U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 July 2013

BALCA Case No.: 2013-TLN-00057
ETA Case No.: H-400-13164-909386

In the Matter of:

BOOT DOCTORS, INC.,

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: George Gleason
Boot Doctors, Inc.
Telluride, Colorado
For the Employer[1]

Gary M. Buff, Associate Solicitor
Vincent C. Constantino, Senior Trial Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: **PAUL R. ALMANZA**
Administrative Law Judge

DECISION AND ORDER REMANDING
CERTIFYING OFFICER'S 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

[1] The index to the 76 page appeal file (citations to which will be abbreviated "AF" followed by the page number) indicates that Norma Linda Perez, attorney for Boot Doctors, submitted a request for administrative review. However, the actual letter requesting review was signed by Mr. Gleason and there is no indication, other than the notation in the index to the appeal file, that Ms. Perez submitted the request for review. AF 1-4.

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). For the reasons explained below, the CO's Final Determination denying certification is REMANDED to the CO for consideration of whether he should issue a partial certification.

STATEMENT OF THE CASE

On June 13, 2013, Boot Doctors, Inc. (the "Employer") submitted an application for temporary labor certification to the Department of Labor's Employment and Training Administration ("ETA"). AF 65-76. The Employer requested certification for 5 Ski Boot Maintenance Technicians to be employed from June 15, 2013, to April 15, 2014. AF 65. In its application, the Employer provided the following information regarding its temporary need for these workers:

> BootDoctors Inc. is a full service ski shop … located in Telluride, Colorado that specializes in custom ski boot fittings and stance alignments. … The development of Telluride, including the introduction of the "Prospect Bowl" in 2003, the opening of extreme terrain in 2008-2009, and the expansion of to [sic] extreme terrain brings new business to the area. Telluride is a town that relies 100% on its tourism revenues during the normal "ski season" which ran for many years from October thru April; however, this has drastically changed in the last two years as a series of strong promotional tourism campaigns have been conducted; consequently, creating new festivals and events. All these has [sic] increased the tourism season and changed the peak season to June 15 thru April 15. By mid June over 12,000 people arrive to Mountain Village for the 2 week Boot Rock Festival that starts on June 21st. In addition to this, the Blues and Brews Festival and other summer festivals bring over 15,000 visitors. All these new events have created a demand for our services during these summer months expanding our peak load season from June 15th through April 15th.

AF 73. In its application, the Employer also included a letter dated June 10, 2013, from George Gleason, its president, stating that it had completed all required pre-filing recruitment requirements but had received no applications. AF 74.

Upon reviewing the Employer's application, the CO determined that the Employer "fail[ed] to establish that the nature of the employer's need is temporary." AF 63. Accordingly, on June 20, 2013, the CO issued a Request for Further Information ("RFI") (AF 61-64) to the Employer seeking "supporting evidence and documentation that justifies the chosen standard and requested dates of temporary need." AF 63. In the

RFI, the CO stated that the Employer's application "did not include adequate attestations to justify its need for temporary workers from June 15, 0213 through April 15, 2014," that "it is unclear how these new events [the events described above] relate to an increase in the employers [sic] business operations or the need for additional Ski Boot Maintenance Technicians," and that "the employer has not explained how the various festivals correlate with its Ski Boot business during its requested dates of need." AF 63. Accordingly, the CO stated:

> The employer's response must include, but is not limited to, the following:
>
> 1. A statement explaining how the need for Ski Boot Maintenance Technicians increase[s] due to "new events" and summer festivals;
> 2. Summarized monthly payroll report for a minimum of **two** previous calendar years that identify, 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; or
> 3. Other evidence and documentation that similarly serves to justify the chosen standard of temporary need; and
> 4. A statement explaining how the submitted documentation supports the employer's requested dates of need.

AF 63 (emphasis in original).

By letter dated June 26, 2013, the Employer responded to the RFI with a cover letter that, with the exception of the following new language, basically restated the justification provided in the application:

> Telluride, Colorado is a renowned premier resort town and by mid June people starts [sic] arriving to Mountain Village for the local festivals and events. A demand for our services during these months has been created due to all these new events, which is when our company sees a financial increase in business from June 15th to April 15th and is how our peak load need was determined.

AF 54 (the majority of this letter contained the exact same text as that found in the application at AF 73). The Employer attached a one page summary payroll report signed by Mr. Gleason for its Ski Boot Maintenance Technicians in calendar years 2011 and 2012 showing that it had only one permanent employee throughout the year and either four or five temporary employees in the months of January, February, March, April, October, November, and December. AF 60 (the entire response to the RFI is at AF 54-60).

On July 5, 2013, the CO issued a Final Determination denying certification, citing Employer's "failure to establish that the nature of the employer's need is temporary," as required by 20 C.F.R. § 655.21(a). AF 51 (the entire Final Determination is at AF 49-53). In explaining why he found the information provided by the Employer in its response to the RFI was insufficient, the CO wrote:

> In reviewing the employer's response to the RFI, the employer failed to submit a sufficient explanation as to how its business operations, and need for five "Ski Boot Maintenance Technicians," relate to the many festivals and events that occur during the expanded period of need or why this request differs from previous filing years.
>
> Furthermore, in reviewing its 2011 and 2012 Payroll Reports and based on the employer's filing history, the employer has established that its peak in business is from October through April. The employer is looking to expand its period of need to include June, July, August, and September due to an alleged increase in business. However, based on the submitted payroll reports, the one permanent worker only experienced an increase, on average, of 15 hours a week during these months. This increase would not support a need for any additional full-time temporary workers. Therefore, the department finds the employer has not demonstrated a sustained increase in business during the months of June through April.
>
> The employer did not adequately respond to the RFI and did not provide sufficient documentation to overcome the deficiency listed above. Therefore, the application is denied.

AF 52-53. The Employer timely petitioned for administrative review. AF 1-48. The Board issued a Notice of Docketing on July 15, 2013, providing the parties an opportunity to submit briefs on an expedited basis. Only the Certifying Officer filed a brief.

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 has submitted substantial additional evidence with its brief. Among other documents, this evidence includes: a very thorough three page undated letter from Mr. Gleason, AF 2-4; a handwritten 2012 payroll document covering its Ski Boot/Binding Technicians, AF 10; a 2010 and 2011 payroll document covering its

Ski Boot/Binding Technicians, AF 11; and Employer's detailed sales information from July 2012 through June 2013, AF 18-47.

The record indicates that none of this evidence was provided to the CO with Employer's application or as part of Employer's response to the RFI. The regulation is clear that a request for review "[m]ay contain only legal argument and such evidence as was actually submitted to the CO in support of the application." 20 C.F.R. § 655.33(a)(5). Moreover, the Board has held that it will not take official notice of any evidence which would undermine the regulation's clear restrictions on the Board's scope of review. *See Albert Einstein Medical Center*, 2009-PER-379, slip op. at 9-13 (Nov. 21, 2011) (*en banc*). As the evidence that the Employer submitted with its request for review is neither a part of the record upon which the CO based his denial nor an appropriate subject of official notice, I cannot consider it on appeal.[2]

The Employer Failed to Establish Temporary Need for the Workers Requested in June, July, August, and September

Based on the information provided in the application and in the response to the RFI, the CO was correct in determining that the Employer did not establish a temporary need for five Ski Boot Maintenance Technicians in June, July, August, and September 2013. Simply put, the explanation provided in the response to the RFI did little more than repeat verbatim the explanation in the application. As the CO found the explanation in the application insufficient, merely repeating that explanation did not provide additional information that could have helped the CO understand why the Employer believed its requested temporary need period was justified. Moreover, the payroll information the Employer provided in the response to the RFI indicated that there was only one permanent employee, and that his hours did not markedly increase during the times in question. Accordingly, based on the information the Employer provided to the CO in its response to the RFI, it is impossible to conclude that the CO erred in concluding the Employer failed to establish a temporary need for the workers requested in June, July, August, and September 2013.

The CO's Final Determination Is Inconsistent with His Determination that the Employer Established Temporary Need for the Workers Requested in October 2013 through April 15, 2014

Although the CO denied the Employer's request for certification in its entirety, that denial is inconsistent with the CO's finding that "in reviewing its 2011 and 2012 Payroll Reports and based on the employers [sic] filing history, *the employer has*

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[2] Given that the regulations prohibit the Board from considering evidence that was not previously submitted to the CO, employers should thoroughly respond to RFIs with as much evidence that both answers the CO's questions and supports certification as is reasonably possible given the tight deadlines involved. This practice would help avoid cases such as this where evidence supporting the Employer's requested period of need simply cannot be considered on review.

established that its peak in business is from October through April." AF 52 (emphasis added). As explained above, the CO did not err in finding, based on the information before him, that the Employer did not establish a temporary need for the months of June, July, August, and September 2013. The quoted sentence, however, indicates the CO found that the Employer had, as in prior years, established a temporary need from October 2013 through April 15, 2014, the end of the Employer's requested period of need. In other words, the CO's findings demonstrate that the stated deficiency of "failure to establish that the employer's need is temporary" pursuant to 20 C.F.R. § 655.21(a) does not exist with respect to the October 2013 to April 15, 2014, portion of the Employer's requested period of need.

Pursuant to 20 C.F.R. § 655.32(f), the CO has the discretion to issue a partial certification by reducing the requested period of need. There is no indication in the record that the CO considered exercising his discretion to issue a partial certification. Given the specific facts of this case, in which the CO's own findings indicate that the deficiency that was the basis for the denial of certification does not exist with respect to the October 2013 to April 15, 2014, portion of the Employer's requested period of need, this matter is remanded to the CO so that he can determine whether to exercise his discretion to grant a partial certification reducing the requested period of need.

ORDER

In light of the foregoing, it is hereby **ORDERED** that this matter is **REMANDED** to the Certifying Officer for further action.

For the Board:

Digitally signed by PAUL R. ALMANZA
DN: CN=PAUL R. ALMANZA,
OU=ADMINISTRATIVE LAW JUDGE,
O=Office of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

PAUL R. ALMANZA
Administrative Law Judge