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BALCA Case No.: 2015-TLN-00027
ETA Case No: H-400-15012-056246

**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, I affirm 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 “construction worker.” AF-45.¹ More precisely, Employer stated that it had been awarded a contract to convert a pier into a ship berth in Houma, Louisiana from March 1 – December 22, 2015 and required fifty construction workers to help complete the project. AF-45. Employer indicated that the requested labor was a “peakload need.” AF-45. 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-45. 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-59. In an attached recruitment report, Employer identified twenty-three U.S. individuals who applied for the positions but were not hired because

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

they did not attend their scheduled interviews or did not possess the necessary qualifications. AF-59-65.

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-30-31. The CO identified four deficiencies. AF-37-42. 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-37. Employer’s advertisements told applicants to “apply at the Terrebonne Career Solutions Center at 807 Barrow Street, Houma LA 70360,” not directly to Employer. AF-37. To remedy this deficiency, the CO asked Employer to provide proof that it published advertisements prior to submitting its *Application for Temporary Employment Certification* that instructed applicants to send resumes directly to Employer. AF-37.

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-37-38. According to the CO, Employer’s “Statement of Temporary Need” did not adequately explain why Employer had a temporary need for labor. AF-38. Further, Employer failed to show how the requested workers would satisfy a “peakload need,” given that the workers were only needed on a single project. AF-38. The CO also found that Employer failed to provide sufficient evidence that it employed full-time, permanent construction workers at the job site in Houma, Louisiana. AF-38. 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-38-40.

Third, due to some conflicting information in Employer’s application, the CO stated that it was unable to determine whether Employer qualified as a “job contractor” under 20 C.F.R. § 655.4. AF-40. To remedy this deficiency, the CO requested that Employer answer a series of questions and clarify its business structure.² AF-41.

Finally, the CO found that Employer failed to provide a complete and accurate application under 20 C.F.R. § 655.20(a) because it indicated that it needed temporary “fitters” in Section F of the application but stated that it required “construction workers” on Section B of the application. AF-42. To remedy this deficiency, the CO instructed Employer change Section F from “fitters” to “construction workers.”³ AF-42.

²In its response, Employer stated that it is not a “job contractor” or “staffing agency” because all of its workers are hired, paid, controlled, managed, and supervised by Employer. AF-14. Accordingly, the undersigned finds that this issue has been resolved and need not be discussed any further for purposes of this opinion.

³In its response, Employer made the requested change. AF-15. Accordingly, the undersigned finds that this issue has been resolved and need not be discussed any further for purposes of this opinion.

Employer's Response

On January 19, 2015, Employer issued a written response to the CO to address the deficiencies outlined in the RFI. AF-12-15. First, Employer acknowledged that its newspaper advertisements instructed applicants to apply to the Terrebonne Career Solutions Center either in person or through the LAWorks HIRE website. AF-12. 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-12. Because the application system is under its complete control, Employer argued that it met the relevant advertising requirements. AF-12-13.

Next, Employer argued that it had established a "peakload need" because Employer had contracted to perform the ship berth project in Houma, Louisiana from March 1 – December 22, 2015. AF-13. According to Employer, it cannot complete this project unless temporary foreign employees were approved because its permanent workforce is engaged in other projects and thus not available to meet the workload at the job site in Houma, Louisiana. AF-13.

Finally, Employer asserted that it normally experiences a "slowdown" during the winter due to poor climate conditions, meaning that it cannot retain enough permanent employees to complete the ship berth project. AF-13. Consequently, Employer contended that temporary foreign workers were required to complete the project. AF-13.

Final Determination

On February 10, 2015, the CO issued a final determination and denied Employer's application for foreign labor certification on the basis that 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-5.

More precisely, the CO found that Employer failed to show that the nature of its employment need was temporary. AF-7. The CO found that Employer did not provide any evidence that it experienced a "slowdown season" during the winter months. AF-10. Further, Employer did not show a "peakload need" because Employer did not present any evidence that it employed permanent construction workers at the job site in Houma, Louisiana. AF-10. Thus, Employer did not show that it needs to supplement its permanent staff at the job site. AF-10. The CO also found that Employer failed to provide contracts, work agreements, invoices, payroll, or other documentation demonstrating its temporary need for workers. AF-10. Finally, the CO stated that Employer did not comply with the regulations regarding advertising because it instructed applicants to submit their applications to the Terrebonne Career Solutions Center, not directly to Employer. AF-11.

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. Additionally, Employer stated that the “Statement of Temporary Need” adequately explained why it had a temporary need for labor. AF-2. Finally, Employer argued that it had satisfied all applicable advertising requirements. AF-3. Employer asserted that applications had been certified in previous situations even when applicants were instructed to apply through the LAWorks HIRE website or Louisiana Workforce Center. AF-4. Thus, in the interests of fairness, Employer’s application should also be approved. AF-4. Further, although Employer’s advertisement told applicants to apply through the Terrebonne Career Solutions Center, Employer’s name also appeared on the advertisement. Thus, Employer contended that applicants understood that they were applying directly to Employer when they submitted an application or resume to the Terrebonne Career Solutions Center. AF-4.

BALCA Adjudication

On February 23, 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 they received the appeal file or by March 11, 2015, whichever was earlier. On March 4, 2015, the undersigned received the Appeal File. 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.⁴ 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 if they wished.

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.

⁴Specifically, 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.

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 in deciding the case:

- (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

In this matter, two issues must be resolved in order to determine whether Employer should be granted temporary labor certification for the requested foreign workers:

- (1) Do Employer's advertisements 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). 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).

The 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 establish that it satisfied 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 has failed to prove that it has met the advertising requirements contained in 20 C.F.R. § 655.17(a). The plain language of 20 C.F.R. § 655.17(a) states that an advertisement must provide “the employer’s name and appropriate contact information for applicants to send resumes *directly* to the employer.” (emphasis added). Here, Employer’s newspaper advertisements from November 23 – 24, 2014 instructed job seekers to contact the Terrebonne Career Solutions Center in order to submit a resume or application. The advertisements did not provide Employer’s contact information so that job seekers could apply directly to Employer.

Employer acknowledges that its advertisements told applicants to apply through the Terrebonne Career Solutions Center rather than directly through Employer. AF-4. Employer argues, however, that applicants understood that they were essentially applying directly to Employer even when submitting an application or resume to the Terrebonne Career Solutions Center because Employer’s name appeared on the newspaper advertisements. AF-4.

Employer’s argument is not persuasive. Although Employer’s name appeared on the advertisements, the regulations do not simply require an employer to list its name on an advertisement: an employer must provide *appropriate contact information* so that applicants can apply directly to the employer. 20 C.F.R. § 655.17(a). Here, Employer did not provide any contact information – such as an address, phone number, e-mail address, or fax number – that would inform applicants as to how they could apply directly to Employer. Moreover, the undersigned cannot determine whether each job applicant subjectively believed that they were applying directly to Employer when they submitted an application to the Terrebonne Career Solutions Center, as Employer claims. Instead, the undersigned is bound by the clear language of the regulations, which state that an advertisement must provide “the employer’s name and appropriate contact information for applicants to send resumes directly to the employer.” 20 C.F.R. § 655.17(a).

Recent BALCA decisions also support the undersigned’s view that Employer failed to satisfy the advertising requirement contained in 20 C.F.R. § 655.17(a).⁵ For instance, in *Quality*

⁵The 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.

Construction & Production LLC, an employer requested seventy-four fitters from August 3, 2009 – May 28, 2010. 2009-TLN-00077 (Aug. 31, 2009). To publicize the job opportunity, the employer issued two newspaper advertisements that directed interested 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), which require an employer to provide its contact information so that job seekers can apply directly to the company. *Id.* at 3. BALCA affirmed on appeal, also holding that the employer failed to comply with the plain language of the regulations. *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 applicants could submit resumes or applications directly to Employer. Accordingly, the undersigned finds that Employer failed to comply with 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 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-10.

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-45.

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 evidence. AF-38. In its response to the CO's RFI, Employer provided the following explanation as to why it had a "peakload need" for temporary foreign labor:

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-13.

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-45; AF-13. At best, Employer's statements are ambiguous in establishing 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