

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 October 2014

BALCA Case No.: 2014-TLN-00042
ETA Case Nos.: H-400-14211-246976

In the Matter of:

TURNKEY CLEANING SERVICES GOM, LLC
Employer.

Appearances: Ashley Foret Dees
For the Employer

Jonathan H. Waxman
Vincent C. Constantino
Office of the Solicitor of Labor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

DECISION AND ORDER
AFFIRMING DENIAL OF 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 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)

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 July 30, 2014, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Turnkey Cleaning Services (“Employer”). AF 160 – 196.² Employer requested certification for 36 “Cleaners of Vehicles and Equipment” from September 27, 2014 until March 1, 2017. AF 160. Employer indicated that the nature of its need was a one-time occurrence, and explained that its need was temporary because:

Employer has a temporary need pertaining to a one-time occurrence. Employer has a need and a temporary event of short duration, pertaining to a signed contract that has created a need for temporary workers.

Employer Turnkey Cleaning Services has entered into a service agreement with LLOG Exploration Company to provide facility and dockside services at the worksite for a period of 3 years, ending on March 1, 2017. For this one-time need, employer seeks temporary foreign working to complete this specific contract.

AT. 160.

On August 5, 2014, the Certifying Officer (“CO”) issued a Request for Further Information (“RFI”) notifying Employer that its application did not comply with the requirements of the H-2B program. AF 152 – 159. The CO identified multiple deficiencies and requested further information to validate Employer’s dates of need and the number of workers required. On August 12, 2014, Employer responded to the RFI, including in its response copies of printouts of Employer’s website; an explanation of Employer’s physical and drug test requirements; copies of newspaper advertisements; a copy of Employer’s job order; an attachment to Employer’s recruitment report; and a statement of temporary need signed by Employer’s CEO and President. AF 134 – 151. In its statement of temporary need, Employer explained:

(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 References to the 196-page appeal file will be abbreviated with an “AF” followed by the page number.

Employer works with companies through Work Orders or contracts to provide the best services possible throughout the year. Employer has a work order currently active through March 1, 2017. Employer has chosen its work dates in accordance with the work order, which justifies this one-time contract for temporary foreign workers. Initial preparation and recruitment for the H-2B program, including the filing of a request for a Prevailing Wage Determination began as soon as possible after the initial of the work order. Employer Turnkey Cleaning Services has been unable to recruit or locate enough willing and able U.S. applicants for the position.

AF 144.

On August 20, 2014, the CO issued a second RFI notifying Employer of additional deficiencies in Employer's application, namely, that Employer failed to establish that its need for nonagricultural labor is temporary in nature. AF 130 – 133. Citing to 20 § C.F.R. 655.6 and 20 C.F.R. § 655.21(a), the CO stated that Employer did not include adequate attestations to establish the requested standard of temporary need. Specifically, the CO stated:

The employer has demonstrated that it is a year-round Industrial Cleaning Services company and it is unclear how the need for the submitted work order differs from other work orders/contracts that are within the scope of the business operations and services. The submitted work order indicates the term of services is for a period of 3 years commencing on or about March 1, 2014; however, once the end date of need has passed, it is unclear how the employer can establish it will not need Cleaners of Vehicles and Equipment for future work orders/contracts. Therefore, it is unclear that the employer has a temporary need for the 36 Cleaners of Vehicles and Equipment from September 27, 2014 through March 1, 2017.

AF 133. To remedy this deficiency, the CO instructed Employer to provide further explanation regarding the differences between the current contract and Employer's previous contracts and the scheduled milestones for the project. The CO also requested that Employer explain how it knew that, after this contract is completed, it will not need workers to fill these positions in future contracts. AF 133.

Employer responded to the second RFI on August 28, 2014. AF 22 – 129. Included in this response were multiple Master Service Agreements, a Certificate of Liability Insurance, a W-9 Tax Form, the current contract, and a statement addressing the temporary need deficiency. *Id.* In response to the stated deficiencies, Employer explained that the current contract differed from contracts Employer normally performs in that it is "much larger in its scope and size than previous contracts that employer has entered into." AF 22. Furthermore, Employer maintains "an otherwise permanent employment situation, but has a temporary event of short duration, which is a huge contract in terms of size and scope and this Work Order has created the need for temporary workers." *Id.* Employer also provided that it has not signed additional long term contracts at this time. *Id.*

After reviewing the documentation that Employer submitted in response to the RFI, the CO concluded that Employer failed to establish a one-time need for the positions in the application. Consequently, on September 5, 2014, the CO issued a final determination denying the requested certification. AF 17 – 21. On September 11, 2014, Employer requested administrative review of the denial. AF 1 – 16.

DISCUSSION

Pursuant to DHS regulations, temporary labor consists of any job in which the employer's need for the duties to be performed by the workers is temporary, regardless of whether the underlying job can be described as permanent or temporary. 8 C.F.R. § 214.2(h)(6)(ii)(A). Employment is of a temporary nature when the employer will need the services or labor only for a limited period of time. 8 C.F.R. § 214.2(h)(6)(ii)(B). Accordingly, an employer must establish that its need for the services or labor “will end in the near, definable future.” *Id.* Generally, that period of time will be limited to one year or less, but in the case of a one-time event the period could last up to three years. *Id.*

In order to obtain certification, the petitioning employer must demonstrate that its need for the services or labor identified in the application qualifies as a temporary need under one of the following four standards: a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B). To qualify under the one-time occurrence standard of temporary need, the employer “must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

In the present case, Employer aims to satisfy the one-time occurrence standard for temporary need by presenting evidence to distinguish this particular contract from previous contracts. Employer argues that this is “the only contract of its kind that Employer maintains and for which Employer seeks to supplement its staff on this one-time basis,” and that it merely “seeks to supplement its staff for specific job duties, during a specific time period with a definable end date – March 2017.” Employer further argues that the instant contract can be distinguished from previous contracts by the fact that additional and more detailed job duties are included than in normal cleaning service contracts, and that Employer does not maintain other contracts with required minimum amounts of work to be performed.

Employer's arguments fall short of establishing that the nature of its need is temporary. Under the first prong of the one-time occurrence standard, Employer fails to establish that it will not need to employ Cleaners of Vehicles and Equipment in the future. As the CO found, Employer has employed such Cleaners in the past and has not presented evidence to show that its need for such workers will cease after the completion of this contract. While Employer details the differences between the instant contract and previous contracts, Employer has not presented evidence to suggest that the contract will be distinct and unique from future contracts.

Under the second prong of the one-time occurrence standard, Employer similarly fails to demonstrate how the contract represents a temporary event of short duration. Employer has provided the dates of service assigned to this particular order for work, but it provided no indication that the circumstances which led to the shortage of required workers will change following those dates. While the instant contract may end in March 2017, Employer has not presented evidence or argument to convince the undersigned that Employer's need will not continue past the contract's end date. Where the nature of Employer's business is to contract to provide services on a project and then move on to another project, the fact that this particular contract may be larger and cover more detailed services than previous contracts does not by itself indicate that the need for such labor will be limited to a one-time occurrence. Employer therefore fails to provide the undersigned with any basis to find that the contract represents anything other than a growth in its business.

In light of the foregoing discussion, the CO's denial of certification is hereby **AFFIRMED**.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Washington, D.C.
WSC:wfh