

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 23 April 2013

BALCA Case No.: 2013-TLN-00046
ETA Case No.: H-400-13057-296615

In the Matter of:

SUR-LOC FLOORING SYSTEMS, LLC,

Employer

Certifying Officer: Chicago National Processing Center

Appearances: Monte B. Lake, Esquire
Wendel V. Hall, Esquire
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For the Employer

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For the Certifying Officer

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION

This matter is before the Board of Alien Labor Certification Appeals (BALCA) pursuant to Sur-Loc Flooring Systems' petition for administrative review of the Certifying Officer's *Final Determination* denying temporary labor certification under the H-2B nonimmigrant program. See 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.¹ For the reasons explained below, the Certifying Officer's *Final Determination* denying certification is REVERSED.

¹ All citations to 20 C.F.R. Part 655, Subpart A refer to the Final Rule promulgated in 2008. Although the Department issued a new Final Rule revising the H-2B program in February 2012, the U.S. District Court for the Northern District of Florida issued an order shortly thereafter enjoining the Department from implementing or enforcing this new Final Rule. See *Bayou Law & Landscape Services et al. v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (April 26, 2012). Accordingly, on May 16, 2012, the Department announced the continuing

BACKGROUND

Statutory and Regulatory Background

The H-2B program establishes a means by which employers may hire foreign workers on a temporary basis “to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.” See 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (DOL or the Department), Employment and Training Administration (ETA). 8 C.F.R. § 214.2(h)(6)(iii). To apply for such certification, employers 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). Once an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer (CO), who will either request additional information or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a). BALCA’s scope of review is limited to the appeal file prepared by the CO, the 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).

Factual & Procedural Background

Sur-Loc Flooring Systems, LLC (Sur-Loc) is in the business of installing outdoor flooring and bleachers for parties and events in the Washington metropolitan area. Last year, Sur-Loc applied for and received a temporary labor certification for six H-2B workers to be employed as Recreation Attendants from April through December 2012. This year, Sur-Loc seeks thirteen H-2B workers to be employed as Recreation Attendants from April 8, 2013, through December 1, 2013; however, the Department only partially certified its initial *Application for Temporary Employment Certification* for six of these positions. AF 152.² Instead of appealing the partial certification of its application, Sur-Loc filed a second *Application for Temporary Employment Certification* on February 26, 2013, wherein it requested seven additional H-2B workers to be employed as Recreation Attendants from April 8, 2013, through December 1, 2013. *Id.* This second application is the subject of the instant appeal.

Upon reviewing Sur-Loc’s *Application for Temporary Employment Certification*, the CO determined that Sur-Loc “failed to establish that the number of worker positions being requested for certification is justified and represent any and all bona fide job opportunities” AF 145. Accordingly, on March 5, 2013, the CO issued a *Request for Further Information* (RFI)

effectiveness of the 2008 rule until such time as further judicial or other action suspends or otherwise nullifies the district court’s order. See *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*; Guidance, 77 Fed. Reg. 28764, 28765 (May 16, 2012).

² Citations to the Appeal File will be abbreviated “AF” followed by the page number.

apprising Sur-Loc that its application “failed to satisfy all the requirements of the H-2B program.” AF 145-150. In an attachment to the RFI, the CO explained:

[O]n January 26, 2013, the employer was partially certified for 6 Amusement and Recreation Attendants from April 8, 2013 through December 1, 2013 in the same area of intended employment as previously certified. In the previously certified case, the employer originally requested 13 workers, however the Department found that 6 was a more true and accurate representation of the number of workers needed by the employer given the documentation submitted.

In its current application, the employer submitted its calendar for March 2012 and March 2013. However, the calendars submitted were only for the first month of the employer’s requested period of need. The employer also submitted a list of contracts which provides a sales report for January 1 through February 21, 2012 and January 1 through February 21, 2013. The list of contracts/sales report do not equate to a specific increase in the number of workers needed, and it is unclear why the employer is submitting a list of contracts for the months of January and February as those months do not fall into the employer’s requested period of need. No actual contracts or summarized payroll reports for each month separating 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 were submitted. Therefore, it remains unclear how the employer established its need for 7 additional workers for the entire period of need requested. The employer has not provided any additional documentation different from what was submitted in its previous application that adequately justifies the accuracy of the number of workers requested.

AF 148. To remedy this deficiency, the CO directed Sur-Loc to submit a statement “regarding the accuracy of the number of workers requested” and documentation to substantiate its need for seven additional positions, including signed work contracts for calendar years 2012 and 2013. AF 149. In addition, the CO requested documentation that justified Sur-Loc’s chosen standard of temporary need, including but not limited to: (1) signed work contracts and/or monthly invoices from previous calendar year(s) clearly showing work will be performed for each month during the requested period of need; or (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; or (3) summarized monthly payroll reports for a minimum of one previous calendar year 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. *Id.*

Sur-Loc responded on March 11, 2013, submitting, *inter alia*, an updated statement of temporary need, a letter from its office manager, Diana Swafford, a calendar of scheduled events from March 2013 to October 2013; sales estimates for September, October and December 2012 and January, February, and March 2013; an annualized payroll summary for 2012; and sales by customer summaries from January 1, 2012 to February 21, 2012 and from January 1, 2013 to

February 21, 2013. AF 17-144. According to Ms. Swafford, Sur-Loc's increased need for Recreation Attendants is related to the company's recent acquisition of \$100,000 in new equipment. AF 42. Specifically, Ms. Swafford explained that "[t]here will be an increase in workloads for recreation attendants to keep up on equipment since it will need [to be] refurbished, cleaned and reorganized and accounted for, after each and every event." Ms. Swafford maintained that Sur-Loc could not comply with the CO's request for 2013 sales and payroll data, as this data had not yet been input into the company's books. Instead, she pointed to projected projects the company had scheduled in 2013. She cautioned that these projections were not complete, since clients often do not schedule until the last minute. In addition, she noted that Sur-Loc was a growing company, and its 2012 projections were higher than they had been in the years before.

On March 20, 2013, the CO issued a *Final Determination* denying certification, citing Sur-Loc's "[f]ailure to establish that the nature of [its] need is temporary," as required by 20 C.F.R. §§ 655.21(a) and 655.22(n). AF 11-16. In particular, the CO found that Sur-Loc failed to support an increased need for Recreation Attendants. AF 15-16. As the CO explained:

The RFI instructed the employer to submit supporting evidence and documentation that justifies its temporary need for 13 temporary Amusement and Recreation Attendants. In response, the employer submitted sales by customer summaries from January 1 through February 21, 2012 and from January 1 through February 21, 2013, which was also submitted in its initial application. However, this documentation does not support the employer's temporary need as January and February do not fall into the requested period of need.

Additionally, the employer submitted sales estimates and a calendar of events from March 2013 to October 2013. However, the employer did not submit signed work contracts or monthly invoices for prior years, other than March 2012. Therefore, the employer has not demonstrated an increased need for Amusement and Recreation Attendants.

The employer was also instructed to submit summarized monthly payroll reports for a minimum of one previous calendar year that identified, 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. The employer submitted an annualized payroll summary for 2012. The payroll summary indicates 20 workers were employed during the year, 17 of which were paid an hourly wage. The hourly employees worked between 94 and 2843.25 hours during the year. However, the payroll summary does not indicate which workers were employed in the requested occupation and it does not separate the permanent and temporary workers. Additionally, the payroll summary does not indicate the hours worked and earnings received by the workers by month. Therefore, it cannot be determined whether the employer has a need for 13 workers during the requested period of need based on the 2012 payroll summary.

Finally, the employer submitted a letter from Diana Swafford stating, “We are projecting other jobs to come up during the calendar season as well. . . . Some clients do not schedule until the last minute.” The employer indicated that it expects to receive additional contracts at the last minute. It appears the employer is requesting temporary workers based on a projected need that has not been confirmed by signed contracts for work. The submitted documentation does not support an increased need for Amusement and Recreation Attendants beyond the number certified last year, and it is too speculative to assume the employer will enter into sufficient contracts to support the need for 13 temporary Amusement and Recreation Attendants.

The employer did not adequately respond to the RFI and did not provide sufficient documentation to overcome the deficiency listed above regarding the nature of the employer’s need.

AF 15-16. “Therefore,” the CO stated, “the application is denied.” AF 16. Sur-Loc timely petitioned for administrative review. AF 1-10. The Board issued a Notice of Docketing on April 2, 2013, providing the parties an opportunity to submit briefs on an expedited basis. Both parties timely filed briefs.

DISCUSSION

An employer who seeks to obtain temporary labor certification under the H-2B program must establish that its need for nonagricultural services or labor is temporary in nature. 20 C.F.R. § 655.21(a), *citing* 8 C.F.R. 214.2(h)(6)(ii). To do so, the employer must provide a detailed statement of temporary need explaining, *inter alia*, any increase or decrease in the number of H-2B positions being requested for certification from the previous year. 20 C.F.R. § 655.21. The employer must maintain documentation justifying its temporary need and provide this documentation to the CO upon request. § 655.21(b).

Prior to certifying an application, the CO must confirm that the employer has, *inter alia*, “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). When evaluating an application, the CO may, in his/her discretion, issue a partial certification reducing the number of H-2B positions being requested based upon information that the Department receives in the course of processing the temporary labor certification application. 20 C.F.R. § 655.32(f).

In the instant case, the CO did not question the temporary nature of the Sur-Loc’s work. Rather, the CO examined Sur-Loc’s application and found that Sur-Loc did not adequately explain why it sought certification for seven more Recreation Attendant positions than it had in 2012. As a result, the CO issued an RFI directing Sur-Loc to submit a statement “regarding the accuracy of the number of workers requested” and documentation to substantiate its need for seven additional positions, including signed work contracts for calendar years 2012 and 2013. AF 149. Sur-Loc responded six days later, providing the CO with over 100 pages of documentation. Although this documentation did not meet the exact specifications of the CO’s request, Sur-Loc provided a reasonable explanation as to why the documentation requested by

the CO was unavailable and appeared to make a good faith effort to provide alternative documentation. For instance, Sur-Loc's office manager, Diana Swafford, stated that the company was unable to comply with the CO's request for 2013 sales and payroll data, as this data had not yet been input into the company's books, but she offered to provide this data at the end of the calendar year.

Even though Sur-Loc did not provide payroll records in the CO's desired format or concrete proof of future contracts, it is not clear that such evidence is necessary to establish a temporary need under the H-2B regulations. As the Department explained in the preamble to the 2008 Final Rule:

[F]or most employers participating in the H-2B program, demonstrating a seasonal or peakload temporary need can best be evidenced by summarized monthly payroll records for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers employed, the total hours worked. **Such records, however, are not the only means by which employers can choose to document their temporary need. The proposed regulation accordingly leaves it to the employer to retain other types of documentation, including but not limited to work contracts, invoices, client letters of intent, and other evidence that demonstrates that the job opportunity that is the subject of the application exists and is temporary in nature.**

...

The Department also recognizes that conventional evidence such as payroll information may not be sufficient to demonstrate a one-time or intermittent need, or seasonal or peakload need in cases in which the employer's need has changed significantly from the previous year. In such cases, the employer should retain other kinds of documentation with the application that demonstrates the temporary need.

73 Fed. Reg. 78020, 78035 (Dec. 19, 2008). The regulations, therefore, leave it up to the Employer to retain documentation and other evidence that demonstrates that the job opportunity that is the subject of the application exists and is temporary in nature. The CO only contests Sur-Loc's need for an additional seven positions (and not the temporary nature of these positions). To justify its need for these positions, Sur-Loc submitted a statement from its office manager, Diana Swafford. Ms. Swafford explained that Sur-Loc's business was growing and its recent acquisition of \$100,000 in new equipment required the company to take on additional staff to refurbish and clean the additional equipment after events. Indeed, Sur-Loc's need for additional staffing is supported by its 2012 payroll records, which reveal that the company paid almost 7,000 hours in overtime last year—and that a majority of these hours were worked by only eight employees. *See* AF 126-134.

The CO's Final Determination denying certification did not address the above-cited evidence in support of certification; rather, it focused on Sur-Loc's failure to provide all of the documentation that was identified for production in the RFI. As discussed above, however, the

regulations provide an employer with flexibility as to the kinds of documentation it may use to support its purported temporary need. Here, Sur-Loc only seeks a modest increase in the number of positions for which it requests certification. The evidence and attestations that Sur-Loc provided in response to the RFI, while not completely determinative, are sufficient to establish a need for such a modest increase in positions.

In light of the foregoing evidence, I find that Sur-Loc sufficiently justified its need for seven additional H-2B workers and, therefore, that the CO erred in denying certification. Accordingly, I hereby remand this matter to the CO with instructions to certify Sur-Loc's application for temporary labor certification for the additional seven Recreation Attendant positions.

ORDER

In light of the foregoing, the Certifying Officer's *Final Determination* denying certification is REVERSED and REMANDED for certification.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge