

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 12 August 2013

OALJ Case Nos.: 2013-TLN-00059
2013-TLN-00060

ETA Case Nos.: H-400-13168-735987
H-400-13168-005753

In the Matters of:

FEDERAL PROFESSIONAL SOLUTIONS, INC.,
Employer

Certifying Officer: Chicago National Processing Center

Before: **STEPHEN M. REILLY**
Administrative Law Judge

DECISION AND ORDER VACATING AND REMANDING CERTIFYING OFFICER'S DENIALS OF CERTIFICATION

These cases arise from two requests for review of United States Department of Labor Certifying Officer's ("the CO") denials of applications for temporary alien labor certification under the H-2B non-immigrant program.¹ The H-2B program permits employers to hire foreign workers to perform temporary non-agricultural 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); 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).

PROCEDURAL HISTORY

These cases involve two Federal Professional Solutions' ("FPS") Applications for Temporary Labor Certification filed on June 17, 2013, each seeking temporary labor certification

¹ I have consolidated the cases because the applications were filed by the same employer on the same dates. Furthermore, the applications and denials are essentially identical. One application seeks five employees for work in Illinois while the other seeks fifteen employees in Virginia.

for Senior Lead Tower Technicians. (AF 279-411)² On June 21, 2013, the Employment and Training Administration (“ETA”) issued its Request for Further Information (“RFI”) along with Attachment A indicating four alleged deficiencies in each of the cases. ETA identified the additional information sought in order to facilitate the Certifying Officer (“CO”) issuing a decision on the applications. (AF 271-78).

On June 28, 2013, FPS responded to the RFIs. (AF 183-270). The response included numerous job descriptions for similar positions, a copy of the job order filed with the Illinois SWA, copies of newspaper advertisements,³ and copies of agreements between FPS and some of its clients. On July 17, 2013, ETA denied FPS’ applications. (AF 176-82). On July 26, 2013, FPS sought review of ETA’s denials.

DISCUSSION

The CO denied the applications for two reasons. The CO found that FPS failed to show

- (1) There are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of filing the petition for H-2B classification at the place where the foreign worker is to perform the work; and
- (2) The employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(AF 176).

In support of its position, ETA relied on wording in two contracts between FPS and clients. “Both contracts indicate that workers will need to complete a background check and drug test. However, this information is not included in the employer’s ETA Form 9142.” (AF 178). The CO gives no regulatory support for its authority to determine job qualifications based on terms in some, but not all, of the contracts FPS has with its clients. The contracts FPS has entered into with various clients do not control the employment relationship FPS has with its employees. It appears that ETA’s naiveté regarding the operation of business agreements leads it to impose unreasonable and unjustified requirements.

Perhaps most disconcerting about ETA’s decision is that it ignores FPS’ response on the issue.

FPS does not require any drug or background check for the position list on the ETA-9142 and therefore did not list any such requirement on the form ETA-9142, job advertisements, prevailing wage request, or job order. We respectfully submit that our private contractual obligations, and the practical

² I have cited to the administrative file in Case No. 2013-TLN-00059. Citations to the Administrative File are abbreviated as “AF.”

³ Postings were placed with the Virginia SWA and advertisements were placed in newspapers covering the Virginia area.

and legal implications of failing to comply with certain provisions of private contract into which our company enters. Are irrelevant to the instant application for temporary labor certification and should have no bearing on the decision. We will say that while such provisions are common in some contracts, the reality is that they are rarely adhered to and not regarded as material or true requirements by our company. Federal Professional Solutions has made a business decision that it will not impose such requirements on our employees and therefore did not list such requirements on the ETA-9142.

(AF 190) FPS' President Marcy Anderson then personally attests:

As president of Federal Professional Solutions I can confirm that neither a drug test nor background check is a requirement for this position. Moreover, I can confirm that neither US workers nor foreign nationals will be required to take a drug or background check as a precondition to employment.

(AF 190).

The contracts establish that the jobs exist and that they will exist for the 18 month period of time for which FPS seeks the temporary employees. To delve deeper into the terms of the contract is beyond the scope of the CO's authority. FPS made a business decision to not require background checks and drug tests of any employees, US or foreign nationals. The CO does not have the authority impose its view on the operation of a business and determine how that business should interact with its clients. The CO has no authority to arbitrarily create an additional job requirement imposing such requirement on the employer and prospective employee.⁴ While I anticipate the CO might argue that a breach of the background and drug check clause in some of the contracts could lead to termination of those contracts, there are numerous other provisions, not the least of which are the pricing terms, that impact the execution of the contract. Just as the CO has no authority to mandate pricing terms, it has no authority to mandate other business decisions such as whether to require drug and background tests.

Furthermore, because "neither US workers nor foreign nationals will be required to take a drug or background check as a precondition to employment" US workers were not put at a disadvantage in seeking employment with FPS. As such, FPS' applications for temporary labor certification for five Senior Lead Tower Technicians in Illinois and fifteen Senior Lead Tower Technicians in Virginia demonstrated that:

- (1) There are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of filing the petition for H-2B classification at the place where the foreign worker is to perform the work; and
- (2) The employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

⁴ Arguably, such a requirement could decrease the number of US applicants for the position.

Finally, because the jobs do not require drug and background checks, the advertisements and job order submitted by the employer do not need to list these items as job requirements. I have examined the newspaper advertisements and job listings with the Illinois and Virginia SWAs and find that they meet the regulatory requirements.

CONCLUSION

I find the CO erred in holding that FPS failed to show that:

- (1) There are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of filing the petition for H-2B classification at the place where the foreign worker is to perform the work; and
- (2) The employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

In addition, I find that the CO's imposition of a requirement that FPS administer drug tests and background checks as a condition of employment even though FPS made a business decision to not do so was arbitrary, capricious and an abuse of discretion.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decisions are hereby **VACATED** and **REMANDED** to the Certifying Officer with instructions to **GRANT** Federal Professional Solutions' applications.

SO ORDERED.

For the Board:

STEPHEN M. REILLY
Administrative Law Judge