

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 June 2013

BALCA Case No.: 2013-TLN-00052
ETA Case No.: H-400-13074-227549

In the Matter of:

GRIGORIY & FAMILY ENTERPRISES, INC.,
Employer

Certifying Officer: Chicago National Processing Center

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, 8 USC §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations at 8 CFR Part 214 and 20 CFR Part 655, Subpart A. The 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 CFR § 214(2)(h)(1)(ii)(D).

Prior to applying for a visa under the H-2B program, employers must file an Application for Temporary Employment Certification with the U.S. Department of Labor’s Employment and Training Administration (ETA). 20 CFR § 655.20. The applications are reviewed by a Certifying Officer (CO) within ETA, who makes a determination to either grant or deny the requested certification. 20 CFR § 655.23. If the CO denies certification, in whole or in part, an employer may request review before an Administrative Law Judge on the Board of Alien Labor Certification Appeals (BALCA or the Board). 20 CFR § 655.33(a).

BACKGROUND

Grigoriy & Family Enterprise, Inc. (Employer) provides housekeeping, maintenance, and janitorial services in several areas throughout Michigan. The Employer filed an Application for Temporary Employment Certification on March 15, 2013, requesting H-2B certification for eight First-Line Supervisors of Housekeeping and Janitorial Workers from May 1, 2013 to January 30,

2014. AF 189-294.¹ The certification request was based on the peak load standard of temporary need. In an attached statement supporting this temporary need, the Employer explained:

Grigoriy & Family Enterprise, Inc. operates in Michigan on a year-round basis and most workers employed by us are recruited for permanent employment. Although we have yearly contracts with numerous large and sizeable corporations and businesses besides the residential units in Wayne County, Michigan, several businesses, cities and communities often contract out for work for cleaning, waxing floors, housekeeping, maintenance and janitorial work on a seasonal or peak load basis, as these are jobs that, in most places, can only be done during certain times of the year. Since Grigoriy & Family Enterprise Inc. has been in the business for over 8 years, it has become well known for quality service and reliability throughout Michigan. As a result, Grigoriy & Family Enterprise Inc. has numerous customers who are not on a written annual contract, but rather on an oral agreement /contract. These businesses have growing demands of scheduled housekeeping, cleaning and janitorial/maintenance services and the work load is at its peak during the months of May 01 2013 to January 30 2014.

AF 238-239. The Employer further stated:

Employer has its 14 permanent employees already booked to provide housekeeping and janitorial services to certain businesses, residential clients, and corporations year round, but, the employer's need to provide service and fulfill all of its contractual obligations during the 9 month peak load (from May 1, 2013 to January 30, 2014), is above and beyond the existing worker levels. During peak load season, as this coming Spring until the middle of the Winter season, Employer is normally over loaded with work and its permanent workers are already scheduled for annual contracted businesses, residential clients, and corporations.

AF 241.

The CO issued a Request for Further Information (RFI) on March 21, 2013, notifying the Employer that its application failed to satisfy all the requirements of the H-2B program. AF 183-188. Specifically, the CO noted that the Employer failed to establish "that its need for the nonagricultural services or labor is temporary in nature" and "that the number of number of worker positions being requested for certification is justified and represent any and all bona fide job opportunities." AF 184. According to the CO, the Employer did not submit any evidence or documentation to support its requested dates of need or the requested number of workers. Accordingly, the CO found that there were not "adequate attestations to establish the requested standard of temporary need." AF 186 (20 CFR § 655.21(a)). To remedy this deficiency, the CO requested that the Employer review the four standards of temporary need and select the standard that best fit its need. AF 187. The Employer was also to update its temporary need statement, if applicable. AF 187. Additionally, the Employer was directed to submit supporting evidence justifying the chosen standard of temporary need, including, but not limited to, the following

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

documentation: (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; (2) annualized 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 services and clearly showing work will be performed for each month during the requested period of need; and (3) summarized monthly payroll reports for a minimum of three 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. AF 188.

The Employer responded to the RFI on March 27, 2013, with an amended application and additional documentation, including a weekly payroll record and “monthly invoices for some of our customers for which the billing every month is virtually the same.” AF 148. In its amended statement of temporary need, the Employer stated that “[t]he temporary additions to staff will not become a part of our regular operation and will return to their home country at the end of our peak load need.” AF 145. The Employer elaborated:

In the past, the peakload was only slightly increased during this time, but this year, the May 2013 – January 2014 peak load will be the busiest and most demanding time for our company because of the number of contracts we have entered into, in order to meet with specific client requirements, to keep up with seasonal transitions, and to fully comply with the demands of all of our clients. Moreover, the change in seasons from May 1, 2013 – January 30, 2014 incorporates the peak of spring into summer, summer into fall and fall into winter and due to recent development and economic upswing in our area, the demand for our services this peak season has substantially increased to the point where our current staff is inadequate to handle the work load.

AF 146. The Employer also provided information and pictures for five major locations where the temporary employees would be placed, asserting that its current billing for each of these locations would be increasing during peak season. AF 147. The Employer provided one invoice, reflecting either February or March 2013 charges, for each of the five locations. AF 152-160. Several additional invoices, with redacted dates, were provided for other clients. AF 161-166.

On May 17, 2013, the CO issued a Final Determination denying certification. AF 132-143. The CO determined that the Employer did not provide adequate documentation to establish a peakload temporary need. AF 134.² In his Final Determination, the CO noted that the Employer “did not provide a summarized monthly payroll for the previous calendar year.” AF 138. Nor did the Employer “provide any work contracts for 2013 which would substantiate the employer’s

² In its request for review, the Employer asserts “new deficiencies” had been brought forward in the Final Determination. AF 2-3. However, the statement they are referring to is not setting forth “new deficiencies” but appears to restate the language of 20 CFR § 655.1(b). The deficiency upon which the CO made his determination is found in the Attachment to Denial. AF 134.

peakload need.” AF 138. In addition, none of the 14 invoices “provided sufficient information to show the work to be performed for each month during the requested period of need.” AF 138.

The Employer requested review of the CO’s Final Determination in a letter dated May 20, 2013 and received by BALCA on May 24, 2013. AF 1-131. The Board issued a Notice of Docketing on May 24, 2013. The Employer filed an “employer update” on May 31, 2013.

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 CFR sec. 655.33(a), (e). Accordingly, I am unable to consider additional evidence included in the Employer’s request for review. 20 CFR § 655.33(a)(5).

Temporary Need

In order to qualify for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor is temporary. Pursuant to regulations promulgated by the Department of Homeland Security (DHS), “temporary services or labor . . . refers to any job in which the petitioner’s need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.” 8 CFR § 214.2(h)(6)(ii)(A). 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.” 8 CFR § 214.2(h)(6)(ii)(B). An employer’s need for nonagricultural services or labor is deemed temporary if it meets one of the following standards of temporary need, as defined by DHS: a one-time occurrence, a seasonal need, a peak load need, or an intermittent need. 20 CFR § 655.6; 8 CFR § 214.2(h)(6)(ii)(B). The burden of proof to establish eligibility falls squarely on the petitioning employer. 8 USC § 1361.

In the instant case, the Employer asserts that it has a peak load need for eight First-Line Supervisors of Housekeeping and Janitorial Workers. AF 189. To establish a peak load need, the Employer must demonstrate “that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.” 8 CFR § 214.2(h)(6)(ii)(B)(3). The Employer argues that it needs to supplement its permanent staff from the beginning of May through the end of January, because “recent development and economic upswing” in the area have increased the demand for the Employer’s services during the peak season.

The Employer did not provide all of the documents requested by the CO in the Request for Information. The Employer did not submit summarized monthly payroll reports for a minimum of one calendar year, and the 11 invoices—at least five of which are neither “from

previous calendar year(s)” nor from “the requested period of need” — do not “clearly show the work to be performed for each month of the requested period of need.”

The record before the CO does not justify the Employer’s purported peak load temporary need. The Employer has not proven that its demand is “seasonal or short term” as required by 8 CFR § 214.2(h)(6)(ii)(B)(3); it has not shown that such a peak season existed in previous years nor has it shown that such a peak season will exist this year.³ The Employer stated, but did not submit proof, that in the past there has been a peak load from May through January that “slightly increased” its work. P146. None of the documentation, including the sample service contract, the schedule of operations, and the 11 invoices, adequately substantiates the claim that there has previously been an increase in work during these nine months. Furthermore, the Employer stated, but did not submit proof, that there would be an increase in demand due to its new contracts. AF 146. The invoices provided for the “major locations” show only past charges for one month. AF 152-160. The Employer did not provide documentation showing that there would be an increase in workload or billing at these or other locations from May 1, 2013 to January 30, 2014. Accordingly, it is impossible to verify that the Employer has a peak load need with a definitive end for which it needs to supplement its permanent staff on a temporary basis.

In light of the foregoing, I find that the Employer failed to establish a temporary need in accordance with the requirement at 20 C.F.R. §§ 655.6 and 655.21. Since the burden to establish eligibility for the H-2B program falls squarely on the petitioning employer, I affirm the CO’s denial of certification on this basis.

ORDER

The Certifying Officer’s Final Determination denying certification is AFFIRMED.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

³ In its request for review, the Employer stated: “We are and will continue to look for permanent workers from within the United States that would be able to permanently replace the temporary workers once their temporary term is completed” AF 5. This suggests that the *need* is not short term, but rather that the Employer has set an arbitrary nine-month period for “temporary” employees so that it can meet its current need.