



ISSUE DATE: 19 OCTOBER 2015

BALCA CASE NO: 2015-TLN-00057

ETA CASE NO: NUMBER: H-400-15057-318800

In the matter of:

ABSOLUTE HOME CARE LLC

Decision and Order Affirming Denial of Certification

Absolute Home Care LLC (“Absolute”) objects to the Certifying Officer’s denial of an application for temporary alien labor certification it submitted under the H–2B visa program. It seeks to temporarily bring 20 foreign nationals into the United States to work during a nine month period from October 1, 2015 through June 30, 2016. They would work in the greater Chicago area for Absolute as home health aides. The Certifying Officer first offered Absolute the opportunity to correct its application’s deficiencies. A final denial was issued on August 27, 2015.

This proceeding at the Board of Alien Labor Certification Appeals (“BALCA”) reviews the Certifying Officer’s action.¹ A judge may affirm a denial, direct the Certifying Officer to grant the application, or remand the matter for more action.² Absolute requested an administrative review of the Certifying Officer’s denial. A review is limited to the record made before the Certifying Officer. Counsel for Absolute, at a prehearing conference on Monday, October 5, 2015, said that his letter requesting administrative review dated September 10, 2015 detailed Absolute’s position, and no further filing would be offered on Absolute’s behalf.

¹ 20 C.F.R. § 655.33(a) (authorizing review).

² 20 C.F.R. § 655.33(e).

A. Labor Certifications by the Secretary of Labor

The H-2 labor program that regulates the temporary admission and employment of non-immigrant foreign workers, first created in the Immigration and Nationality Act of 1952 (“INA”),³ as amended, split into two distinct programs in 1986. The program for agricultural workers is not involved here. This application sought labor certification from the Secretary of Labor, under § 101(a)(15)(H)(ii)(b) of the INA,⁴ for non-agricultural workers.⁵

Labor certification is a precondition for an alien worker to obtain H-2B immigration status from the Department of Homeland Security.⁶ The H-2B visa classification for a temporary worker not employed in agriculture admits a foreign worker to the United States who has “a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other [than agricultural] temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in the country.”⁷

Section 214(c)(1) of the INA, as amended,⁸ requires that an employer petition the Department of Homeland Security to classify a prospective temporary worker as an H-2B non-immigrant. Adjudication of that petition allows the worker to obtain an H-2B visa from the Secretary of State.

U.S. Citizenship and Immigration Services (“USCIS”) is the component within the Department of Homeland Security that adjudicates petitions for H-2B status.⁹ Section 214(c)(1) of the INA¹⁰ requires the Secretary of Homeland Security to consult with “appropriate agencies of the Government” about its H-2B decisions.¹¹ The Secretary of Homeland Security consults with the Secretary of Labor because the Department

³ 8 U.S.C. § 1101, et seq.

⁴ Codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

⁵ H.R. Rep. No. 99-682, pt. 1, at 80; see also Immigration Reform and Control Act of 1986, Pub. Law No. 99-603, § 301(a), 100 Stat. 3359, 3411 (codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a)).

⁶ 8 U.S.C. § 1184(c)(1); 8 C.F.R. § 214.2(h)(6)(iii) (2009).

⁷ 8 U.S.C. § 1101(a)(15)(H)(ii)(b); see also 8 C.F.R. § 214.2(h)(1)(ii)(C).

⁸ Codified as 8 U.S.C. § 1184(c)(1).

⁹ See 8 C.F.R. § 214.2(h)(6) et seq.

¹⁰ 8 U.S.C. 1184(c)(1).

¹¹ 8 U.S.C. § 1184(c).

of Labor is in the best position to advise Homeland Security on whether “unemployed persons capable of performing such service or labor cannot be found in this country.”¹²

The Secretary of Homeland Security and the Secretary of Labor have jointly determined¹³ that the best way to consult is to require that, before an employer files an H–2B petition at Homeland Security, it must first obtain a temporary labor certification from the Secretary of Labor.¹⁴ Certification by the Secretary of Labor shows:

1. that the employer has made unsuccessful efforts to recruit a U.S. worker for the job it seeks to admit an H–2B worker to perform, and
2. each H–2B worker, and any U.S. worker the employer successfully recruits for the work, will be paid no less than the prevailing wage for that work in the geographic area of the job, a wage level the Secretary of Labor sets.¹⁵

The Secretary of Labor thereby assures USCIS that U.S. workers capable of performing the services or labor are unavailable, and admission of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers.

B. Specific Issue

The central issue in this denial is whether Absolute demonstrated a seasonal need, which makes the need for workers temporary, rather than permanent. Except in circumstances this application does not present, the maximum period an H–2B non-immigrant may be authorized to work is nine months. This application sought the full nine months, claiming a seasonal need for all nine, from October to June. The application stated that in all but the summer months—when students seek short term work—fewer workers [than it needs] are available, so Absolute wants to “turn to foreign sources of labor to fill its staffing needs.” The specific justification was that “higher levels of depression, isolation and

¹² See WAGE METHODOLOGY FOR THE TEMPORARY NON-AGRICULTURAL EMPLOYMENT H–2B PROGRAM, PART 2, published at 78 Fed. Reg. 24047, 24048 (Apr. 24, 2013), *relying on*, 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

¹³ See 78 Fed.Reg. at 24048 (Apr. 24, 2013).

¹⁴ 8 C.F.R. § 214.2(h)(6)(iii)(A).

¹⁵ 78 Fed. Reg. 24047, 24048; 8 C.F.R. § 214.2(h)(6)(iv)(A).

illness” that clients experience during these nine months “heighten[] the need for additional care services.” No opinion from a health care provider plausibly supported or explained that statement. I’m not certain plausibility would be enough, but Absolute did not show even that.

The Certifying Officer determined the application only demonstrated a shortage of labor, not that the need is “temporary and not permanent in nature.”

C. Temporary need

The definition of temporary services and how to meet it is found in the Department of Homeland Security regulations.¹⁶

Temporary services or labor—(A) Definition. Temporary services or labor under the H-2B classification refers to any job in which the petitioner’s need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) Nature of petitioner’s need. Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner’s need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

(1) One-time occurrence. The petitioner 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.

(2) Seasonal need. The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner’s permanent employees.

(3) Peakload need. The petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the

¹⁶ 8 C.F.R. § 214.2(h)(6)(ii)(A), (B)(1)-(3).

temporary additions to staff will not become a part of the petitioner's regular operation.

The Secretary of Labor's regulations require an adjudicator to deny an application (unless based on a one-time occurrence) where the employer has a need lasting more than 9 months.¹⁷

D. Arguments by Absolute

Absolute contends in its request for review that it has a seasonal need. Absolute did show it served substantially more clients in the 2014 winter months of January, February, and March (12 to 17 clients), than in the summer months of July August and September (3 to 8 clients).

The application never explains cogently why Absolute needs 20 foreign workers, instead of, say, 40, or as few as 1. The months in 2014 Absolute placed the most home health care aides were January, February, and March. I infer 20 is the number of positions Absolute hopes it might fill if it had foreign workers for even nine months, not the number of workers that would satisfy a seasonal need. The application doesn't actually describe a seasonal need, but instead a labor shortage.

Absolute's criticism that the Certifying Officer puts the cart before the horse actually strengthens the Officer's position. Absolute says it can't be expected to show contracts for 20 (or implicitly any other number of positions foreign workers could fill) because no client would contract with Absolute without assurance that Absolute could live up to its part of the bargain and deliver the workers. This looks like an ongoing business opportunity to place more workers than Absolute has, not a seasonal need. One of the potential clients it relies on is a hospice agency in the Chicago area (found among the contracts in Absolute's Ex. 7). Nothing in the application shows the number of patients who need home health services as one aspect of their overall need for hospice care is in any way seasonal. People become terminally ill without regard to season, so far as I know. This application certainly shows no nine-month hospice season.

At best the application submitted shows more need for home health services in 2014 during the Chicago area's coldest months (January February or March). It doesn't show a need during a nine-month period or season. Nor does Absolute show

¹⁷ 20 C.F.R. § 655.6(b).

why 20 is an appropriate number of non-immigrants to admit to the United States to fulfill that need.

Order

The decision of the Certifying Officer is affirmed.

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California