



Issue Date: 08 April 2015

BALCA Case No.: 2015-TLN-00031

ETA Case No.: H-400-15013-407779

In the Matter of:

Sur-Loc Flooring Systems LLC,
Employer.

DECISION AND ORDER AFFIRMING 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 affirm 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). On March 4, 2015, the same court issued an order vacating the 2008 Final Rule, and permanently enjoining the Department from implementing or enforcing the 2008 regulations. Perez v. Perez, Case 3:14-cv-682-MCR-EMT, Order at 7-8 (March 4, 2015). Based on the court’s order in Perez v. Perez, the Acting Chief of BALCA stayed proceedings in this matter, by Order dated March 13, 2015. Subsequently, on March 18, 2015, the district court granted the Secretary of Labor’s motion requesting a stay of the injunction up to and including April 15, 2015. Thereupon, on March 20, 2015, the Acting Chief of BALCA lifted the stay.

STATEMENT OF THE CASE

On January 13, 2015, Employer submitted for filing its ETA Form 9142B, H-2B Application for Temporary Employment Certification for eight workers for the position of “Amusement and Recreation Attendant,” from April to November 2015, and selected the “seasonal” temporary need standard. AF 10-14.²

The CO sent a Request for Further Information (“RFI”) to Employer on January 20, 2015. AF 10-14.³ In the RFI, the CO noted two deficiencies. First, Employer failed to establish that its need for nonagricultural services or labor was temporary in nature. Second, Employer failed to establish that the number of worker positions being requested for certification was justified and represented any and all bona fide job opportunities. AF 10. Regarding the failure to provide adequate documentation to establish temporary need, the CO cited Employer’s previous request for certification, in which Employer indicated that it required the services of 13 temporary workers for the dates of February 1, 2015 to November 30, 2015 to work at the Employer’s facility in Kearneysville, WV. AF 13. Certification for that application had been granted, and now the Employer was seeking certification for an additional eight workers for the dates of April 1, 2015 to November 30, 2015 to perform the same duties at the same worksite. Id. The CO stated that the Employer did not explain why it needed an additional eight temporary workers for its 2015 season. Id.

Accordingly, the CO directed the Employer to submit the following evidence:

1. Signed work contracts and/or monthly invoices from previous calendar year(s) clearing showing work will be performed for each month during the requested period of need on the ETA Form 9142, Section B, Items 5 and 6;
2. Annualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of service and clearly showing work [that] will be performed for each month during the requested period of need on the ETA Form 9142, Section B, Items 5 and 6;
3. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation; the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the [E]mployer attesting that the information being presented was compiled from the [E]mployer’s actual accounting records or system.

The CO also demanded that the Employer provide a written explanation as to why the Employer needs an additional eight workers for its 2015 season.

AF 13-14.

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

³ A copy of the RFI is at AF 429-33.

The Employer responded to the RFI on January 22, 2015 and attached additional information which, in the Employer's view, responded to the CO's RFI. AF 15. The Employer's response included the following:

- A "letter of explanation" from the Employer.⁴ AF 16-17; copy at AF 427-28.
- Amended ETA Form 9142, Section B, Item 9 (statement of temporary need) with continuation sheet. AF 18-19.
- Schedule of operations throughout the year. AF 20-22; copy at AF 424-26.
- Employer's brochure. AF 23-28; copy at AF 418-23.
- Contract between the Employer and "Cirque Del Soleis" ("CDS") to support the need for eight additional workers.⁵ AF 29-39. AF 39 is "Exhibit A" to the Contract.⁶
- Invoices for 2014. AF 190-412.
- Summarized monthly payroll and reports covering January-December 2014 ("dating back 12 months"). AF 43-189.

As to the issue of why the Employer needed an additional eight workers, the Employer's office manager stated as follows: "This year we also were awarded the '[CDS]' contract, so we are applying for an additional 8 workers for the period of April-Nov[ember]. This is why we are doing a second separate application for the additional 8 work[er]s. This job is on top of all the other jobs that we do each year. If we are not able to get these additional [workers] along with our regular yearly visa guys we will not be able to do this contract. I will attach this contract as I do have this one." AF 16-17. The office manager also stated that as the business continues to grow, the need for workers continues each year; she also remarked that the workers "have been a great help in our business" and have a good work ethic. AF 17.

On February 13, 2015, the CO issued a Final Determination denying the request for certification under H-2B for the eight additional temporary employees.⁷ AF 5. The CO stated that the "documentation submitted by the employer was not sufficient to establish that the number of worker positions being requested for certification on the application is true and

⁴ Employer's agent's listing of items submitted included a "Business necessity letter explaining a history of the business." AF 15. I could not find an item titled "business necessary letter" in the record. I note that the Employer's "letter of explanation" (AF 16-17) also discusses, briefly, the business and its history.

⁵ The name of the organization "Cirque du Soleil" is spelled in various ways throughout the record. For the sake of consistency I will use "CDS" to refer to Cirque du Soleil.

⁶ This document is of poor quality and is difficult to read.

⁷ In the Final Determination, the CO determined that the Employer had adequately addressed the issue of establishing a temporary need for employees. I will not discuss it further in this Decision. See AF 7.

accurate and represents bona fide job opportunities.”⁸ AF 8. Specifically, the CO stated the following:

- The contract that the Employer submitted in response to the RFI was with “TENTES FIESA LTEEE” (“TF”) which included attachments for set up dates and tear down dates for shows in various cities between November 2014 and February 2016.⁹ But the Employer indicated in the ETA Form 9142B that the location of employment was either Jefferson County VW or the Washington-Arlington-Alexandria (DC-VA-MD-WV) area;
- The CO also stated that the role of the Employer in the contract was not clear, and remarked that “it is not clear ... why a contract between two parties would go into detail about a separate contract that one party may have with a different party ‘[CDS].’ If the employer is seeking to demonstrate its need for H-2B workers due to its obligation to provide services (via H-2B workers) to [CDS] then that is the contract that should have been submitted.”
- Lastly, the CO stated that Exhibit A to the contract was blank.

AF 9.

In conclusion, the CO stated that the Employer has not established that the number of worker positions being requested for certification was true and accurate and represented bona fide job opportunities. Id.

By letter dated February 23, 2015, Employer appealed the Final Determination and submitted a request for administrative review.¹⁰ AF 3. In its letter, the Employer’s counsel stated that the CO was “confused” about the terms of the contract with TF. Id. Counsel stated that TF is a tent manufacturer that entered into a contract with the Employer to provide flooring “for a [CDS] show in Sur Loc’s area of intended employment” and the contract “is just one

⁸ The CO’s Final Determination letter stated that the Employer failed to show that there were not sufficient numbers of qualified U.S. workers available for the job opportunity and/or the employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers. AF 5. In the “Attachment to Denial of H-2B Temporary Labor Certification” (“Attachment”), the CO clarified that denial was based on the Employer’s failure “to provide adequate documentation to establish temporary need for number of workers requested.” AF 7. I will presume that the basis for the CO’s denial is as stated in the Attachment: that is, the Employer failed to establish that it needed eight additional workers.

⁹ The organization “Tentes Fiesta” is spelled in various ways in the record. For the sake of consistency I will use “TF” to refer to it.

¹⁰ The Employer’s submission requested a hearing. As discussed in my Order of March 24, 2015, the regulation does not provide for a hearing; thus, I have construed the Employer’s submission as a request for administrative review. 20 C.F.R. § 655.33 (2008); see also Order of Mar. 24, 2015, at 1 n. 1.

among many that Sur-Loc provided in response to the RFI and is not the sole basis for its judgment that it would have 8 job opportunities in the upcoming season.” AF 3-4.

The Board of Alien Labor Certification Appeals (“BALCA”) received and docketed the appeal file on March 4, 2015. By Order issued March 13, 2015, BALCA placed the matter in abeyance in light of the district court’s decision in Perez v. Perez, No. 3:14-cv-682 (N.D. Florida, Mar. 4, 2015). By Order dated March 20, 2015, BALCA lifted the stay on the proceeding. By fax dated March 20, 2015, the parties proposed a schedule which included dates for the filing of briefs (March 27, 2015) and for an administrative law judge’s decision (by April 10, 2015). By Order dated March 24, 2015, I informed the parties that this matter had been assigned to me, and I approved the parties’ proposed briefing schedule.

The CO and the Employer timely filed submissions by fax on March 27, 2015. The CO stated that the RFI provided clear notice of the CO’s concerns that the Employer needed to provide in response, and also stated that the Final Determination detailed the deficiency that the Employer did not address in its response to the RFI – that is, that the number of worker positions requested was true and accurate and represented a bona fide job opportunity.¹¹ The Employer’s brief was more detailed. The Employer noted that it had timely replied to the RFI and had submitted voluminous evidence. Employer’s brief at 5. Where the CO erred, the Employer stated, was in its analysis of the evidence that the Employer had presented. Id. The Employer explained that the TF contract was a supply contract in which TF contracted with Sur Loc to provide flooring for CDS events. Id., at 6-7. Specifically regarding the contract with TF, the Employer stated that it would employ H-2B workers only in the area of intended employment listed in the ETA Form 9142 and the CO “overlooked that other Sur Loc workers will provide services as required in other parts of the country making it necessary to replace them.” Id. at 6.

APPLICABLE LAW

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 9142B). 20 C.F.R. § 655.20 (2008). After an employer’s application has been accepted for processing, a CO will review 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

¹¹ I presume that what the CO’s submission called a “Denial,” was the Final Determination letter.

certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

Under 20 C.F.R. § 655.6(a) (2008), an employer seeking a worker under the H-2B program must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. Under the regulation, the employer must attest that it will employ H-2B workers only at the locations listed in the application's area of intended employment. 20 C.F.R. § 655.22(l). The employer also is responsible to establish the number of H-2B temporary workers needed and must attest that the number of positions for which certification is requested is accurate. 20 C.F.R. § 655.22(n).

The denial of a temporary labor certification must specify the reason(s) for the denial. 20 C.F.R. § 655.32(e). The CO must offer the employer an opportunity to request administrative review of the denial or to file a new application in accordance with the CO's specific instructions. 20 C.F.R. § 655.32(e)(3). If the Employer requests administrative review, the review request 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(a)(5).

DISCUSSION

In this case, the CO agreed, after receipt of the Employer's submission in response to the RFI, that the Employer established that it has a temporary need for employees. AF 7. But the CO was not persuaded that the Employer established that it needed eight additional employees; also, the CO had concerns about the location of the proposed employment, based on the information the Employer provided in response to the RFI. AF 9. In the CO's view, the TF contract the Employer submitted did not address these deficiencies. AF 8-9.

The payroll information the Employer provided substantiates its assertion that many of its employees are temporary. AF 40-189. The invoices that the Employer provided reflect the type of business that the Employer conducts. In some instances, the Employer acted as a supplier, either selling or renting materials. See, e.g., AF 200-01 (Select Event Rentals), AF 197 (Arena Americas). In other cases, the Employer performed services such as installation of flooring. See, e.g., AF 193 (Special Olympics MD). In still other instances, the Employer both sold and installed materials. See, e.g., AF 208-14 (National LGBTQ Task Force). Such information is consistent with the Employer's Office Manager's Letter of Explanation. See AF 15-16. The Letter of Explanation also states that many customers book the Employer's company for special events, so contracts do not exist until a month or so before the event. As for the CDS contract, the Letter of Explanation indicated this was a new customer ("This year we also were awarded the '[CDS]' contract"), and stated that this necessitated the application for eight additional workers ("This is why we are doing a second separate application for the additional 8 work[er]s." The amended ETA form 9142B states that the company is located in West Virginia with job sites

“for this application” also in Maryland, Washington DC, Virginia and West Virginia” (emphasis added).

The TF contract is the only specific item the Employer submitted in response to the RFI that relates to the issue of its increasing workload. It is dated February 2014.¹² AF 30. It stated that TF is contracting for “rental installation and support services” for flooring and carpeting in support of multiple [CDS] locations in North America, Europe, and Australia.” AF 30. The Employer (“supplier” under the TF contract) is responsible to provide materials and labor at various sites. *Id.* The various sites, and the dates, are listed in Exhibit A to the contract. AF 39. The earliest date listed is November 2014 and the latest date listed is December 2015.¹³

I have considered the Employer’s assertion that many of its customers do not sign contracts until shortly before an event as its justification for not providing additional documents to support its need for eight additional workers. I find that this assertion is credible, based on the nature of the work the Employer does (selling and installing flooring), and the type of events for which the Employer’s product is used (outdoor events such as exhibits, fairs, concerts, etc.). However, on review of the record, I find that the TF contract does not support the Employer’s asserted new need for eight additional workers in the 2015 season. Notably, the TF contract was signed in February 2014, almost a year before the Employer’s H-2B application, which was submitted in January 2015.¹⁴ Thus, the Employer knew, not later than the date the TF contract was signed, that it would need workers to perform the work specified in that contract through the 2015 season.¹⁵ As well, the Employer did not provide any information on the issue of the specific number of additional workers needed, as the CO had directed. I find that it is impossible to know, from review of the TF contract and the other information in the record, why the Employer thinks it needs eight additional employees, as opposed to some other number. In addition, I note that the locations of the work specified in the TF contract are not consistent with

¹² I find that the CO’s asserted concerns about the form of the contract (“not clear whether the employer is the supplier or receiver of services” and “Exhibit A is left blank”) have no merit. On my review, I conclude that the TF contract is a contract with the Employer for the Employer to act as a subcontractor, providing flooring and associated labor (transport, installation, and de-installation) to support TF’s contract with CDS. I also find that Exhibit A, which the CO stated was not provided in response to the RFI, is in the record (though it is several pages out of sequence from where it should be).

¹³ Exhibit A is a poor-quality copy and the entries are in very small print. I needed a 5-power magnifying glass to read the document.

¹⁴ I am unable to assess the credibility of the Employer’s assertion in its brief that “Sur Loc won a new contract after it started a previous Application” and “had to prepare a separate Application” because the record is silent as to when the Employer submitted its previous application for workers for the 2015 season. Employer’s brief at 8.

¹⁵ I take at face value the Employer’s Office Manager’s “Letter of Explanation,” in which she states: “Each year we continue to grow with events.” AF 16.

the Employer's H-2B application, either initially or as amended in response to the RFI. Exhibit A to the TF contract relates to the Employer's work at multiple sites, none of which are in the geographic region listed in the Employer's ETA Form 9142B. See AF 39.

In its brief, the Employer argued that the CO "overlooked that other Sur Loc workers will provide services as required in other parts of the country making it necessary to replace them." Employer's brief at 6. This suggests that the Employer's plan is to use the eight H-2B workers sought to "backfill" employees in the Employer's location in West Virginia or in other locations within the geographic areas mentioned in the application, thus freeing other employees to perform the duties specified in the TF contract. This argument, however, was not asserted in the Employer's initial application. And, on review, I find that it is not even reasonably inferred, from the data the Employer submitted in its initial application. Further, I am precluded, under the regulation, from considering evidence or arguments that were not submitted to the CO. 20 C.F.R. § 655.33(a)(5).

CONCLUSION

Based on the foregoing, I find that the Employer has not met the requirement to establish the need for eight additional H-2B workers for the period from April to November 2015.¹⁶ Accordingly, I AFFIRM the Certifying Officer's Final Determination denying Employer's Application for Temporary Employment Certification for eight workers in the positions of Amusement and Recreation Attendant.

For the Board:

ADELE HIGGINS ODEGARD
Administrative Law Judge

¹⁶ Nor has the Employer established, based on the data submitted, that the additional H-2B workers will work in the geographic area specified in the Employer's application.