

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 31 March 2015

BALCA Case No.: 2015-TLN-00029; 2015-TLN-00030
ETA Case No.: H-400-15016-695641; H-400-15016-695646

In the Matter of:

HOBBY PRODUCTS INTERNATIONAL, INC.,
Employer.

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For the Certifying Officer

Before: **COLLEEN A. GERAGHTY**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIALS OF CERTIFICATION

These cases arise from the Employer's request for review before the Board of Alien Labor Certification Appeals ("BALCA") of the denials by a Certifying Officer ("CO") for the Employment and Training Administration ("ETA") of its applications for H-2B temporary labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), 1184(a)(c); 8 C.F.R. § 214.2(h); 20

C.F.R. Part 655, Subpart A.¹ The above captioned cases have been consolidated because they present common issues of fact and law. For the reasons set forth below, the CO's denials of temporary labor certification in these matters are affirmed.

STATEMENT OF THE CASE

On January 16, 2015, the Employment and Training Administration ("ETA") received an application for H-2B temporary labor certification from Hobby Products International, Inc. ("Employer") for one worker as a "Mechanic," for employment from April 1, 2015 to March 31, 2016. (AF 51).²

The Employer initially stated in its application that the type of its temporary need was "intermittent." (AF 51). In its Statement of Temporary Need, the Employer explained that it designs, develops, sells and exports radio-controlled cars and trucks, as well as parts and accessories. (AF 51). The Employer stated "the sales of the products is the only sources of generating revenue of the Employer, and thus the [sic] increasing the recognition of the high quality and performance of the products is the key to promoting sales." (AF 51). The Employer has provided technical/mechanical support to its users who participate in races, but has never employed a full-time product demonstrator of the products. (AF 51). The Employer stated that it decided to employ a Product Demonstration Specialist in an effort to promote product sales and a Mechanic to maintain, repair, and set up the Employer's products to enhance the demonstrator/operator's performance. (AF 51). The Employer stated that races and/or promotional events are held a few times a month throughout the United States, and the Employer intends to conduct a concentrative promotional campaign during its fiscal year 2015. (AF 51).

On January 22, 2015, the CO issued a Request for Further Information ("RFI"), identifying three specific deficiencies with the Employer's application. (AF 44-50). One of the deficiencies identified by the CO was that the Employer failed to justify that its need for nonagricultural services or labor was temporary as required by 20 C.F.R. § 655.6. (AF 46). The CO found that the Employer's Statement of Temporary Need did not provide sufficient

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).

² Because the two above-consolidated cases involve the same factual and legal issues, this decision will cite to the Appeal File for 2015-TLN-00029 as the representative file, cited as "AF" followed by the page number. I note that for 2015-TLN-00030, the Employer's application was for a "Product Demonstration Specialist," not a Mechanic. Despite the different positions, the arguments presented and the analysis of the appeal is the same for both applications.

information to establish an intermittent need, nor did the Employer justify a period of need in excess of 10 months.³ (AF 46).

To remedy the deficiency, the CO directed the Employer to review the four standards of temporary need (one time, seasonal, peak load, and intermittent) and chose a standard that best fit its need, and to provide an updated temporary need statement containing the following:

1. A description of the employer's business history and activities (i.e. primary products or services) and a schedule of operations through the year;
2. An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need; and
3. An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need.⁴

(AF 46-47). In addition, the CO required supporting evidence justifying the chosen standard of temporary need and the dates of need, including monthly payroll reports identifying the number of workers, the total hours worked, and the total earnings received, in the requested occupation. (AF 48).

The Employer responded to the RFI on January 29, 2015, attaching an amended application. (AF 22-43). In the amended application, the Employer changed the standard of temporary need to a one-time occurrence. (AF 29). In its revised Statement of Temporary Need, the Employer again explained that it designs, manufactures, distributes and exports radio-controlled cars and trucks, accessories, and parts, and supplies "over 60 different types of products in the market worldwide." (AF 29). The Employer stated that races of radio-controlled cars have been held nationally and internationally and that "winning results of those races are a very effective way to increase reputation." (AF 37). The Employer indicated it has provided technical/mechanical support to those who participate in races with its products, but never employed a full-time mechanic. (AF 37).

The Employer continued: "In consideration of this competitive market, Employer decided to conduct an extensive promotional campaign for its fiscal year 2015, starting on April 1, 2015 and ending on March 31, 2016." (AF 37). The Employer stated "for successful results of the campaign, Employer needs a temporary employee who will solely perform his duties as Mechanic to set-up, maintain, repair, and adjust the cars and truck that Product Operation

³ Except for where an employer's need is a one-time occurrence, certification will not be granted for employment exceeding 10 months, absent unusual circumstances. 20 C.F.R. § 655.6(c).

⁴ For Case No. 2015-TLN-00030, the CO also required: "An explanation regarding how the employer determined the number of workers requested and documentation to establish that this is accurate and represent bon fide job opportunities." (2015-TLN-00030, AF 51).

Specialist will operate” and to “provide mechanical support and advices to maximize the specialist’s performance throughout this campaign period.” (AF 37). The Employer concluded that it needs one temporary worker for one occasion to “concentrate its marketing/promotional efforts to enhance the result.”⁵ (AF 37).

The Employer stated in response to the RFI request for documentation that it did not have supporting documentation to justify the chosen standard of temporary need because the Employer has never hired for the temporary position. (AF 26).

On February 13, 2015, the CO issued a Final Determination denying certification. (AF 16-21). The CO found that the Employer corrected 1 of the 3 deficiencies identified in the RFI, but two deficiencies remained. (AF 17-21). One of the remaining deficiencies was the failure to establish temporary need as required by Section 655.6. (AF 17-20). The CO noted that the Employer changed the standard of temporary need to a one-time occurrence, but found the Employer failed to justify the one-time need. (AF 19). The CO stated that the “employer has not explained how it determined its dates of need, how it determined that it will no longer have a need for a worker to promote products despite the competitive nature of its business, or how the employer determined the need will end by the finite end date requested.” (AF 19-20). The CO further found that the Employer did not provide any documentation to support its temporary need. (AF 20).

The Employer requested administrative review of the denial before BALCA on February 23, 2015. (AF 1-14). The Employer stated in its review request that it needs a temporary worker solely for its promotional campaign during its fiscal year (which are the start and end dates of the employment requested). (AF 1). The Employer argued that it provided documentation showing need for temporary work with its application, including a list of its products, documentation of its promotional event, and another organization’s race schedule. (AF 2). The Employer also included additional documentation with its request for review, namely: (1) a race schedule in which a temporary employee will participate; (2) new product information, which was designed and developed for the Employer’s marketing campaign. (AF 2).

On March 3, 2015, I issued a Notice of Docketing, allowing the parties to file briefs within five business days. (AF 1-15). On March 4, 2015, the Federal District Court for the Northern District of Florida vacated the Department of Labor’s 2008 regulations under which these proceedings arise, and permanently enjoined the Department of Labor from enforcing the regulations. *Perez v. Perez*, No. 3:14-cv-682 (N.D. Florida, Mar. 4, 2015). On March 12, 2015, the CO requested that further proceedings be suspended indefinitely in light of the *Perez* decision, and on March 13, 2015, Administrative Law Judge Stephen R. Henley, Acting Chair of BALCA, issued an Order Staying Administrative Proceedings in all pending H-2B temporary labor certification matters. Therefore, these matters were held in abeyance pursuant to Judge Henley’s Stay Order.

⁵ For Case No. 2015-TLN-00030, the Employer similarly stated that it has never employed a full-time Product Demonstration Specialist. The Employer stated the Product Demonstration Specialist will operate Employer’s products to demonstrate its high performance at races and events throughout the campaign period, as a way “to concentrate its marketing/promotional efforts to enhance the result.” (2015-TLN-00030, AF 37).

On March 18, 2015, the U.S. District Court for the Northern District of Florida granted the Department of Labor's motion to stay the Injunction Order in *Perez* to allow the continued processing of H-2B applications under the 2008 regulations until April 15, 2015. On March 19, 2015, the CO filed a status report and suggested that Judge Henley's Stay Order be lifted, and on March 20, 2015, Judge Henley issued an Order Lifting Stay on Administrative Proceedings.

The parties have since filed appellate briefs in these matters ("Er. Br." and "CO Br." respectively). In the Employer's appellate brief, it reiterated its arguments made in its request for review. Er. Br. 3-4. The CO in its brief argued that the Employer did not comply with the requirements of the RFI, because it did not provide adequate documentation of its temporary need and did not explain "whether this work was done in the past by its permanent full time staff and whether and why such marketing practices will not be needed in the future." Er. Br. 4-5.

DISCUSSION

For an employer to participate in the H-2B program, it must establish a need for temporary nonagricultural services or labor. 20 C.F.R. § 655.6(a). An employer's need is considered temporary if the employer can establish that the need is either: (1) a one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need, as defined by the Department of Homeland Security at 8 C.F.R. § 214.2(h)(6)(ii)(B). 20 C.F.R. § 655.6(b). To establish a one-time occurrence, the employer must "establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker." 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

The regulations further require an employer to maintain documentation evidencing the temporary need and to supply such documentation in response to a RFI from the CO. 20 C.F.R. § 655.6(e). While an applicant need only submit a detailed statement of temporary need at the time of the application's filing, failure to provide substantiating evidence or documentation in response to the CO's RFI "may be grounds for the denial of the application." 20 C.F.R. § 655.21(b).

In denying certification in the instant matters, the CO first found that the Employer's response to its RFI did not explain how it determined its dates of need, how it determined that it will no longer have a need for a worker to promote products despite the competitive nature of its business, or how the employer determined the need will end by the finite end date requested. (AF 20).

I find that the Employer did in fact explain how it determined its dates of need, specifically it requested a worker from April 1, 2015 to March 31, 2016, as this represents the fiscal year during which it is conducting a promotional campaign. However, I agree with the CO that the Employer has failed to show that it will no longer need a mechanic/demonstration specialist to promote products after the fiscal year is over.

The Employer explained the important role races of radio-controlled cars play in increasing the company's reputation, and in turn increasing the sales of products. (AF 29, 51). The Employer stated "the sales of the products [are] the only sources of generating revenue" and "increasing the recognition of the high quality and performance of the products is the key to promoting sales." (AF 51). The Employer emphasized that the "competitive market," required its promotional campaign in 2015. (AF 37). While these statements explain why the Employer has commenced a promotional campaign, it raises the question of why the need for a mechanic/demonstration specialist will cease at the end of the campaign period. Having these workers at races will continue to be a way to increase the Employer's reputation and sales in an ongoing, "competitive market," after the one year promotional campaign period has ended. The Employer acknowledged that it has provided technical/mechanical support to users in races in the past, albeit not on a full-time basis, suggesting to me that the need is present outside of the promotional campaign period set by the Employer. (AF 51). Without an explanation from the Employer why the need for a mechanic/demonstration specialist as a way to promote sales will cease after the fiscal year 2015, we agree with the CO that the Employer has failed to establish, as required for a "one-time occurrence," that "it will not need workers to perform the services or labor in the future." 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

The CO also found that the Employer failed to provide documentary evidence supporting its temporary need. (AF 20). The Employer stated in its response to the RFI that the documentary evidence requested by the CO, namely monthly payroll reports, does not exist because it has never hired for the positions before. (AF 26). I accept the Employer's statement as to the payroll reports; however, the Employer has provided no other relevant documentation establishing a one-time occurrence need, as required by the RFI. (AF 7). The Employer points to documents it provided with its application, as documentation of need.⁶ (AF 2, 61-66). The documentation included a printout showing some of Employer's products, a printout entitled "2014 HB HPI Racing Series" which described the first race of the Employer's series, and a list of racing events by an outside organization. (AF 62). While these documentations confirm the Employer's statements as to its variety of products and participation in reoccurring races, it does not establish any temporary, one-time need for the workers requested.

Based on the foregoing, I find the Employer failed to meet its burden of establishing a need for a temporary worker on a one-time basis. 8 C.F.R. § 214.2(h)(6)(ii)(B); 20 C.F.R. § 655.6(b); 8 U.S.C. § 1361. Accordingly, I hereby affirm the CO's denials of the Employer's applications.

⁶ The additional evidence sent to BALCA with the Employer's Request for Review is barred from consideration under the regulations. 20 C.F.R. § 655.33(a)(5) (requests for review may "contain only legal argument and such evidence as was actually submitted to the CO in support of the application"); 20 C.F.R. § 655.33(e) ("BALCA must review a denial of temporary labor certification only on the basis of the Appeal File, the request for review, and any legal briefs submitted.").

ORDER

It is hereby **ORDERED** that the Certifying Officer's denials of the Employer's Applications for Temporary Employment Certification is **AFFIRMED**.

SO ORDERED.

For the Board:

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts