



Issue Date: 08 August 2014

BALCA Case No.: 2014-TLN-00035
ETA Case No.: H-400-14165-962366

In the Matter of:

ASHLEY'S SOCCER CAMP, INC. d/b/a
THE SPORTS DOMAIN ACADEMY,
Employer.

Before: Paul R. Almanza
Administrative Law Judge

DECISION AND ORDER AFFIRMING
CERTIFYING OFFICER'S PARTIAL CERTIFICATION

This case arises from a request for review of the Certifying Officer's ("CO") decision to partially certify an application for temporary alien labor certification under the H-2B non-immigrant program. 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. *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).¹ Following the CO's partial 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 CO's Final Determination for Partial Certification is **AFFIRMED**.

¹ All citations to 20 C.F.R. Part 655, Subpart A refer to the Final Rule promulgated in 2008 ("2008 Rule"), 73 Fed. Reg. 78020 (Dec. 19, 2008), as amended by the Interim Final Rule ("2013 IFR") promulgated in 2013, 78 Fed. Reg. 24047 (Apr. 24, 2013), since the Department has postponed its implementation of the Final Rules promulgated in January 2011, 76 Fed. Reg. 3452 (Jan. 19, 2011) ("2011 Wage Rule") and February 2012, 77 Fed. Reg. 10038 (Feb. 21, 2012) ("2012 Rule"). *See* 79 Fed. Reg. 11450, 11453 (Mar. 5, 2014) (announcing that until such time as the Department finalizes a new wage methodology, the current wage methodology contained in 20 C.F.R. § 655.10(b), as set by the 2013 IFR, will remain unchanged and continue in effect); 78 Fed. Reg. 53643 (Aug. 30, 2013) (indefinitely delaying effective date of 2011 amendment); *Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (ND FL Apr. 26, 2012) (enjoining DOL from implementing or enforcing the 2012 Rule), affirmed by *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013); 77 Fed. Reg. 28764 (May 16, 2012) (announcing "the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the order in the *Bayou II* litigation").

STATEMENT OF THE CASE

On June 14, 2014, Ashley's Soccer Camp, Inc., d/b/a The Sports Domain Academy (the "Employer") submitted an application for temporary labor certification to the Department of Labor's Employment and Training Administration ("ETA"). AF 65-89. The Employer requested certification for ten Soccer Instructors to be employed from August 11, 2014, to November 16, 2014.² *Id.* AF 65. (The Employer had previously applied for, and received, certification of thirty soccer instructors to be employed from March 3, 2014, to November 16, 2014. AF 26; AF 30. I refer to this certification as the "prior certification.") In its application, the Employer provided a two page letter explaining its temporary need for these ten workers and detailing the coaching services that it provides for approximately 80 travel soccer teams plus five "intown recreational [fall-only] programs." AF 76-77. In particular, this letter explained:

As well as the recreational programs, we also see an increase in some travel teams as commitment is higher in the fall than in the spring. ... We see our work in the following programs doubled in the fall [the letter refers to two programs that go from once-a-week practices in the spring to twice-a-week practices in the fall]....

In conclusion I have provided plenty of evidence showing a peakload temporary need for the fall soccer season. The addition of the work listed above *coupled with three current staff resigning and returning to England from our initial application* [the prior certification] shows that we have an increased need for temporary soccer instructors.

AF 77 (emphasis added). In its response to the Request for Information ("RFI"), the Employer stated that:

Due to advice from the DOL we stopped asking for 40 coaches from March to November and instead use 2 applications. We know from experience that coaches leave, are fired or resign before the intended end date, which is why we used to ask for more workers. Since then we are reduced to 30 coaches from March to November, *then depending on how many leave and how much new work we get we apply for a new LCA. From our original application* [the prior certification] *earlier this year for 30 coaches, 1 coach did not show, 3 voluntarily resigned and 1 worker was released. This application for a further 10 coaches is to replace the 5 that we have lost from the original application* [the prior certification] *and 5 workers for the increase in recreational soccer work.*

AF 26 (emphasis added).

² As the CO correctly notes at page 1 of his letter brief, at two places on page 1 of the ETA Form 9142B Employer submitted, it requested certification of only five positions. At another place on page 1 of the ETA Form 9142B Employer stated it was requesting ten positions, while several other portions of the file demonstrate the Employer was requesting ten positions. See AF 1, 26, 65, 79-81. The CO determined the Employer was seeking ten positions. AF 22, 61.

On July 10, 2014, the CO issued a Final Determination for Partial Certification, stating that:

Certification is being reduced to 5 Coaches and Scouts because the employer has not established its need for 10 temporary foreign workers. Specifically, in response to the RFI, the employer provided payroll summaries for 2011 through 2014 that indicated the employer used a maximum of 29 workers. Additionally the employer recently received a certification for 30 Coaches and Scouts (H-400-13352-984744) from March 03, 2014 to November 16, 2014 [the prior certification]. In combination with the current application, the employer is asking for 40 workers. The employer stated its need for an additional 10 workers is to backfill for 5 coaches lost and 5 coaches to fulfill additional contracts. However, the loss of workers does not represent an increased need for an additional 5 workers as the employer has already received a certification [the prior certification] that accounts for these workers. Therefore, the number of workers has been reduced to 5, the number of additional workers the employer was able to justify based on evidence of additional business.

AF 22-23. The Employer timely petitioned for administrative review. AF 1-21. I issued a Notice of Docketing on July 29, 2014, providing the parties an opportunity to submit briefs on an expedited basis. On August 6, 2014, I held a conference call with Employer and counsel for the CO, primarily to inquire as to the CO's position on whether an employer can re-submit a prior certification that it had already used to obtain H-2B visas for temporary workers if it was filing a new petition to obtain visas for workers to replace those temporary workers who left employment during the period of need covered by that prior certification. The CO filed a letter brief that was received by e-mail on August 6, 2014.

DISCUSSION

Scope of Review

The scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the 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).

In this case, the Employer has submitted evidence with its request for review. The regulation is clear that a request for review "[m]ay contain only legal argument and such evidence as was actually submitted to the CO in support of the application." 20 C.F.R. § 655.33(a)(5). Accordingly, while I recognize the evidence Employer has submitted is "largely duplicative of what was already submitted," CO's Letter Brief, at 5 n.3, to the extent any of that evidence is not already a part of the record upon which the CO based his decision to partially certify the application, I cannot consider it on appeal.

The CO Correctly Determined the Employer Only Established Temporary Need for Five Workers, Not Ten

Based on the information provided in the application and in the response to the RFI, the CO correctly determined that the Employer only established a temporary need for five Soccer Instructors, not ten. The Employer adequately explained that the additional work it has for the fall season required five additional workers, and candidly stated in the response to the RFI that “[t]his application for a further 10 coaches is to replace the 5 that we have lost from the original application [the prior certification] and 5 workers for the increase in recreational soccer work.” AF 26. Accordingly, based on the information the Employer provided to the CO in its response to the RFI, it is impossible to conclude that the CO erred in finding the Employer failed to establish a temporary need for the five workers it requested based not on its well-documented increased fall workload, but rather based on its need to replace workers hired under the prior certification who left their positions with Employer. Indeed, given Employer’s statement in its response to the RFI, it is clear that the CO was correct in finding that only five of the requested ten positions were supported by Employer’s increased fall workload.

The Employer Should Consider Approaching U.S. Citizenship and Immigration Services as Recommended by the CO

In his letter brief, the CO implicitly recognizes the situation that Employer finds itself in and recommends a way forward, stating that:

While the workers [the five workers from the prior certification who left their positions with Employer] may no longer be available, the certifications [for their positions] are still active and may not be reissued under a new certification. In order to get replacement workers under these current certifications [the prior certification], *the employer would need to go back to the United States Citizenship and Immigration Services and apply through that agency to get replacement workers.* There is no increased temporary need here which would warrant the issuance of another 5 H-2B labor certifications, only a need to replace workers for which H2-B temporary labor certifications already exist.

CO’s Letter Brief, at 4 (emphasis added).³ Recognizing that I am a Department of Labor administrative law judge and have no authority concerning procedures that U.S. Citizenship and Immigration Services, a component of the Department of Homeland Security, may follow in this situation, I have no reason to question the CO’s position that the Employer should approach U.S. Citizenship and Immigration Services and apply using the prior certification for five Soccer Instructors to replace the five Soccer Instructors certified under that prior certification who left their positions with Employer.

³ During the conference call I held with counsel on August 6, 2014, counsel for the CO covered the issue I’ve quoted in italics, adding the caveat that as he did not represent U.S. Citizenship and Immigration Services, he could not state their position on the issue.

ORDER

In light of the foregoing, it is hereby **ORDERED** that CO's Final Determination for Partial Certification is **AFFIRMED**.

For the Board:

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.