



Issue Date: 30 April 2015

In the Matter of:

CLEOPATRA TRUCKING, LLC.
Employer.

BALCA Case No.: 2015-TLN-00041
ETA Case Nos.:H-400-15035-835064

Appearances: G. Antonio Anaya
For the Employer

Jeffrey L. Nesvet
Jonathan R. Hammer
Office of the Solicitor of Labor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Daniel F. Solomon**
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 to hire foreign workers under this program must apply for and receive a “labor certification”

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”).

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 February 4, 2015, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Cleopatra Trucking, LLC (“Employer”). AF 85-92.² Employer requested certification for 150 “Commercial Truck Drivers” from May 8, 2015 until December 31, 2015. AF 85. Employer indicated that the nature of its need was seasonal, and explained that its need was temporary because:

The long-distance trucking industry is highly seasonal. Each year, business slows down significantly during the first fiscal quarter of the year (Jan. – March) and then begins to increase every April, peaking in December. Attached is a graph of the annual business cycle of Applicant for March, 2013 through December, 2014, clearly showing this trend. The seasonal need is consistent every year – the second, third and fourth quarters are far busier than the first quarter. This annual, seasonal cycle is also supported by the annual revenue reports of numerous other long-distance trucking companies, including UPS, Old Dominion, Con-Way, Inc., Swift Transportation Co. and Pacer.

AF 85.

On February 10, 2015, 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 65-74. The CO identified multiple deficiencies and requested further information to validate Employer’s dates of need and the number of workers required. On February 12, 2015, Employer responded to the RFI, including in its response a written explanation regarding RFI deficiencies; affidavit of Michael G. Wessa on behalf of Cleopatra Trucking, LLC DBA USXpedited, LLC; affidavit of Rodney C. Harvey on behalf of Cleopatra Trucking, LLC DBA USXpedited, LLC; copy of company log of company hours and trucks; payroll for 2013 and 2014 for Cleopatra Trucking, LLC DBA USXpedited, LLC; copy of an incomplete ETA Form 9141; copy of the job order; copies of newspaper advertisements published in the Columbus Dispatch; copy of the advertising receipts for the Columbus Dispatch; and revised recruitment report. AF 25-63.

After reviewing the documentation that Employer submitted in response to the RFI, the CO concluded that Employer 1) failed to provide adequate documentation of the number of workers needed, 20 C.F.R. §§ 655.239b), 655.22(n); 2) did not obtain a prevailing wage determination from the National Prevailing Wage Center (NPWC), 20 C.F.R. §§ 655.15(d); 3)

² References to the 94-page appeal file will be abbreviated with an “AF” followed by the page number.

did not include the correct end date of the job opportunity and wage in the newspaper advertisements and job order, 20 C.F.R. §§ 655.15(d), (f), 655.179d), (g); and 4) did not demonstrate that the job requirements are normal and accepted in the field. AF 15. Consequently, on March 24, 2015, the CO issued a final determination denying the requested certification. AF 15 – 23. On April 1, 2015, Employer requested administrative review of the denial. AF 1 – 4.

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). The Labor Department's H-2B regulations refer to the Department of Homeland Security regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B) for the definition of temporary need. 20 C.F.R. § 655.6(b). That regulation provides:

(ii) *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.

In the present case, employer argues that the CO incorrectly determined that the documentation submitted failed to support the requested number of works. The employer argues that the CO failed to consider the affidavit of Michael G. Wessa that establishes the temporary need for the number of workers requested. AF 1. Employer also argues that it contacted the Chicago NPC about the prevailing wage and submitted the ETA Form 9141. AF 2. Furthermore, in regards to the different ending dates in the job order, advertisements, and ETA Form 9142, employer stated:

Applicant completed the job order, putting in an end date 8 months from the first date of need, namely, February 8, 2016. By the time the advertisements were requested, that end date had moved to February 8, 2016. By the time the advertisements were requested, that end date had moved to February 16, 2016. However, when the Form 9142 was completed, Applicant realized that the end of the peak season of need ended on December 31, 2015, and that it

would be inappropriate to have temporary employees beyond the end of the period of the peak need.

Finally, employer argues that Mr. Wessa's affidavit makes clear that Applicant's insurance carrier mandates 24 months of experience and "it would be unreasonable to believe that the insurance requirements of Applicant are so different from other companies as to say that this qualification is not required by non-H-2B employers in the same or comparable occupations." AF 4.

First, the employer's arguments fail to establish that it has a bona fide need for 150 workers. The employer's affidavit only claims and does not demonstrate that it will receive a certain percentage of the available work and that it will need 150 workers to cover the work it receives. Moreover, the employer's payroll summary shows that the maximum number of drivers it has employed is 50 and it usually employs less. AF 50. This suggests that the employer has not previously received the work it claims it will receive. Second, although the employer submitted ETA Form 9141, it did not include the PWD that it was required to obtain from the NPWC. AF 9-10. Thus, the employer failed to demonstrate that it is offering the prevailing wage. Third, although employer explained why the duration of need was different throughout the application process, this does not remedy the deficiencies. Moreover, because the employer did not obtain a PWD, the employer cannot show that the newspaper advisements and job order contained the correct wage information for the job opportunity. Lastly, the BALCA looks to the experience requirements listed in the O*Net to determine what is "normal and accepted." In cases where the experience requirements are greater than those required by the O*NET classification, the burden is on the employer to show that its requirements are normal and accepted; and the burden requires more than a mere assertion, without supporting facts. See Lodoen Cattle Company, 2011-TLC-109 (Jan. 7, 2011), citing Carlos Uy III, 1997-INA-304 (Mar. 3, 1999). The employer merely states that its requirement is normal in the occupation but does not provide evidence supporting this assertion.

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

For the Board:

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE