fill all our clients requests for our products but we know we could do better if we could locate all the workers we need. We only requested to be certified for 28 workers because we are confident these twenty-three (23) workers will call us in September and commit to these jobs the way they have the past several years. We have not put the historically returning U.S. workers on the recruitment report because it is customary for them to contact us no earlier than September to advise us they are returning.

We have an actual need for the additional workers because the U.S. workers we expect to return cannot do all the work. It is critical in a product with a very short shelf life to get it to the customers on a timely basis before the wreaths and garlands begin losing their aroma and begin to die and the holidays are over. Speed is of the essence.

AF 76-77. The payroll report summary included in the Employer's response indicates that the Employer employed 30 temporary workers in October 2011 (25 U.S. workers and 5 H-2B workers), for a total of 1,922 hours, and 27 temporary workers in November 2011 (23 U.S. workers and 5 H-2B workers), for a total of 2,949 hours. AF 27-28. The Employer explained that it employed three more workers in October than November, because one of its U.S. workers quit, and two workers listed on the payroll in October were family members who only worked for a few hours. AF 27.

After reviewing the Employer's response to the RFI, the CO determined that the Employer's staffing levels and compensation documentation only demonstrated a need for five temporary workers. AF 58-59. Because the Employer had successfully recruited and hired one U.S. worker for these positions, the CO issued a *Final Determination for Partial Certification* on July 13, 2012, certifying four of the twenty-eight Floral Designer positions that the Employer had requested in its application. AF 58.

On July 23, 2012, the Employer filed an appeal with the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"), arguing that the CO had erroneously

limited certification of its application to four workers. AF 1. BALCA issued a Notice of Docketing on July 24, 2012. Both the CO and the Employer submitted briefs shortly thereafter.

DISCUSSION

Scope of Review

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). In this case, the Employer submitted evidence in its request for reconsideration that was not included in either its original application or RFI response materials. Accordingly, this evidence will not be considered on review.

Temporary Need

To obtain certification under the H-2B program, an applicant must include a detailed statement of temporary need. 20 C.F.R. § 655.21 (2011). This statement must include, *inter alia*, a statement justifying any increase or decrease in the number of H-2B positions being requested for certification from the previous year. § 655.21(a)(4). Moreover, before certifying an *Application for Temporary Labor Certification*, the CO must confirm that the Employer's application complies with the regulatory criteria for H-2B certification. 20 C.F.R. § 655.23(b) (2011). The regulatory criteria includes, *inter alia*, that the employer has "established that the number of worker positions being requested for certification is justified and represent bona fide job opportunities." 20 C.F.R. § 655.23(b) (2011). After examining the evidence that the Employer submitted in response to the RFI, the CO determined that the Employer failed to justify its request for 28 workers. I agree.

The Employer's 2011 payroll records indicate that the Employer employed 30 temporary workers in October 2011 (25 U.S. workers and 5 H-2B workers), and 27 temporary workers in November 2011 (23 U.S. workers and 5 H-2B workers). AF 27-28. While it appears that some of these workers worked overtime hours, the majority of its workers worked an average of less than 35 hours a week. Moreover, even though November was the Employer's busiest month, three of the Employer's five H-2B workers

averaged significantly less than 35 hours a week. Thus, excluding the twenty-three domestic workers that the Employer expects to return this year, these records only indicate that, at most, Employer has a recurring need for the five H-2B workers it employed last year—and not an additional twenty-three H-2B workers.

Moreover, the Employer has not explained how its invoices or sales documentation justifies a significant increase in the number of H-2B positions for which it obtained certification in 2011. In fact, in its brief, the Employer states that it “will be the first to admit that invoices do not demonstrate Employer’s inability to locate the temporary labor force needed.” Employer’s Brief at 3. Indeed, instead of justifying its requested increase with supporting documentation, the Employer simply argues that its need for the number of workers requested in its application is not capable of proof by independent documentation. Employer’s Brief at 7. According to the Employer, its own knowledge “is the highest and best evidence” of its staffing needs, and thus maintains that its sworn statement is sufficient to justify the requested need because it has “no bad intentions” and there is no evidence that it is not honest or credible. *Id.* But it is the Employer’s burden to prove that the requested positions represent bona fide job opportunities, and the CO is not required to take the Employer at its word.

In sum, the Employer failed to provide any evidence, other than its own sworn declaration, justifying that it had a greater need for workers this year than it did in 2011. The CO was thus unable to determine whether the additional positions the Employer requested represented bona fide job opportunities. Accordingly, I find that the CO did not err in partially certifying the Employer’s *Application for Temporary Labor Certification*.

ORDER

In light of the foregoing, the Certifying Officer’s *Final Determination for Partial Certification* is AFFIRMED.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

