



Issue Date: 17 October 2014

BALCA Case No.: 2014-TLN-00041
ETA Case Nos.: H-400-14196-761889

In the Matter of:

Anchorage City Limits Lofts dba The Lofts

Employer.

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For the Certifying Officer

Before: Kenneth A. Krantz
Administrative Law Judge

DECISION AND ORDER - AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s denial in the above-captioned H-2B temporary labor certification matter. The H-2B program permits 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, “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 8 C.F.R. §214.2(h)(1)(ii)(D); see also 8 U.S.C. §1101(a)(15)(H)(ii)(b); 8 C.F.R. §214.2(h)(6)(ii)(B); 20 C.F.R. §655.6(b)¹. Employers who seek

¹ The proposed revisions to federal regulations related to the H-2B program, 20 CFR Part 655, Subpart A, published in Vol. 77 Fed. Reg., No. 34 at 10038-10109 and 10147-10169 (Feb. 21, 2012) were stayed on May 16, 2012 following a U.S. District Court decision, Vol. 77 Fed. Reg., No. 95 at 28764 (May 16, 2012). See also *Bayou Lawn & Landscape Services, et. Al. v. Sec. of Labor*, 713 F3d 1080 (11th Cir. 2013) affirming the U.S. District Court for Northern Florida. Accordingly, the regulations promulgated at Vol. 73 Fed. Reg., No.245 at 78020-78069 (Dec. 19, 2008) apply in this matter.

to hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”). 8 C.F.R. §214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 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).

BACKGROUND

On June 15, 2014, the employer filed an H-2B application with the Department seeking two full time workers to be employed as Bartenders for the period from August 1, 2014 to July 31, 2015. On July 22, 2014, the Certifying Officer (CO) sent a Request for Further Information (RFI) citing three deficiencies which requested that the employer provide certain information in accordance with 20 C.F.R. § 655.

On July 22, 2014 the employer responded to the RFI and satisfied two of the deficiencies in response to the CO’s RFI request. One deficiency, failure to satisfy obligations of H-2B employers §655.22, was not remedied.

On August 18, 2014 the CO denied certification because the employer did not adequately explain how its request for H-2B workers who speak French or Italian was normal and accepted in the Bartender occupation, nor did the employer provide support showing it is offering terms and conditions normal to U.S. workers similarly employed.

The employer sent a Request for Administrative Review on September 3, 2014. The Notice of Docketing was issued on September 18, 2014.

BALCA received the Solicitor’s brief on September 25, 2014. The Employer did not submit a brief. The Appeals File was received on September 8, 2014.

STATEMENT OF THE CASE

An employer seeking certification to employ H-2B nonimmigrant workers bears the burden to establish eligibility for issuance of a requested temporary labor certification. The Employer must offer “terms and working conditions normal to U.S. workers similarly employed in the area of intended employment, meaning that [the terms and conditions of employment] may not be unusual for workers performing the same activity in the area of intended employment ...” 20 C.F.R. §655.22(a). The qualifications for the job must be “consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.” 20 C.F.R. §655.22(h)

Where an employer has submitted an application for temporary labor certification of H-2B workers and that application fails to meet all the obligations required by 20 C.F.R. §655.22 or other requirements of the H-2B program, “the CO must issue a RFI [Request for Further Information] to the employer” setting forth the deficiency in the application and permitting the employer to submit supplemental information and documentation for consideration before

issuance of a final determination on the application. Failure to comply with an RFI, including not providing all documentation within the specified time period, may result in a denial of the application and also result in the CO requiring supervised recruitment in the future. 20 C.F.R. §655.23(c).

Upon appeal to BALCA, only that documentation upon which the CO's final determination was made (the Appeal File), the request for BALCA review (which may not contain evidence that was not submitted to the CO for consideration in the underlying determination), and submitted legal briefs may be considered. 20 C.F.R. §655.33.

DISCUSSION

At issue in this case is whether or not the employer satisfied the requirements of § 655.22. Specifically, whether foreign language fluency is a usual request for similarly employed workers and whether the Employer's request would adversely affect qualified U.S. workers.

§ 655.22 Obligations of H-2B Employers:

- (a) The employer is offering terms and working conditions normal to U.S. workers similarly employed in the area of intended employment, meaning that they may not be unusual for workers performing the same activity in the area of intended employment, and which are not less favorable than those offered to the H-2B worker(s) and are not less than the minimum terms and conditions required by this subpart.
- (h) ... the qualifications for which are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.

The CO found the employer's request for bartenders who speak Italian or French is not a normal and accepted request in the occupation of bartending. Employer submitted market research which showed a trend among hotels to target international travelers. The CO found these submitted materials were inadequate to overcome the deficiency, *i.e.* the language requirement remained unusual for U.S. workers similarly employed.

The employer stated bartenders with foreign language skills are needed for greeting guests, presenting menus, answering questions, and making food and drink suggestions to its target clientele, presumably guests who speak French or Italian. In support of its foreign language request, the employer submitted job orders from other employers, none of which included a foreign language requirement. The employer also submitted affidavits from the hotel owners that the hotel is branding itself as a multicultural hotel with a majority of its guests coming from French and Italian speaking countries. While there is no direct evidence to indicate from what country the hotel's guests arrived, the employer included an Alaska visitor statistics chart indicating the potential market for international visitors. The CO addressed the visitor statistics and found .7% of the tourists to Alaska fit the employer's target clientele with no proof the .7% of visitors specifically visit Anchorage. Thus, the CO found the employer did not overcome the deficiency that its terms and conditions are normal for U.S. workers similarly employed.

The Employer disputes the CO's finding that only .7% of all visitors to Alaska fit the employer's target clientele. The employer claims there are 1.2 million visitors to Alaska in the summer. The employer further states:

Of those 1.2 million visitors, 7% were from non-German speaking parts of Europe (NGS) (84,000 people). Moreover, 7% of those visitor [sic] were Canadian. In Canada, 22.3% of the population is French speaking. Therefore if we combined these number [sic] (7% of NGS tourists and 22.3% of the 7% of Canadians who are French speaking) then we get 102,480 people. If each person spent \$200 on one hotel room alone, then it would come out to \$20,496,000 – in a three month period of time! In fact the potential to solicit this target market is so great, that even if The Lofts only cornered .0025 of the market, they would be completely sold out and stand to make over \$50,000 a night, which translates into \$4,554,000 in a three month period of time! Obviously, The Lofts' need for workers who can effectively communicate with their target market is critical to the success of its multicultural brand and marketing strategy.

The employer's argument relies on the benefit of too many variables to be persuasive. The math and money involved in the employer's argument assumes that the 84,000 non-German speaking Europeans visiting Alaska speak either French or Italian. The figures do not consider the possibility that visitors could come from Spain, Turkey, Sweden or any of the dozens of European countries that are non-German speaking, non-French speaking, and non-Italian speaking. The employer's figures also assume that the 18,480 Canadians who travel to Alaska do so in the same proportion of English to French speakers as exists in Canada. The employer presents a market share of .0025 without indicating how it arrived at this number. In addition to these unaddressed variables, the employer states the 102,480 potential visitors come to Alaska in a "three month period of time." The source of the employer's visitor information actually defines the Alaska summer season as May 1st through September 30th which is 5 months rather than 3 months. *McDowell Group, Inc. Alaska Visitor Statistics Program VI: Summer 2011 Page 111-15.*

The employer has no evidence showing how many, if any, of the 102,480 potential clientele actually visits Anchorage. If the potential clientele do visit Anchorage, there is no indication they stay in a hotel. If they stay in a hotel, there is no indication they spend \$200 on a room. The problem with the numbers cited by the employer is there is nothing indicating what percent of the visitors to Anchorage fit their specific demographic of French or Italian speaking clientele.

The employer's support for its need for workers with foreign language skills uses figures that are too speculative. This support does not overcome the deficiency in showing why the employer needs workers who can speak French or Italian.

The employer also submitted job orders for other employers that did not contain a language requirement. The CO found the Employer failed to list the minimum job requirements for the

bartender positions. The Employer argues the language fluency was not a requirement, but rather a preference. The CO argued the H-2B regulations require an employer to state its minimum requirements. i.e. an employer is not permitted to include “preferences.” Further, the Solicitor’s brief states, “An employer who does not advertise a job opportunity with the minimum requirements has failed to conduct an accurate test of the job market, precluding the certification that qualified U.S. workers were not available and would not be adversely affected by the employer’s hiring H-2B workers. *Hunt Construction of Central Florida*, 2011-TLN-28 (June 8, 2011), Decision at 5; *see also Objectstream Incorporated*, 2011-PER-1315 (August 23, 2012), Decision at 3-4.”

CONCLUSION

In conclusion, I find that the employer did not provide enough additional documentation to demonstrate that the employer’s requirements for the job opportunity are consistent with the normal and accepted qualifications required by non-H-2B employers and would not adversely affect qualified U.S. workers. The Certifying Officer’s denial must be affirmed.

ORDER

It is hereby ORDERED that the Certifying Officer’s DENIAL of the Employer’s June 15, 2014 Application for Temporary Employment Certification is AFFIRMED.

KENNETH A. KRANTZ
Administrative Law Judge

KAK/jp/mrc