

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 January 2015

BALCA Case No.: 2015-TLN-00013

ETA Case No.: H-400-14326-408089

In the Matter of:

JOHN CLIFTON
d/b/a CLIFTON'S CONSTRUCTION
Employer.

Before: Theresa C. Timlin
Administrative Law Judge

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This matter arises under the temporary nonagricultural employment provisions of the Immigration and Nationality Act (“INA,” or “the 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 U.S. Department of Labor (“DOL,” or “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii).¹ For the reasons set forth below, I reverse the Certifying Officer’s (“CO”) denial of certification.

¹ All citations to 20 C.F.R. Part 655 refer to the Final Rule promulgated in 2008. Although the Department promulgated a new Final Rule in February 2012, the U.S. District Court for the Northern District of Florida has issued an order enjoining the Department from implementing or enforcing this rule. See Bayou Law & Landscape Services et al. v. Solis, Case 3:12-cv-00183-MCR-CJK, Order at 8 (April 26, 2012). Accordingly, on May 16, 2012, the Department announced the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends, or otherwise nullifies the district court’s order. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Guidance, 77 Fed. Reg. 28764, 28765 (May 16, 2012).

STATEMENT OF THE CASE

On November 22, 2014, the CO accepted for filing Employer's ETA Form 9142, H-2B Application for Temporary Employment Certification for the position of Fence Erector. (AF 28-42).² The CO sent a Request for Further Information ("RFI") to Employer on November 28, 2014.³ (AF 24-27). Specifically, the CO noted two deficiencies. First, the Chicago National Processing Center ("CNPC") was unable to verify the existence of the business and requested additional information to verify the existence of the Employer at the listed address. Secondly, Employer failed to submit a complete and accurate ETA Form 9142 as Employer submitted a portion of Appendix B.1 that expired October 31, 2012. With respect to the first deficiency (which is the only deficiency at issue here⁴), the CO directed Employer to submit evidence showing that Employer's business name and address provided on the ETA Form 9142 are associated with JOHN CLIFTON dba CLIFTON'S CONSTRUCTION. The CO noted:

Examples of evidence may include articles of incorporation, a business license, other documentation issued by the State of Texas which indicates the business name and address, documentation issued by the IRS which indicates the business name and address, bank account statements that list the requested information or other official documentation which satisfies the requirement.

(AF 26). Employer responded on November 26, 2014 by email, attaching the correct version of Appendix B.1 and account information from the Texas Workforce Commission's website showing a company name of John Clifton dba Clifton's Construction located at 440 FM 816, Wolf City, TX 75496. (AF 22-23.)

On December 22, 2014 the CO issued a Final Determination, finding that the screenshot from the Texas Workforce Commission showing a business of John Clifton d/b/a Clifton's Construction, located at 440 FM 816, Wolfe City, TX 75496, was not satisfactory for the purpose of proving the business exists. (AF 12-15.) The Final Determination again set forth suggested documentation that would suffice (the same list set forth *supra*) and stated, "The Department does not consider the generation of a Work in Texas profile as documentation issued by the State of Texas." (AF 15.) Employer has appealed the Final Determination.

Employer argues that the existence of a Work in Texas profile demonstrates that an employer exists in the state of Texas. In order to receive a Work in Texas account, an employer must provide a federal ID number, which must match the Texas Workforce Commission number; both of these numbers must be tied to the physical location of the employer. An employer must

² In this decision, AF is an abbreviation for Appeal File.

³ Although dated November 28, 2014, the CO forwarded the RFI to Employer by email on November 26, 2014.

⁴ Employer corrected the other deficiency.

also have paid employees in the State of Texas in order to get a Texas Workforce Commission number. Employer further points out that the Texas Workforce Commission is a State of Texas entity. (Employer's Brief, p. 3.)⁵ Finally, Employer argues that Texas Workforce Commission is the State Workforce Agency ("SWA") for the State of Texas, and that the Department accepts SWA job orders as proof that pre-filing recruitment efforts were conducted as required. Employer questions why the Department considers documentation from the SWA as sufficient for one purpose, but not for establishing that an employer exists. (Id.)

The Board of Alien Labor Certification Appeals ("BALCA") received and docketed the appeal file on January 7, 2015, and issued a Notice of Docketing on January 9, 2015. Employer filed its Brief in Support of Reversal on January 13, 2015. The Solicitor did not file a brief on behalf of the CO.

DISCUSSION

The H-2B program permits employers to hire foreign workers on a temporary basis to "perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States]." 8 U.S.C. § 1101(a)(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 Department's ETA. 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an "Application for Temporary Employment Certification" ("ETA Form 9142") with ETA's CNPC. 20 C.F.R. § 655.20 (2008). After an employer's application has been accepted for processing, a CO will reviewed it, and either request additional information, or issue a decision granting or denying the requested certification. 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).

In this case, the CO determined that Employer failed to adequately document that it is a bona fide employer, as defined in the regulations. Section 655.4 defines an employer as follows:

A person, firm, corporation or other association or organization; (i) Has a place of business (physical location) in the U.S. and a means by which it may be contacted; (ii) Has an employer relationship with respect to H-2B employees or related U.S. workers under this part; and (iii) Possesses, for purposes of the filing of an application, a valid Federal Employer Identification Number (FEIN).

⁵ I note that Employer included three exhibits with its brief. Exhibit 1 is an Assumed Name certificate filed in the State of Texas by John Clifton for Clifton's Construction. Exhibit 2 is a copy of the Work in Texas website screenshot submitted to the CO. Exhibit 3 is information taken from the website for Work in Texas answering the question "What is Work in Texas.com?" I note that BALCA is only permitted to review evidence that was part of the record upon which the CO's decision was made. See 20 C.F.R. §§ 655.11(e)(1). Exhibit 2, therefore is admissible. Exhibits 1 and 3, however, are outside the scope of documents that BALCA is permitted to review.

20 C.F.R. § 655.4(1)(i)-(iii). The CO determined that Employer had not adequately documented its existence at the address listed on the ETA Form 9142. Consequently, the CO found that Employer failed to establish that it has a physical place of business (physical location) in the U.S. and a means by which it may be contacted.

The regulations do not specify what information an employer must provide in order to adequately document that it has a physical location in the U.S. and a means by which it may be contacted.⁶ The CO, however, provided Employer with “examples” of evidence: “articles of incorporation, a business license, other documentation issued by the State of Texas which indicates the business name and address, documentation issued by the IRS which indicates the business name and address, bank account statements that list the requested information or other official documentation which satisfies the requirement.” (AF 26.)

Employer responded to the deficiency notice immediately⁷ by forwarding a printout of its account page from the Work in Texas website, reflecting that it has an active business account, with an Employer ID, located at the address given in the ETA Form 9142. Employer argues that this is sufficient proof, citing the fact that Work in Texas is a state entity. Employer also argues that ETA accepts proof of making the required job postings at Work in Texas as adequate proof of compliance with the posting requirements. Thus, according to Employer, information about an employer’s account posted on the Work in Texas website should also be adequate proof that Employer is a bona fide employer with a physical presence in the U.S.

I agree with Employer. The CO gave as an example of adequate documentation “other documentation issued by the State of Texas which indicates the business name and address,” or “other official documentation which satisfies the requirement.” Businesses facing an initial determination denying their application must quickly turn around their response to the RFI (employers must submit any supplemental information and documentation no later than seven calendar days from the date of the RFI). (AF 24.) Applications for employment of nonimmigrant seasonal employees are time-sensitive. Here, Employer provided the CO with the documentation that was most readily available, the information from an entity of the State of Texas. The Department accepts information from Work in Texas to satisfy the pre-filing job posting requirements for the H-2B program. The information submitted here adequately establishes that Employer has a physical location in the U.S.

⁶ I have also found no case law on point.

⁷ In fact, Employer responded before the date of the letter informing Employer of the deficiency.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's Final Determination denying Employer's ETA Form 9142, H-2B Application for Temporary Employment Certification for the position of Fence Erector is **REVERSED**.

For the Board:

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey