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BALCA Case No.: 2015-TLN-00026
ETA Case No: H-400-15012-725656

**IN THE MATTER OF:
Masse Contracting, Inc.,
Employer**

Before: Drew A. Swank
Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary non-agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A. The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States “if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). For the reasons set forth below, the undersigned affirms the Certifying Officer’s denial of temporary labor certification.

STATEMENT OF THE CASE

H-2B Application

On January 12, 2015, Masse Contracting, Inc. (“Employer”) filed an H-2B *Application for Temporary Employment Certification* for the job title of “fitters.” AF-40.¹ More precisely, Employer indicated that it had contracted to convert a pier into a ship berth in Houma, Louisiana from March 1 – December 22, 2015 and required forty fitters to help complete the project. AF-40. Employer stated that the requested labor was a “peakload need.” AF-40. In its “Statement of Temporary Need,” Employer stated that temporary foreign workers were necessary because “our permanent crew is busy working in our regular projects” and “in order to complete it [the ship berth project] on the allotted time, much labor help is necessary...” AF-40. Employer then filed a job order with the Louisiana Workforce Commission and published advertisements for the available positions in a local newspaper on November 23 – 24, 2014. AF-44. In an attached recruitment report, Employer identified nineteen U.S. individuals who applied for the positions but were not hired because they did not attend their scheduled interviews. AF-54-59.

¹For purposes of this opinion, “AF” stands for “Appeal File.”

Request for Further Information

On January 16, 2015, the Certifying Officer (“CO”) issued a Request for Further Information (“RFI”), notifying Employer that the CO could not render a final determination on its application because Employer did not comply with all application requirements. AF-35-36. The CO identified three deficiencies. First, the CO found that Employer failed to comply with 20 C.F.R. § 655.17(a), which requires an employer to issue advertisements with the employer’s name and contact information so that job applicants can submit resumes directly to the employer. AF-32. Employer’s advertisements told applicants to “apply at the Terrebonne Career Solutions Center,” not directly to Employer. AF-32. To remedy this deficiency, the CO asked Employer to provide evidence that it published advertisements before submitting its *Application for Temporary Employment Certification* that instructed applicants to send resumes directly to Employer. AF-32.

Second, the CO found that Employer failed to establish that it had a “temporary” employment need, as required by 20 C.F.R. 655.21(a). AF-32-33. According to the CO, Employer’s “Statement of Temporary Need” did not adequately explain why the requested foreign workers would be “temporary.” AF-33. Further, Employer failed to show how the requested workers would satisfy a “peakload need,” given that they were only needed for a single project. AF-33. To remedy this deficiency, the CO instructed Employer to review its chosen standard of temporary need, provide an updated “Statement of Temporary Need,” and submit additional evidence to support its chosen standard of temporary need. AF-34.

Finally, the CO requested that Employer confirm its status as a job contractor. AF-35. Employer had provided inconsistent information regarding whether it was an “individual employer” or a “contractor.” AF-35. To remedy this deficiency, the CO instructed Employer to submit additional information to clarify its status.² AF-36-37

Employer’s Response

On January 19, 2015, Employer issued a written response to the CO to address the deficiencies outlined in the RFI. AF-13-16. First, Employer acknowledged that its newspaper advertisements instructed applicants to apply to the Terrebonne Career Solutions Center. AF-13. Employer asserted, however, that it directly manages this application system and immediately receives an e-mail each time a resume or application is submitted. AF-13. Next, Employer argued that it had established a “peakload need” because Employer had shown that it contracted to perform the ship berth project in Houma, Louisiana from March 1 – December 22, 2015. AF-14. According to Employer, it could not complete this project unless temporary foreign employees were approved. AF-14. Finally, Employer asserted that it normally experiences a “slowdown” during the winter months, meaning that it cannot retain enough permanent employees to complete the ship berth project. AF-14. Consequently, Employer contended that temporary foreign workers were required to perform the project. AF-14.

²In its response to the CO, Employer stated that it is an “employer” because it interviews, hires, pays, and supervises its own employees. AF-15. Employer’s response resolved this issue, and the undersigned need not address it any further.

Final Determination

On February 10, 2015, the CO issued a final determination and denied Employer's application for foreign labor certification because Employer failed to establish that:

- (a) there are not sufficient numbers of qualified U.S. workers who are available for the job opportunity which temporary labor is sought; and/or
- (b) the employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.

AF-6.

More precisely, the CO found no evidence that Employer experienced a "slow-down season" during the winter months. AF-11. Employer also failed to show that it regularly employs permanent construction laborers in the area of intended employment, as required for a "peakload need." AF-11. Moreover, Employer did not provide additional contracts, work agreements, invoices, payroll, or other documentation to justify Employer's requested need. AF-11. Finally, the CO stated that Employer did not comply with the regulations regarding advertising because it instructed applicants to submit applications to the Terrebonne Career Solutions Center, not directly to Employer. AF-12.

Appeal

On February 17, 2015, Employer submitted a request for review to the Board of Alien Labor Certification Appeals ("BALCA"). AF-1. In support of its appeal, Employer argued that the CO did not adequately explain why Employer's "Statement of Temporary Need" was insufficient to establish a temporary labor need. AF-2. Employer also asserted that it supplied human resources and payroll reports to show its need for temporary labor at the place of employment. AF-2. Employer also argued that it had satisfied all applicable advertising requirements. AF-3. Although Employer directed applicants to apply through the Terrebonne Career Solutions Center, this location offered a "one stop" job application system and notified Employer each time a new application was submitted in the LAWorks HIRE website or Louisiana Workforce Center. AF-3. Employer also managed and controlled the application system, so a job seeker was essentially applying directly to Employer when it submitted an application or resume to the Terrebonne Career Solutions Center. AF-4. Finally, Employer asserted that its application should be certified because BALCA had approved applications in other situations even when applicants were instructed to apply through the LAWorks HIRE website or Louisiana Workforce Center. AF-4. Thus, in the name of fairness, Employer's application should also be approved. AF-4.

BALCA Adjudication

On February 19, 2015, BALCA received Employer's appeal. The case was assigned to the undersigned on February 25, 2015. On March 2, 2015, the undersigned issued a "Notice of Docketing," which permitted the parties to file briefs within five business days after receiving the appeal file or by March 11, 2015, whichever was earlier. On March 4, 2015, the undersigned received the Appeal File. However, on March 13, 2015, the undersigned issued an order notifying the parties that the case had been stayed until further notice because the United States District Court for the Northern District of Florida had vacated the regulations governing the H-2B visa program.³ On March 20, 2015, Acting Chief Administrative Law Judge and Acting Chair of BALCA Stephen R. Henley issued an order lifting the stay on all H-2B visa cases currently under consideration. Per Judge Henley's instructions, the undersigned issued an order on March 23, 2015 lifting the stay on this case. This order also informed the parties that they could file briefs no later than March 27, 2015.

On March 27, 2015, Jeffrey L. Nesvet, an Associate Solicitor for Employment and Training Legal Services, filed a brief on behalf of the CO. He argued that the CO properly denied Employer's application for temporary labor certification because Employer did not comply with the pre-filing advertisement requirements and did not establish a temporary peakload need for H-2B workers. Employer did not file a brief.

SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer's request for review, which may only contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.33(e). After considering this evidence, BALCA must take one of the following actions:

- (1) Affirm the CO's denial of temporary labor certification,
- (2) Direct the CO to grant temporary labor certification, or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.33(e)(1)-(3).

ISSUES

Two issues must be resolved in order to determine whether Employer should be granted temporary labor certification for the requested foreign workers:

³Specifically, on March 4, 2015, the United States District Court for the Northern District of Florida held that the regulations governing the H-2B program – commonly called the "2008 Regulations" – must be vacated because the DOL lacked the authority to promulgate the regulations. *Perez v. Perez*, Case 3:14-cv-00682-MCR-EMT Document 14 (N.D. Fla. 2015). Two weeks later, the court issued an order staying its decision to vacate the 2008 Regulations until April 15, 2015 so that the DOL and Department of Homeland Security could craft a new joint interim final rule to govern the H-2B program. *Perez v. Perez*, Case 3:14-cv-00682-MCR-EMT Document 19 (N.D. Fla. 2015). Accordingly, the undersigned has the authority to decide this matter under the 2008 Regulations.

- (1) Do Employer's newspaper advertisements from November 23 – 24, 2014 satisfy 20 C.F.R. § 655.17(a), which requires that all advertisements contain "the employer's name and appropriate contact information for applicants to send resumes directly to employer?"
- (2) Has Employer demonstrated that it has a "peakload need" for temporary foreign workers, as defined by 8 C.F.R. § 214.2(11)(B)(3)?

APPLICABLE LAW

A CO may only grant an employer's H-2B application if there are not enough available domestic workers in the United States who are capable of performing the temporary labor at the time the employer files its application for certification. 8 U.S.C. § 1101(a)(H)(ii)(b); *Burnham Companies*, 2014-TLN-29 (May 19, 2014). Consequently, before filing an *Application for Temporary Employment Certification*, employers must satisfy certain pre-filing recruitment steps designed to inform American workers about the job opportunity. *J & J Pine Needles, LLC*, 2015-TLN-00002 (Nov. 14, 2014). Specifically, among other things, an employer must publish two print advertisements that provide "the employer's name and appropriate contact information for applicants to send resumes directly to the employer." 20 C.F.R. § 655.15(d)(3); 20 C.F.R. § 655.17(a).

Federal regulations also state that the job opportunity subject to the H-2B labor certification application must be "a bona fide, full-time temporary position." 20 C.F.R. § 655.22(h). An employer bears the burden of demonstrating that its need for non-agricultural labor or services is "temporary" in nature. 20 C.F.R. § 655.21(a). The employer's need is considered temporary if it qualifies as either a "one-time occurrence," "seasonal need," "peakload need," or an "intermittent need," as defined by the Department of Homeland Security. 8 C.F.R. 214.2(h)(6)(ii)(B); 20 C.F.R. 655.6. A "peakload need" occurs when the employer "needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand" and can establish that "the temporary additions to staff will not become a part of the petitioner's regular operation." 8 C.F.R. § 214.2(11)(B)(3).

DISCUSSION

The undersigned finds that Employer has failed to satisfy the advertising requirements contained at 20 C.F.R. § 655.17(a). Additionally, Employer has failed to demonstrate that it has a "peakload need" for labor, as defined by 8 C.F.R. § 214.2(11)(B)(3). Accordingly, for the reasons that follow, the undersigned affirms the CO's denial of the temporary labor certification.

Advertising Requirements

First, Employer failed to prove that it met the advertising requirements contained at 20 C.F.R. § 655.17(a). The plain language of 20 C.F.R. § 655.17(a) states that all advertisements must provide "the employer's name and appropriate contact information for applicants to send resumes *directly* to the employer." (emphasis added). Here, Employer's advertisements from November 23 – 24, 2014 did not provide its contact information so that applicants could apply

directly to the company. Instead, the advertisements instructed job seekers to contact the Terrebonne Career Solutions Center in order to submit a resume or application.

Employer argues that although its newspaper advertisement instructed applicants to apply through the Terrebonne Career Solutions Center, this location offered a “one stop” job application system and notified Employer each time a new application was submitted. AF-3. Further, Employer claims that it manages and controls the application system, so an applicant was essentially applying directly to Employer when it contacted the Terrebonne Career Solutions Center. AF-4. Employer’s argument, however, does not comply with the plain language of 20 C.F.R. § 655.17(a) or recent BALCA decisions addressing this very issue.⁴ For instance, in *Quality Construction & Production LLC*, an employer requested seventy-four fitters from August 3, 2009 – May 28, 2010. 2009-TLN-00077 (Aug. 31, 2009). The employer then issued two newspaper advertisements that instructed applicants to apply at “Lafayette Career Solutions.” *Id.* at 2. The CO denied the employer’s application, finding that it failed to comply with the plain language of 20 C.F.R. § 655.17(a). *Id.* at 3. BALCA affirmed on appeal, also holding that the employer failed to comply with the plain language of the regulations because the advertisements did not provide the employer’s contact information so that applicants could apply directly to the employer rather than through “Lafayette Career Solutions.” *Id.* at 4-5.

BALCA reached a similar ruling two months later in *East Bernstadt Cooperate Inc.* 2010-TLN-00004 (Oct. 30, 2009). In *East Bernstadt*, an employer submitted an application for fifty production workers from October 1, 2009 – June 30, 2010. *Id.* at 1. To announce the job opportunity, the employer published a newspaper advertisement that identified the employer by name and city and told applicants to “apply at the nearest one-stop career center.” *Id.* at 2. The CO denied temporary labor certification because the employer failed to demonstrate that it had provided “appropriate contact information for applicant to send resumes directly to the employer.” *Id.* On appeal, BALCA found that the CO properly denied the employer’s application because the employer failed to provide its contact information so that applicants could apply directly to the company rather than through a state agency or job center. *Id.* at 3-4.

As in *Quality Construction* and *East Bernstadt*, Employer in this case instructed applicants to apply through a third party – the Terrebonne Career Solutions Center – and did not provide applicants with its contact information so that they could submit resumes or applications directly to Employer. The undersigned thus finds that Employer failed to comply with the plain language of 20 C.F.R. § 655.17(a), which requires an employer to provide its “name and appropriate contact information for applicants to send resumes *directly* to the employer.” (emphasis added). Accordingly, the CO properly found that Employer did not meet the advertising requirements under 20 C.F.R. § 655.17(a).

Peakload Need

The undersigned also finds that Employer has failed to establish a “peakload need” for temporary foreign labor. To demonstrate a “peakload need,” an employer must show, in part, that it “needs to *supplement its permanent staff at the place of employment* on a temporary basis

⁴The two BALCA decisions discussed, *infra*, are not binding on the undersigned but are highly persuasive, given that the factual scenarios and legal issues in those cases are very similar to the matter before the undersigned.

due to a seasonal or short-term demand.” 8 C.F.R. § 214.2(11)(B)(3) (emphasis added). The CO found, *inter alia*, that Employer did not demonstrate a “peakload need” because it failed to show that it regularly employs permanent construction workers at the job site in Houma, Louisiana. AF-11-12.

The undersigned agrees with the CO’s interpretation of 8 C.F.R. § 214.2(11)(B)(3). Before showing that foreign workers are needed to “supplement” permanent employees at a job site, an employer must first establish that members of its permanent staff will be working at that job site. In other words, if permanent workers are not employed at a specific job site, temporary foreign workers cannot possibly “supplement” them at that location, as required for a “peakload need” under 8 C.F.R. § 214.2(11)(B)(3).

In this case, Employer has failed to present sufficient evidence demonstrating that members of its permanent staff will be working at the job site in Houma, Louisiana. Specifically, Employer’s “Statement of Temporary Need” stated the following, *inter alia*, to explain why it had a “peakload need” for temporary foreign workers:

All year Masse Contracting, Inc. works on a variety of projects in different states...We are now currently doing jobs along the East Coast in New Jersey, New York, Rhode Island and North Carolina as well as in Iowa, Minnesota, and Ohio. *Our permanent crew is busy working in our regular projects.* Luckily, this year we were able to attain a very good and profitable contract in the area of Houma, LA. However, in order to accomplish and thus, complete our project an increase in manpower is vital. This project is estimated to use 800,000 work man hours. In order to complete it on the allotted time, much labor help is necessary and it is key for our success. (emphasis added).

AF-40.

The CO found that this statement did not adequately explain why the requested foreign workers would satisfy a “peakload need” and asked Employer to provide additional information. AF-34. In its response, Employer provided the following explanation to explain why it had a “peakload need:”

Masse Contracting Inc. does not currently have the numbers of workers required to achieve this contract agreement. At all times, Masse Contracting Inc., has its permanent staff working in different projects and areas throughout the United States. *Our permanent staff will be completing other tasks and activities that coincide with this specific project.* So in this case, and in order to meet obligations specified in our agreement with Suncoast, we must seek the support of temporary labor because this area has a proven shortage of workers. (emphasis added)

AF-14.

Employer bears the burden of demonstrating its need for temporary labor, and these statements, as well as the rest of the Appeal File, do not establish that Employer’s permanent

staff will be working at the job site in Houma, Louisiana. 20 C.F.R. § 655.21(a). Instead, Employer states that its permanent staff is “busy working in our regular projects” and “will be completing other tasks and activities that coincide with this specific project.” AF-40; AF-14. At best, Employer’s statements are ambiguous in showing whether permanent employees will be employed at the Houma, Louisiana job site. At worst, they indicate that Employer’s permanent staff is engaged in other projects around the country and that the entire project in Houma, Louisiana will be performed by temporary foreign workers. Accordingly, the undersigned finds that Employer has not met its burden of demonstrating that its need for non-agricultural labor or services is “temporary” in nature and affirms the CO’s denial of temporary labor certification.

CONCLUSION

Employer has failed to satisfy the advertising requirements contained at 20 C.F.R. § 655.17(a) because it did not provide job applicants with its contact information so they could apply directly to Employer. Moreover, Employer has not established that it has a “peakload need” for temporary labor because it has not demonstrated that temporary foreign workers are needed to “supplement” permanent workers at the job site in Houma, Louisiana. Accordingly, the CO’s decision to deny Employer’s application for temporary foreign workers must be affirmed.

ORDER

IT IS HEREBY ORDERED that the Certifying Officer’s Decision is **AFFIRMED**.

DREW A. SWANK
Administrative Law Judge