

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 05 February 2014

BALCA Case No.: 2014-TLN-00008
ETA Case Nos.: H-400-13337-480471

In the Matter of:

JAMAICAN ME CLEAN, LLC

Employer.

Appearances: Richard Alvoid, PA
Pensacola, Florida
For the Employer

Certifying Officer: Chicago National Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the Certifying Officer's denial of an application for temporary alien labor certification under the H-2B nonimmigrant program. The H-2B nonimmigrant 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. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Following the Certifying Officer'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). For the reasons explained below, the Certifying Officer's Final Determination partially granting certification is REVERSED and REMANDED to the Certifying Officer so that he may fully evaluate and explain the evidence presented by the Employer.

STATEMENT OF THE CASE

Jamaican Me Clean, LLC ("Employer") submitted an application for temporary labor certification to the Department of Labor on December 3, 2013, requesting H-2B temporary labor certification for 135 Housekeepers to be employed from March 1, 2014 to November 1, 2014.

Administrative File (“AF”) at 504-1062. The Employer provided the following explanation to justify a temporary, peakload need for 135 Housekeepers:

[Employer] is requesting labor certification for 135 temporary, seasonal workers from March 1, 2014 to November 1, 2014, the busy tourist season along the Florida Gulf Coast. Employer has a peakload need of housekeepers during these months because of a current cleaning contract she has with Edgewater Beach and Golf Resort in Panama City Beach, FL. [Employer] has agreed to clean 530 of Edgewater Beach's resort condo units from March 1, 2014 to November 1, 2014 (see Service Agreement).

Effective November 6, 2013, Edgewater Beach and Golf Resort and [Employer] contracted for year round cleaning services. Per this contract, Employer will clean approximately 20 resort condo units daily for Edgewater Beach during the off-season (i.e., November 1, 2013 through February 28, 2014) and clean 530 resort condo units from March 1, 2014 to November 1, 2014. Employer will continue with off-season cleaning services from November 1, 2014 through November 6, 2014, the end of their current contract.

[Employer] is currently advertising for local housekeepers to supplement its permanent staff but has had little success. Employer is therefore requesting 135 temporary, seasonal workers to assist her permanent staff with the peakload need of housekeepers from March 1, 2014 to November 1, 2014.

...

Since its inception, [Employer] continues to grow in spite of occasional losses:

- 2005, \$10,719 gross
- 2010, \$118,448 gross, profit of \$37,628
- 2011, \$178,031 gross, loss of \$55,605
- 2012, \$294,517 gross, loss of \$33,394

[Employer]’s payroll expenses for the last four years (see FL Employer’s Quarterly Report) are:

- 2010, JAMAICAN ME CLEAN's payroll expenses were \$22,532
- 2011, JAMAICAN ME CLEAN's payroll expenses were \$131,151
- 2012, JAMAICAN ME CLEAN'S payroll expenses were \$227,794
- 2013, JAMAICAN ME CLEAN's payroll expenses are in excess of \$356,318

[Employer]’s permanent housekeepers for the last three years (see Monthly Wage Report and Payroll Summaries) are:

- 2011, JAMAICAN ME CLEAN had 11 permanent housekeepers
- 2012, JAMAICAN ME CLEAN had 19 permanent housekeepers
- 2013, JAMAICAN ME CLEAN had 14 permanent housekeepers

[Employer] started with 2 permanent employees in 2005 and currently maintains 14 permanent employees, 5 of whom work regularly at *Edgewater Beach and Golf Resort* (see Employer's 2013 Monthly Payroll Report).

From the beginning, [Employer]'s primary source of business has been in cleaning resort hotels and condos along the Gulf Coast during the tourist season, which starts in March of each year and continues through the end of October. Each March, Spring Break opens the tourist season with a flood of college students swarming the beaches all along the Gulf Coast (see Spring Break blog). Weddings, conferences, and family vacations bring other tourists and business to the Gulf Coast of Florida during the Spring and Summer months (see Panama City Beach Chamber of Commerce and Edgewater Beach Resort ads), dramatically increasing the occupancy rates of local hotels and resorts from June through October.

One such local resort is *Edgewater Beach and Golf Resort* (see Edgewater 2013 'Combined Summary Forecast/Budget') located in Panama City Beach, FL. As *Edgewater Beach's* occupancy rates increase during the tourist season, so do the cleaning opportunities for [Employer] (see 2012, 2013 Monthly Revenue Graphs).

...

On November 6, 2013, *Edgewater Beach* and [Employer] contracted again for cleaning services, but this time on a year-round basis. Both agreed that [Employer] will clean approximately 20 resort condo units daily at *Edgewater Beach* during the off-season months of November 2013 through February 2014, AND 530 resort condo units from March 1, 2014 to November 1, 2014, during the peak business months (see Service Agreement) for both companies. Employer's current permanent staff of 14 cannot clean all 530 condo units and Employer has advertised locally for seasonal housekeepers to help fill this peakload need created by the busy tourist season along the Gulf Coast (see SWA and News Herald ads).

Edgewater Beach and Golf Resort has over 870, 1-2-3 and 4-bedroom Resort condo units for rent (see 2013 Condo Units information) and [Employer] has agreed to clean 530 of these units. Employer estimates a need of 135 housekeepers to clean these 530 condo units daily based on the First Lady of Service, Mary Starkey's, cleaning standard of 1 housekeeping cleaning a 500 square foot area in an hour (see Home Staffing Network article).

AF 506-508. The Employer's application also included an affidavit from the Employer's owner to detail the Employer's projected need. In relevant part, this affidavit states:

My company has a cleaning contract with *Edgewater Beach and Golf Resort* in Panama City Beach, FL to provide housekeeping services for 530 of Edgewater's resort condo units from March 1, 2014 through November 1, 2014.

The floor plans for these 530 Resort condos at *Edgewater Beach and Golf Resort* include:

- 1-bedroom (basic) condo units are 612 square feet in size and take 1 hour to clean
- 1-bedroom (delux) condo units are 1013 square feet in size and take 2 hours to clean
- 2-bedroom condo units are 1317 square feet and take 2.5 hours to clean
- 3-bedroom (basic) condo units are 1573 square feet and take just over 3 hours to clean
- 3-bedroom (delux) condo units are 1847 square feet and take 3.5 hours to clean

Each of my housekeepers will clean Edgewater's condos in the following way each day:

- sweep/vacuum and mop all the flooring
- strip and remake beds
- remove soiled linens
- clean bathrooms and restock supplies
- clean kitchen and restock supplies
- remove all waste from the unit

I estimate that 1 housekeeper can clean 4 condo units daily based on the industry standard of one housekeeper cleaning 500 square feet per hour.

AF 608. In support of these statements, the Employer provided over 500 pages of documentation, including, *inter alia*, copies of recruitment documentation; a copy the November 2013 Service Agreement between the Employer and Edgewater Beach Resort; a copy of the Edgewater Beach Resort 2013 Combined Summary Forecast/Budget; copies of business payroll expenses for years 2013, 2012, 2011, 2010; and copies of business revenue for years 2013, 2012 and 2011. AF 504-1062

Upon reviewing the Employer's application, the Certifying Officer ("CO") determined that the Employer "fail[ed] to provide adequate documentation to establish temporary need for number of workers requested," as required by 20 C.F.R. §§ 655.22(n), 655.23(b). AF 502. Specifically, the CO found that the employer's payroll records from November 2012 through November 2013 "show[] there were only 19 workers during the employer's requested dates of need," and thus did "not support the employer's certification request for 135 Maids and Housekeeping Cleaners." AF 502. Accordingly, on December 10, 2013, the CO issued a *Request for Further Information* ("RFI") directing the Employer to submit "supporting evidence and documentation to establish that the number of worker positions being requested for certification is true and accurate and represents bona fide job opportunities." The CO also directed the Employer to submit "an explanation of how the submitted documentation supports the number of workers requested."

The Employer responded to the RFI by e-mail dated December 18, 2013. AF 55-499. The Employer's response included copies of signed contracts, letters from vendors, and monthly invoices from 2011-2013; copies of paystubs for vendors from 2011-2013; summarized payroll reports for permanent and temporary employees from years 2011, 2013, and 2013; and an affidavit from the Employer's owner explaining the Employer's need for 135 H-2B workers.¹ The summarized payroll reports provide the following data regarding the temporary and permanent workers that the Employer employed during 2011, 2012, and 2013:

| Month | # of Permanent Workers | Total Payroll for Permanent Workers | # of Temporary Workers | Total Payroll for Temporary Workers |
|--------------------|------------------------|-------------------------------------|------------------------|-------------------------------------|
| January 2011 | 5 | \$1,336.00 | — | — |
| February 2011 | 5 | \$2,290.00 | 1 | \$600.00 |
| March 2011 | 6 | \$4,171.00 | — | — |
| April 2011 | 6 | \$7,350.00 | — | — |
| May 2011 | 7 | \$6,719.00 | — | — |
| June 2011 | 6 | \$6,359.00 | 19 | \$12683.00 |
| July 2011 | 7 | \$9,110.00 | 21 | \$26981.00 |
| August 2011 | 4 | \$2,629.00 | 21 | \$14879.00 |
| September 2011 | 3 | \$3,118.00 | 9 | \$7320.00 |
| October 2011 | 3 | \$3,931.00 | 6 | \$6430.00 |
| November 2011 | 11 | \$6,740.00 | 1 | \$240.00 |
| December 2011 | 9 | \$9,118.00 | — | — |
| 2011 Totals | | \$62,871.00 | | \$69,133.00 |
| January 2012 | 2 | \$1,595.00 | 3 | \$2160.00 |
| February 2012 | 2 | \$1,650.00 | 4 | \$2390.00 |
| March 2012 | 2 | \$1,644.00 | 10 | \$5100.00 |
| April 2012 | 6 | \$7,142.00 | 10 | \$5682.00 |
| May 2012 | 4 | \$7,501.00 | 5 | \$2636.00 |
| June 2012 | 8 | \$16,270.00 | 15 | \$6880.00 |
| July 2012 | 8 | \$9,434.00 | 16 | \$16082.00 |
| August 2012 | 9 | \$12,825.00 | 22 | \$20271.00 |
| September 2012 | 9 | \$11,251.00 | 32 | \$26993.00 |
| October 2012 | 11 | \$13,416.00 | 27 | \$20685.00 |
| November 2012 | 15 | \$19,580.00 | 7 | \$4092.00 |
| December 2012 | 15 | \$11,846.00 | 4 | \$1765.00 |
| 2012 Totals | | \$114,154.00 | 3 | \$114,736.00 |
| January 2013 | 8 | \$7,454.00 | 7 | \$2,260.00 |
| February 2013 | 8 | \$715.00 | 7 | \$2,140.00 |
| March 2013 | 8 | \$1,382.00 | 7 | \$3,601.00 |
| April 2013 | 8 | \$1,5661.00 | 4 | \$5,700.00 |
| May 2013 | 8 | \$1,322.00 | 38 | \$30,041.00 |
| June 2013 | 7 | \$944.00 | 50 | \$52,491.00 |
| July 2013 | 7 | \$993.00 | 46 | \$50,468.00 |
| August 2013 | 7 | \$13,332.00 | 42 | \$58,063.00 |
| September 2013 | 7 | \$692.00 | 41 | \$41,898.00 |
| October 2013 | 7 | \$612.00 | 36 | \$32,431.00 |
| November 2013 | 7 | \$603.00 | 19 | \$7,643.00 |
| 2013 Totals | | \$43,710.00 | | \$286,736.00 |

¹ The Index to the Administrative File indicates that the Employer's response to the RFI included an affidavit from the Employer's owner explaining the Employer's need for 135 H-2B workers, but the Administrative File BALCA received does not include a copy of this affidavit.

AF 125-128.

On January 3, 2013, the CO issued a *Final Determination* partially certifying the Employer's application. AF 51-54. The CO reduced the number of certified positions from 135 to 16 because:

The employer requested 135 Maids and Housekeeping Cleaners from March 01, 2014 through November 01, 2014 on a peakload need. The submitted payroll documentation shows that at most the employer has employed 50 temporary workers during any month within the last three years. In the employer's response to the RFI letter issued on December 10, 2013, the employer stated there is an increase in business but identified the increase is mainly during their slow season. The employer's move to secure more business during the months not requested would further indicate an increase in the need for permanent workers while decreasing the need for temporary workers.

After evaluating the number of temporary workers that the employer has justified as needing during the entire period requested, the 2012 payroll documentation best represents the employer's need because the payroll dollars dedicated to staff is almost equally distributed between permanent and temporary staffing. The payroll submitted for 2013 did show that they employed at most 50 temporary workers for one of the months requested but it is also noted that the payroll dedicated to permanent workers significantly decreased while the payroll for temporary workers increased which contradicts the employers effort to secure more work during the time period that used to be their slow season.

Upon review of the documentation provided, the employer demonstrates a need of no more than 16 workers for the requested dates of need. The total number of temporary workers for the first 5 months of 2012 was 16. Although they did employ more than 16 workers in some of the months requested, the employer must show that they can support the number of workers for the full time period requested.

AF 52.

The Employer requested administrative review of the *Final Determination* by letter dated January 10, 2014.² The Employer argued that the CO's decision to decrease the number of certified positions was based on the erroneous assumption that the Employer's worker availability in 2012 will comport with its projected need in 2014. AF 1-50. The Employer asserted that the CO has no basis to judge the Employer's projected need in 2014 against the Employer's 2012 numbers, because in 2012, the Employer did not have a Service Agreement

² BALCA did not docket the request for review until Tuesday, January 14, 2014; Monday, January 13, 2014 was a Federal holiday.

with Edgewater, and this determination does not take into account the fact that the Employer has a new and larger contract than the previous years.

The undersigned Administrative Law Judge issued a Notice Docketing on January 14, 2014, informing the parties that BALCA had docketed the appeal and providing the parties the opportunity to file a brief on an expedited basis. The Employer filed a brief on January 23, 2014; Counsel for the Certifying Officer did not file a brief. The Board did not receive a complete copy of the Administrative File until February 4, 2014.

DISCUSSION

To obtain temporary labor certification under the H-2B program, the petitioning employer 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 petitioning employer must maintain documentation justifying its temporary need and provide this documentation to the CO upon request. § 655.21(b).

Prior to issuing a temporary labor certification, the CO must confirm that the petitioning employer has “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 employer’s 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 examined the Employer’s application and found that the Employer did not adequately explain why it sought certification for 135 Housekeepers. In the *Final Determination*, the CO recognized that the Employer’s 2013 payroll reports indicated that the Employer employed up to 50 temporary workers during one of its peakload months, but discounted this increase because the hours worked by the Employer’s permanent employees significantly decreased during these months. After reviewing the Employer’s documentation, the CO concluded that the Employer demonstrated a need of no more than 16 workers for the requested dates of need because the “total number of temporary workers for the first 5 months of 2012 was 16.” *Id.* In so doing, the CO recognized that the Employer employed more than 16 workers in some of the months requested during its 2012 season, but stated that the Employer “must show that [it] can support the number of workers for the full time period requested.” *Id.*³

In its application, however, the Employer provided a reasonable explanation as to why it requested a greater number of workers this year than it had in previous years: it had signed a

³ In addition, the CO relied on the fact that the letter that the Employer submitted in response to the RFI “stated there is an increase in business but identified the increase is mainly during [the Employer’s] slow season.” *Id.* Because this letter was not included in the Administrative File, it cannot be considered as a basis to justify the CO’s decision to decrease the number of workers certified in the Employer’s application.

contract with the Edgewater Beach Resort to provide housekeeping services for 530 resort condo units from March 1, 2014 through November 1, 2014. The number of units in its service agreement this year significantly exceeded the number of units in the service agreements from previous years.⁴ In both its initial application and its response to the RFI, the Employer provided a signed Service Agreement to document this alleged increase in its peakload need. AF 60-62. Neither the RFI nor the Final Determination addresses this evidence or argument. The CO's reliance on the 2012 payroll records completely disregards the fact that the Employer's business has grown since that time, and the CO did not take into account the Employer's argument that it has entered into a service agreement to clean many more units than it has in previous years.

Still, the CO has identified some inconsistencies in the Employer's payroll records, and it is not clear that the Employer has demonstrated a need for all 135 workers requested in its application. The Employer, for instance, never addressed the significant decrease in hours worked by its permanent employees during the period of requested need, despite a sharp increase in hours worked by its temporary employees. Nor did the Employer address the fact that it only employed up to 50 temporary housekeepers during its period of peakload need last year, even though it had requested and received temporary labor certification for 82 housekeeper positions.

In light of the foregoing, the Certifying Officer's Final Determination granting partial certification is hereby REVERSED, and it this matter shall be REMANDED to the Certifying Officer so that he may fully evaluate and explain the evidence presented by the Employer.

SO ORDERED.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

⁴ In 2013, for instance, the Employer contracted with Edgewater to provide housekeeping services for 376 condo units from March 1, 2013 to November 1, 2013.