

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 July 2014

BALCA Case No.: 2014-TLN-00032
ETA Case No.: H-400-14141-668532

In the Matter of:

US TRAVEL WORK AND STUDY OVERSEAS ONE CORP.,

Employer.

Appearances: Marvin Smith, *pro se.*
For the Employer

Gary M. Buff, Associate Solicitor
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Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **TIMOTHY J. McGRATH**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from the Employer's request for review before the Board of Alien Labor Certification Appeals ("BALCA") of the denial by a Certifying Officer ("CO") for the Employment and Training Administration ("ETA") of its application for H-2B temporary labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), 1184(a)(c); 8 C.F.R. § 214.2(h); 20

C.F.R. Part 655, Subpart A.¹ For the reasons set forth below, the CO's denial of temporary labor certification in this matter is affirmed.

STATEMENT OF THE CASE

On May 23, 2014, the Employment and Training Administration ("ETA") received an application for H-2B temporary labor certification from US Travel Work & Study Overseas One Corp. ("Employer") for sixty "Maids and Housekeeping Cleaners," to be employed from May 21, 2014 to November 30, 2014, for seasonal positions. (AF 73, 100).² The Employer stated "[d]uring this time of year we have a larger increase for the needs of housekeepers from the spring to fall months." (AF 100). The Employer explained "[a]fter several listing and recruiting drive[s] we have fall[en] short of our needs of [a]n additional 60 housekeepers maid[s]." (AF 114). The Employer listed the basic rate of pay offered as "From: \$9.00 To: \$17.40." (AF 104). The Employer also included statements from Sunny Days Retirement Home Corp. and EconoLodge detailing their needs for housekeeping services and noting: "We therefore hope that you expeditiously approve our request for housekeeping service on a temporary basis during the 2014 busy season from spring to fall months."³ (AF 111-112).

On May 30, 2014, the CO issued a Request for Further Information ("RFI"), notifying the Employer that its application did not comply with the requirements of the H-2B program and identifying several specific deficiencies with the application. (AF 93-99). One of the deficiencies identified by the CO in the RFI was the Employer's failure to comply with the requirements found at 20 C.F.R. § 655.21(a), requiring attestations regarding its temporary need. (AF 95). Specifically, the CO found the Employer's response "was not sufficient because the Statement of Temporary Need did not explain the nature of the temporary need based on the employer's business operations." (AF 95). The CO also determined Statement of Temporary Need "does not explain the employer's business history and activities or schedule of operations throughout the year with specificity to substantiate a need from May 21, 2014 through November 30, 2014." (AF 95).

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").

² Citations to the Administrative File will be abbreviated "AF" followed by the page number.

³ Both of the letters from EconoLodge and Sunny Days Retirement Home Corp. use essentially identical language, differentiated only by select word changes and spelling errors. (AF 111-112).

To remedy the deficiency, the CO directed the Employer to submit:

1. A description of the employer's business history and activities (i.e. primary products or services) and schedule of operations through the year; 2. An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need; and 3. An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need.

(AF 95-96).

The Employer responded to the RFI on June 16, 2014. (AF 82-92). In its response, the Employer included a duplicate copy of its ETA Form 9142 and Appendix B. (AF 82-92). The Employer did not submit any new information or documentation with its response. (AF 82-92). On June 19, 2014, the CO issued a Final Determination denying certification. (AF 73-81). The CO found the Employer failed to correct any of the five deficiencies identified in the RFI. (AF 75). Specifically, the CO found "[n]o further documentation was submitted in response to the RFI. The documentation submitted by the employer did not address the deficiency identified in the RFI. As such, the deficiency remains with the application. (AF 77).

On July 3, 2014, the Employer requested administrative review of the denial before BALCA. (AF 1-72). Employer now includes a Statement of Temporary Need, (AF 4), a pay roll report, (AF 6), invoices for services rendered to EconoLodge at 260 E. Merritt Island Causeway from March 1, 2013, through April 30, 2014, (AF 7-36), as well as various contracts between the Employer and its clients. (AF 37-50). I issued a Notice of Docketing on July 10, 2014. (AF 1-3). In the Notice of Docketing, I allowed the parties until the close of business on July 17, 2014, to file additional briefs. On July 16, 2014, the CO filed a brief requesting affirmance of the Final Determination. The Employer filed a brief in support of its position on July 17, 2014.

DISCUSSION

An employer seeking H-2B temporary labor certification must include a detailed statement of temporary need containing the following:

(1) A description of the employer's business history and activities (i.e., primary products or services) and schedule of operations throughout the year; (2) An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need; (3) An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need"

20 C.F.R. § 655.21(a). In the request for review sent to BALCA, the Employer attached a Statement of Temporary Need dated June 20, 2014, as well as contracts for services also executed in June 2014. (AF 4, 37-50). In its brief, the Employer argues it was not properly

served the RFI and therefore BALCA was the first opportunity it had to respond to the RFI and file supporting documentation. The Employer's argument is not persuasive. Even if I accept the Employer's assertion that it was not properly served the RFI, the Employer did submit a response to the RFI that was received by the CO even though it was untimely. (AF 73-81). In its response the Employer only submitted a duplicate copy of its application and appendix B. (AF 83-91). The Employer did not submit a revised Statement of Temporary Need and supporting information until after the CO's Denial and Final Determination. As such, the Employer's Statement of Temporary Need and supporting materials, sent to BALCA but not presented to the CO, are barred from consideration under the regulations. 20 C.F.R. § 655.33(a)(5) (requests for review may "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(e) ("BALCA must review a denial of temporary labor certification only on the basis of the Appeal File, the request for review, and any legal briefs submitted.").

As the Employer failed to provide a detailed Statement of Temporary Need in response to the CO's RFI pursuant to Section 655.21(b), I hereby affirm the CO's denial of the Employer's application. As the application fails for the above deficiency I need not address the CO's remaining reasons for denial.

ORDER

It is hereby **ORDERED** that the Certifying Officer's denial of the Employer's Application for Temporary Employment Certification is **AFFIRMED**.

SO ORDERED.

For the Board:

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts