

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 04 October 2012

BALCA Case No.: 2012-TLN-00050

ETA Case No.: C-12213-59522

In the Matter of:

D'ANGELO ITALIAN MARKET,
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* (ETA Form 9142) with the Department of Labor’s Employment and Training Administration (“ETA”). 20 C.F.R. § 655.20. Employers’ 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 31, 2012, ETA received an application from D'Angelo Italian Market (the "Employer") requesting H-2B temporary labor certification for a "Consulting Chef" from September 17, 2012 to September 17, 2015. AF 101.¹ The Employer indicated that this position was a "one-time occurrence" and provided the following statement of temporary need:

Our recently-opened restaurant is in need of a consulting chef specializing in authentic Italian cuisine who will develop a new menu, instruct our staff in preparing items on this menu, design our dining room and kitchen areas and generally offer his expertise to enhance our business and ultimately result in the create of new jobs in our community. The consulting chef would design and introduce a menu designed to appeal to our target customers who are seeking genuine Italian cuisine and ambience, calculate cost of supplies needed to implement the menu, identify vendors and suppliers, and develop procedures for quality control and cost effectiveness. The consulting chef will train the staff in all aspects of food procurement, preparation and service. Additionally, the consulting chef will make recommendations concerning kitchen design and configuration to ensure maximum efficiency and proper adherence to health codes and maintenance of equipment, and will also advise staff concerning proper and efficient service in the dining area. We have not previously employed a chef consultant and anticipate that once the above goals have been attained, we will have no need for a consulting chef in the future.

AF 101.

On August 1, 2012, the CO issued a Request for Further Information (RFI) notifying the Employer that its application did not comply with all of the requirements of the H-2B program. AF 92-98. Among other things, the CO found that the Employer failed to demonstrate that its need for the services of a Consulting Chef were temporary in nature. AF 94-95. In discussing this failure, the CO remarked that it was "unclear" how the Employer determined its true and accurate dates of need. *Id.* The CO observed that while the Employer "anticipated" that it would no longer need a Consulting Chef after attaining its stated goals, the Employer provided no explanation or evidence to establish how its goals would be attained during the requested three-year period. *Id.* To remedy this deficiency, the CO instructed the Employer to submit an explanation detailing how it arrived at this three-year period and an end date of September 17, 2015, as well as documentation to corroborate this explanation. AF 95.

The Employer responded to the RFI on August 8, 2012, submitting, *inter alia*, an addendum to its initial statement of temporary need. AF 48-91. The addendum, signed by the Employer's owner, Joe D'Angelo, states that are "several explanations for the three year period," and notes "[i]n fact, three years may not be enough time." AF 67. Mr. D'Angelo explained that the Employer is in the process of expanding its counter-service operation to incorporate a sit-down table service. *Id.* He estimated that the "repetition and training requiring [sic] to get it up and running efficiently, to where it is a consistent product, will take at least three years," explaining:

A consulting chef is needed to adapt an efficient plan to run the restaurant, and make decisions such as number of seating, menu items, and determine whether the plan may

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

require permits. Upon executing the plan and strategy, the hiring process for the appropriate staff will also take time. The ideal consulting chef, (which we believe is Giuseppe) specializes in determining an effective and sufficient business model, successful design and development of the restaurant — including creating the menu, laying out the design, training the chefs, hiring and supervising the staff, and also adapting to trial and error.

In order to meet the demands of the town, the menu will need to introduce new and exciting items of culinary excellence, maintain consistency of the product, and establish a signature niche in the market, along with superior customer service. Giuseppe's training under world-renowned executive and pastry chefs of the highest caliber in Europe (as noted in his resume, Stefano Laghi, winner of the world championship of pastry and kitchen chefs, as well as Massari Iginio, winner of the World Cup of Pastry in France), and his experience in the Italian restaurant business and personnel management has equipped him with the culinary expertise that this town demands, and makes him a unique and unmatched candidate for this position.

We also plan on relying on Giuseppe to make revisions once the restaurant section is opened, and make necessary "tweaks" as we move forward. Three years is not even really enough for what we need him for. We will have to manage with the time available.

We've estimated that at least 3 years is needed to reach and maintain a consistent product—the key to establishing credibility and success in any market—lies in the hands of an experience and competent Consulting Chef.

AF 67.

After reviewing the Employer's response, the CO issued a *Final Determination* denying certification on September 7, 2012. AF 41-47.² The Employer's BALCA appeal followed. The Board issued a Notice of Docketing on September 21, 2009, setting out an expedited briefing schedule. The CO filed a brief on September 27, 2012; the Employer did not file an additional brief or statement of position.

DISCUSSION

Scope of Review

BALCA's scope of 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 application. 20 C.F.R. § 655.33(a), (e). The Employer's request for review cites evidence, including a letter signed by Anna D'Angelo, that was not included in the Employer's filings before the CO. Accordingly, this evidence will not be considered.

² The CO cited two deficiencies as a basis for the denial. As discussed below, I find that the CO did not err in finding that the Employer failed to establish that the nature of its need for a Consulting Chef is temporary. Accordingly, it is not necessary to discuss the CO's second basis for denial.

Temporary Need

To obtain certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 20 C.F.R. § 655.6(a).³ To do so, an employer must demonstrate that the position for which it requests certification will end in the “near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). “Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years.” *Id.* The Employer must also establish that the position meets one of the following four regulatory standards: one-time occurrence, seasonal, peakload, or intermittent. *See* 20 C.F.R. § 655.6(b) (requiring the petitioner to justify its need under one of the four standards defined by the Department of Homeland Security (“DHS”) at 8 C.F.R. § 214.2(h)(6)(ii)(B)).

The Employer maintains that its need for a Consulting Chef qualifies as temporary under a “one-time occurrence” standard. To establish a temporary need under this standard, a petitioning employer must demonstrate “that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). The Employer asserts that it has not employed a Consulting Chef in the past and will not require the services of a Consulting Chef after its sit-down table service is “up and running efficiently.” In making this argument, however, the Employer fails to adequately explain why it requires the services of a Consulting Chef for exactly three years in order to attain this goal.

A review of the record reveals that the Employer provided absolutely no evidence to suggest that its need for a Consulting Chef will terminate after the requested three-year period. In the RFI, the CO warned the Employer that it had not “explained or provided evidence to establish how its goals will be attained from September 17, 2012 through September 17, 2015,” and instructed the Employer to submit “[a]n explanation as well as documentation establishing how [it] determined it will need the requested worker for a three year period.” AF 94. Despite these explicit instructions, the Employer submitted a response that did not explain why it required the services of a Consulting Chef for three years (as opposed to, say, two years, four years, or five years) in order to meet its stated goals. In fact, the Employer effectively conceded that it requested this three-year period because of the time limit imposed by the regulations. *See* AF 67 (“Three years is not even really enough for what we need him for. We will have to manage with the time available.”). It is thus impossible to determine whether the requested dates of need are a true and accurate reflection of the Employer’s actual need for the services of a Consulting Chef. Significantly, the Employer acknowledged that it will require the services of a

³ In its request for review, the Employer maintains that there “is no statutory or regulatory definition of the term ‘temporary.’” But DHS regulations clearly 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. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years.

8 C.F.R. § 214.2(h)(6)(ii)(B).

Consulting Chef for “at least three years,” if not longer, to meet its stated goals. AF 67. A temporary need under the one-time occurrence standard, by definition, may only last up to three years. Considering the Employer’s self-confessed 3+ year need for the services of a Consulting Chef, as well as the complete lack of evidence to corroborate this period of need in the record, I find that the CO did not err in determining that the Employer failed to establish that its need for a Consulting Chef is temporary in nature. Accordingly, I affirm the CO’s denial of the Employer’s application on that basis.

ORDER

In light of the foregoing discussion, it is hereby **ORDERED** that the Certifying Officer’s denial of certification is **AFFIRMED**.

For the Board:

WILLIAM S.COLWELL
Associate Chief Administrative Law Judge