



Issue Date: 04 May 2015

BALCA Case No.: 2015-TLN-00042

ETA Case Nos.: H-400-14356-431623

In the Matter of:

BMC WEST CORPORATION

DBA SELECT BUILD NEVADA, INC.

Employer

DECISION AND ORDER

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).

Employers who seek 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)¹.

¹ The regulations found at 20 C.F.R. Part 655, Subpart A (2009), which were published in the Federal Register on December 19, 2008 (“2008 Rule”), 73 Fed. Reg. 78020, apply to this case. The Department of Labor (“DOL”) indefinitely delayed implementation of the Final Rule published on February 21, 2012 (“2012 Rule”), 77 Fed. Reg. 10038, after the United States District Court for the Northern District of Florida issued a preliminary injunction enjoining DOL from implementing or enforcing it. *See* 77 Fed. Reg. 28764 (May 16, 2012) (announcing the continuing effectiveness of the 2008 Rule “until such time as further judicial or other action suspends or otherwise nullifies the order in the Bayou II litigation”); *Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183, Order at 8 (N.D. Fla. Apr. 26, 2012) (issuing order temporarily enjoining DOL from implementing or enforcing the 2012 Rule), affirmed by 713 F.3d 1080 (11th Cir. 2013); *see also* *Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183 (N.D. Fla. Dec. 18, 2014) (vacating the 2012 Rule and permanently enjoining DOL from enforcing it).

BACKGROUND

On February 9, 2015, the Employer submitted its Application for Temporary Employment Certification: ETA Form 9142B. (AF 379-393)². On February 19, 2015, the Certifying Officer (“CO”) sent the Employer a Request for Further Information (RFI). (AF 371-378). The CO stated the employer failed to establish that its labor need was temporary in nature and that the number of positions requested represented bona fide job opportunities. (AF 371). On March 9, 2015, the Employer responded to the RFI providing, among other things, a list of contracted jobsites, posted job orders, newspaper advertisements, and payroll summaries. (AF 9-109).

On April 15, 2015 the CO denied certification (AF 2-6) for “Failure to provide adequate documentation to establish temporary need for number of workers requested. 20 CFR §655.23(b), 20 CFR §655.22(n).” (AF 4). On April 23, 2015 the Appeal File was transmitted to BALCA, in accordance with 20 C.F.R. § 655.33(b)(2009), and this matter has been assigned to me.³ The Office of the Solicitor submitted a brief in support of the CO’s denial on April 29, 2015.

STATEMENT OF THE CASE

An employer seeking certification to employ H-2B nonimmigrant workers bears the burden of establishing eligibility. The Employer must show that there are not sufficient numbers of qualified U.S. workers available for the job opportunity for which temporary labor certification is sought. The Employer must also show that the employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. § 655.1(b). Upon appeal to BALCA, only that documentation upon which the CO’s final determination was made (the Appeal File), the request for BALCA review (which may not contain evidence that was not submitted to the CO for consideration in the underlying determination), and submitted legal briefs may be considered. 20 C.F.R. §655.33.

The CO denied the application because the documents submitted in the Employer’s response to the RFI did not support the Employer’s requested dates of need nor did the Employer provide support for its need for 200 workers. (AF 5-6). In its request for review the Employer states the need for 200 workers is based on a peakload occurrence and that the documentation submitted in the RFI response satisfied the regulation requirements. (See AF 1).

² The Appeal File will be cited as AF followed by the page number(s).

³ DOL’s reliance on the 2008 Rule was called into question on March 4, 2015, when the District Court issued an order vacating the 2008 Rule and permanently enjoining DOL from enforcing it. (See *Perez v. Perez*, No. 14-cv-682 (N.D.Fla. Mar. 4, 2015) (2015 U.S. Dist. LEXIS 27606) (“Vacatur Order”). The District Court ordered a stay of its Vacatur Order through May 15, 2015 allowing DOL to resume processing H-2B labor certification applications. (*Perez v. Perez* No. 14-cv-682 (N.D.Fla. April 15, 2015).

DISCUSSION

The regulations the CO cited as deficient, in pertinent part, read as follows:

§655.23(b) . . . Criteria for certification, as used in this subpart, are whether the employer has: established the need for the nonagricultural services or labor to be performed is temporary in nature; established that the number of worker positions being requested for certification is justified and represent bona fide job opportunities; made all the assurances and met all the obligations required by § 655.22; and complied with all requirements of the program;

And

§655.22(n) The dates of temporary need, reason for temporary need, and number of positions being requested for labor certification have been truly and accurately stated on the application. (AF 4).

The Employer indicated a peakload need for 200 workers from April 1, 2015 through December 15, 2015. (AF 379). To support its request, the Employer submitted 100 pages of documents which included summarized monthly payrolls for 2013 and 2014, schedules of operations, and master contracts describing ongoing multi-year business relationships. (AF 9-109). The CO, however, had required the Employer to provide an itinerary that detailed the locations where work would be performed, the dates when the work would be performed, and the number of workers for each location. (AF 375). The Employer failed to submit the required itinerary.

The Employer bears the burden of establishing its peakload need. The Employer acknowledged the documentation it supplied, master contracts, does not support its claim. “The emphasis of pointing a start and finish date to demonstrate a peak load need is highly unlikely in Master Contracts due to the continuous work that must be performed.” (AF 11). The Employer did not provide evidence to support its 2015 dates of need. Further, the 2013 and 2014 payroll summaries show the number of workers for the Employer varied greatly from month to month: the most: 161 in October 2014 and the fewest: 15 in April 2014. The payroll histories do not support a peakload need of 200 workers for each month of a 10 month period.

The Employer did not provide the require documents the CO stated in his RFI. As such, he could not determine the validity of the Employer’s peakload need, whether there are not sufficient numbers of qualified U.S. workers available, and whether the positions would adversely affect the wages and working conditions of U.S. workers similarly employed. § 655.1(b).

Accordingly, the CO's denial is affirmed.

ORDER

It is hereby **ORDERED** that the Certifying Officer's **DENIAL** of the Employer's February 9, 2015, Application for Temporary Employment Certification is **AFFIRMED**.

KENNETH A. KRANTZ
Administrative Law Judge

KAK/jdp/mrc