



Issue Date: 13 February 2015

OALJ CASE NO: 2015-TLN-00022
ETA CASE NO: H-400-14336-045681

In the Matter of:

CATER FARMS & PLANTING. LLC.

Decision and Order Reversing Denial and Granting Certification

It would seem the Office of Foreign Labor Certification never heard of the harmless error rule. Cater Farms & Planting, LLC (Cater), has asked the Board of Alien Labor Certification Appeals (BALCA) to review the denial of a request for temporary alien employment certification.¹ The certification application Cater filed on December 24, 2014 is one step in an effort to obtain visas for 20 individuals to enter the United States as non-immigrant workers under the H-2B visa program.² Cater applied to employ them to plant trees during the nearly 4 months from December 15, 2014 to April 4, 2015. The denial of Cater's application for employment certification is reversed, with instruction to grant the application.

Cater had to delay filing its application until December 24, 2014, nine days after Cater actually needed the workers. The delay was caused by inaction at the Department of Labor (although not inaction by the Office of Foreign Labor Certification). The Office of Foreign Labor Certification routinely permits applications for temporary employment certification to be filed after the first date of need the application describes, and did so in this case. But when that happens, it treats the filing date as the first date of need.

¹ The denial is found at Administrative Record (Admin. R.) P8–P12; 20 C.F.R. § 655.33(a).

² Admin. R. P26 –P57. The date stamp appears at P26.

The Certifying Officer of the Office of Foreign Labor Certification, Employment and Training Administration, found that Cater “demonstrate[d] its current need for the H–2B workers.”³ But the application was denied nonetheless, on a general finding that Cater “failed to satisfy all the requirements of the H–2B program.”⁴ The application was deficient in only one respect, related to the timing of Cater’s efforts to recruit U.S. workers for the tree planting positions. Recruitment efforts are required before an employer such as Cater may resort to filling its labor need with foreign workers. The efforts to recruit workers are untimely if they occur more than 120 days before the date of need for the H–2B workers stated in the labor condition application.⁵

The Chicago National Processing Center does not accept an application for temporary employment certification for the position of forestry tree planting unless accompanied by a current Farm Labor Contractor Certificate of Registration and a Farm Labor Contractor Employee Certificate of Registration. Cater applied to the Wage and Hour Division of the U.S. Department of Labor to renew these certificates on September 19, 2014— about 90 days before the day it needed the H–2B workers (*viz.*, December 15, 2014). Wage and Hour did not renew the certificates until Friday, December 12, 2014.⁶ I cannot tell whether the Wage and Hour Division mailed the certificates out that day. Cater did not receive them until December 19, 2014, four days after Cater’s need for H–2B workers began.

The job order Cater placed with for these 20 positions with the Arkansas Department of Workforce Services opened on August 21, 2014 and closed on August 31, 2014.⁷ Therefore, the job order began 125 days before Cater’s need for the H–2B workers, when measured by the application’s actual filing date of December 24, 2014. This exceeds the 120-calendar-day recruitment period⁸ by 5 days. Had the Wage and Hour Division renewed the two certificates in less time, and had the application been filed by the first date of need (*i.e.*, December 15, 2014) the recruitment efforts would have been timely.⁹ The date of the job order and Cater’s recruitment efforts would have been within 116 days of the date of need. They would have been timely.

³ Admin. R. P14.

⁴ Admin. R. P14.

⁵ 20 C.F.R. § 655.15(e).

⁶ Admin. R. P54 & P55.

⁷ Admin. R.P46, P47–P52.

⁸ 20 C.F.R. § 655.15(e)(1) sets the 120-day requirement.

⁹ 20 C.F.R. § 655.15(e) & (f).

A Request for Information is a document that lists deficiencies in an application that the applicant may try to correct within a very brief time,¹⁰ to avoid denial of its application. Cater told the Certifying Officer in its response to the Request for Information that:

“The reason [for] a late filing is not through any fault of the employer, but due to the delays by DOL Wage & Hour Division, National Certificate Team in the issuance of the Farm Labor Contractor Certificate (FLC) and the Farm Labor Contractor Employee (FLCE) Certificates.”¹¹

Nothing in the file from any component of the U.S. Department of Labor takes issue with Cater’s assertion. The date of issue given on each of the two certificates is consistent with what Cater says.

In this circumstance Cater is entitled to certification. This is no blanket authority to permit an applicant to fudge the 120-day recruitment period by as many as five days. This employer applied for the necessary certification renewals about 90 days in advance. The renewal applications were made to a component of the U.S. Department of Labor, which eventually did issue them. The employer filed its application promptly after the certifications were received. Had the Department’s Wage and Hour Division acted within a more reasonable time on the renewals, the employer’s documented recruitment efforts would have been timely.

The lateness here is harmless error. The application was filed nine days after what the employer had sought as the first date of need. But the date of filing became the first date of need instead. That date made the recruitment efforts five days too early, and outside the 120-day period the regulation sets for the employer to recruit U.S. workers. The application was untimely due to inaction of the Wage and Hour Division. The employer made a reasonable effort to obtain the renewals it needed from the Wage and Hour Division in a timely fashion. The error (or more accurately an omission to act) was this Department’s. In this narrow circumstance the employer is entitled to certification.

¹⁰ The applicant must get the information requested to the Certifying Officer within seven calendar days. Admin. R. 14.

¹¹ Admin. R. P19.

Order

The denial is reversed. Under 20 C.F.R. § 655.33(e)(2), the Certifying Officer is directed to grant the certification.

So Ordered.

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California