

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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ETA Case No.: **Issue Date: 17 April 2013** **BALCA Case No.: 2013-TLN-00045**
H-400-13052-860845

In the Matter of:

GOLDEN ACRES HOME CARE II,

Employer

Certifying Officer: Chicago National Processing Center

Appearances: Gary M. Buff, Associate Solicitor
Stephen R. Jones, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

The above-captioned matter arises under the temporary nonagricultural labor or services provisions of the Immigration and Nationality Act (“INA”), 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 nonimmigrant program, permit employers to hire foreign workers on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States].” *See* 8 U.S.C. § 1101(a)(H)(ii)(b).

BACKGROUND

The H-2B nonimmigrant program is administered by the Department of Homeland Security (“DHS”) in conjunction with the Department of Labor (“DOL” or the “Department”). An employer who seeks to hire foreign workers through this program must obtain a “labor certification” from the United States Department of Labor (“DOL” or “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for such certification, the petitioning employer must file an *Application for Temporary Employment Certification* (ETA Form 9142) with ETA’s Chicago National Processing Center. 20 C.F.R. § 655.20 (2008). Applications are reviewed by a Certifying Officer, who will either request additional information

or issue a determination granting or denying the requested labor certification. 20 C.F.R. § 655.23. If the Certifying Officer denies certification, in whole or in part, then the petitioning employer may seek administrative review before the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a).

The Employer in this matter, Golden Acres Home Care II (“the Employer”), filed an application with ETA on February 22, 2013, requesting H-2B temporary labor certification for four Personal Care Aide positions from May 1, 2013 to April 30, 2014. AF 39-83.¹ The Employer’s Statement of Temporary Need provided, in pertinent part:

We operate a 24-hour care Residential Care for Elderly & has [sic] been in operation since 2007 up to present. We are licensed to operate 24 residents, ambulatory, non-ambulatory & bedridden.

...

At present, we have only 2 full time live in caregivers who are working, one in Bldg. A and one in Bldg. B. We also have 1 temporary part time caregiver who works with us from 5:30am to 8:30am from Tuesday to Saturday.

The other full time live in caregivers are temporarily [sic] cannot work, because the first caregiver just gave birth and the other one is out of the country to attend personal and important matters. These two caregivers are my daughters and we started this business together since 2007. They will come back to work next year.

A 24-hour care is consistently needed. This facility for elderly needs flexible or extended care wherein live in caregivers offers the highest level. Four of more live in caregivers my share the job in each building, a total of eight caregivers. We suggest [sic]

We need 4 full time temporary caregivers to start on May 1, 2013 to April 30, 2014 to augment the current manpower complement we have, to enable us to fully meet the needs of the elderly.

AF 48.

After reviewing the Employer’s application, the above-captioned Certifying Officer (“CO”) issued a *Request for Further Information* (“RFI”) to inform the Employer that the Department identified three deficiencies in its application. AF 33-38. Only one deficiency is relevant to the instant appeal: the Employer’s failure to establish a temporary need for the requested H-2B workers, as required by 20 C.F.R. § 655.6. *Id.* In particular, the CO referenced the Employer’s statement of temporary need and observed:

From this statement, it is not clear how the employer has determined the requested dates of need. Specifically, the employer has two full-time workers currently unavailable, one who has recently given birth, and one who is out of the country

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

attending to personal matters, yet the employer indicates both will be unavailable for the same time period. The employer must provide documentation showing the exact dates both employees left, and when each will return.

In addition, while the employer states two full-time workers are currently unavailable, the H-2B application indicates four caregivers are needed. The employer has not explained why an absence of two workers has created a need for four workers.

Finally, the employer has not explained how it has been determined that the services of these four H-2B workers will not be needed until May 1, 2013, although the employer is currently short two full-time workers, and that the services will not be required after April 30, 2014.

Id. To remedy this deficiency, the CO instructed the Employer to submit a revised statement of temporary need containing the following information: (1) a description of the Employer's business history and activities (*i.e.*, primary products or services) and schedule of operations through the year; (2) 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; (3) an explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need; and (4) a statement explaining how the Employer had determined its dates of need. AF 36.

The Employer responded to the RFI on March 4, 2013. AF 10-32. In its response, the Employer reiterated the information in its initial application and added:

During this period from May 1, 2013 to April 30, 2014, we need four full time temporary, one time occurrence [sic] to augment the current manpower complement, to enable us to fully meet the needs of the elderly and to comply with the regulations of the Department of Social Services Community Care Licensing, to wit:

1. To fill up two Caregivers who filed on leave December 14, 2012 and February 1, 2013 and will return to work on April 16, 2014 and April 30, 2014 respectively.
2. To fill up temporarily two vacant positions to work a [sic] full time caregivers, while we continue finding a new worker.

We have only two full time caregivers, one in building A and one in building B. One caregiver in each building is not enough to serve ten residents in building A and 14 residents in building B. Efforts were made in the past to employ a full time live in caregiver, but negative results. We need a [sic] full time caregivers [sic] to fill up the position temporarily to meet the needs of the elderly until April 30, 2014. While these temporary live in caregivers are working, we will be able to meet the needs of the elderly and we are in compliance as required by the state. At the same time, [sic] will give us time to find a full time live in caregiver.

AF 12. Upon reviewing this response, the CO found that it failed to remedy the deficiency identified above. AF 4-9. Accordingly, on March 20, 2013, the CO issued a *Final Determination* denying certification. AF 4-9. In particular, the CO observed:

The employer's response has not established that the job offer is a one-time occurrence that would end on April 30, 2014. The RFI response stated that eight caregivers were needed to fully staff the facility. Even with the return of the two workers on extended absence, only four caregivers would be available after April 30, 2014, leaving the facility in need of four additional full-time caregivers. The RFI response also stated that the employer was having difficulty filling these four vacant positions. This indicates that the four temporary caregivers may still be needed after April 30, 2014. Therefore, the employer failed to adequately respond to the RFI, and failed to provide sufficient documentation to overcome the deficiency listed above. A one-time occurrence has not been established.

AF 9. "Therefore," the CO stated, "the application is denied." *Id.* The Employer's appeal followed. AF 1-3.

The undersigned issued a Notice of Docketing on April 2, 2012, providing the parties an opportunity to file briefs on an expedited basis. Both parties timely filed briefs in this matter.

DISCUSSION

Scope of Review

The Board'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). Accordingly, I am unable to consider any additional evidence that the Employer cites in its request for review and /or briefs filed before the Board.

Temporary Need

The H-2B program is, by definition, limited to non-agricultural temporary service or labor. 8 U.S.C. §1101(a)(15)(H)(ii)(b). Accordingly, an employer petitioning for H-2B temporary labor certification must establish that its need for nonagricultural services or labor is temporary in nature. 20 C.F.R. § 655.6(b), *citing* 8 C.F.R. § 214.2(h)(6). Pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B):

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. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

8 C.F.R. § 214.2(h)(6)(ii)(B). Accordingly, employers who seek to hire H-2B workers must provide a detailed statement of temporary need containing: (1) a description of its business history and activities (*i.e.*, primary products or services) and schedule of operations throughout the year; (2) an explanation regarding why the nature of the job opportunity and number of foreign workers being requested for certification reflect a temporary need; and (3) an explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need. 20 C.F.R. § 655.6(b), *citing* 8 C.F.R. § 214.2(h)(6).

In the instant case, the Employer asserts that its need for four Personal Care Aides is a temporary one-time occurrence. To meet this regulatory standard, the Employer must establish 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). Because the Employer employs Personal Care Aides on a permanent basis, it must demonstrate that a temporary event of short duration created a temporary need for four additional Personal Care Aides. The Employer failed to meet this burden.

Significantly, the Employer never sufficiently explained why it will no longer need the services of the four Personal Care Aides for which it requests certification after April 30, 2014—the end date of its purported period of temporary need. Indeed, it appears that the Employer requires the services of these Personal Care Aides on an ongoing basis. The Employer’s inability to hire permanent Personal Care Aides to fill these positions does not constitute a temporary need. I therefore agree with the CO, and find that the Employer failed to establish that its need for the H-2B workers is temporary in nature. Accordingly, I affirm the CO’s denial of the Employer’s application on this basis.

ORDER

In light of the foregoing, the Certifying Officer’s *Final Determination* denying certification is AFFIRMED.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge