



Issue Date: 06 April 2015

BALCA Case No.: 2015-TLN-00034
ETA Case Nos.: H-400-15007-178743

In the Matter of:

Z & L DIRT CONSTRUCTION

Employer.

DECISION AND ORDER
AFFIRMING
DENIAL OF TEMPORARY
LABOR CERTIFICATION

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

The Employer, Z & L Dirt, is a small construction company that specializes in dirt road construction, building foundations and related work. (AF 3)². On January 20, 2015, the employer filed an H-2B application with the Department seeking 5 full-time workers to be employed as Construction Laborers for the period from February 16, 2015 through December 16, 2015. (AF 554).

On January 27, 2015, the Certifying Officer (CO) issued a *Request for Further Information* (RFI), in part, because the Employer failed to establish the nature of the employer's need is temporary per § 655.6. (AF 548). The RFI directed the Employer to provide specific documentation to justify its chosen standard of need. (AF 551).

On February 4, 2015, the employer responded to the RFI. (AF 323-500). On February 19, 2015, the CO denied certification because the employer failed to show that:

- There are not sufficient numbers of qualified U.S. workers available for the job opportunity for which temporary labor certification is sought; and/or
- The employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.
(AF 317)

Specifically, the CO denied certification based on 20 CFR § 655.6 for failure to establish that the nature of the employer's need is temporary. (AF 319). The employer sent a Request for Administrative Review on February 26, 2015. (AF 3). On March 24, 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 parties were permitted to submit briefs by March 31, 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. §

² Citations to the Appeal File are abbreviated as AF followed by the page number.

³ On March 12, 2015 the Certifying Officer requested that further proceedings be suspended indefinitely in light of the decision in *Perez v. Perez*, No. 3:14-cv-682 (N.D. Fla., Mar. 4, 2015). By Order dated March 13, 2015, Administrative Law Judge Stephen R. Henley, the Acting Chair of BALCA, stayed all pending H-2B temporary labor certification matters, including the above-captioned matter. On March 19, 2015, the Certifying Officer filed a status report stating that the district court had granted the Secretary of Labor's motion requesting a stay of the district court's injunction order until and including April 15, 2015; further, the Certifying Officer suggested that the stay be lifted and that "reasonable briefing schedules of a minimum of five days" be set. Thereafter, on March 20, 2015, Judge Henley lifted the stay.

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 information submitted by the employer was not sufficient to establish the dates of need requested . . . from February 16, 2015 through December 16, 2015. . . [T]he employers statement . . . indicating its need is tied to a recurring period of the year is inconsistent with the dates of need established in its prior certification. It is unclear by the documentation provided how the job opportunity is temporary rather than an ongoing, permanent need for workers. ” (AF 320).

The Employer argues it “made a plausible case for their (sic) assertion that their (sic) need for Construction Laborers is temporary, based on the Oil Industry Boom – which as its name describes it ‘boom’ of a business or industry means to grow or expand suddenly, the word has an inherent finite quality.” (AF 9).

DISCUSSION

At issue in this case is whether or not the Employer established that its labor need satisfies the meaning of temporary as defined by the Act. § 655.6(b) states:

The employer's need is considered temporary if justified to the Secretary as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security. 8 CFR 214.2(h)(6)(ii)(B).

The Employer describes its need as “peakload”. (AF 533). In order to fit this definition, “The petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.” § 214.2(h)(6)(ii)(B).

In describing its temporary need, the Employer stated:

The Owner. . . is usually able to complete small projects with the help of one employee, however these upcoming projects will require a full-time temporary staff of at least five. . . (AF 533). Z & L DIRT cannot anticipate the housing and construction demands due to the Oil Industry Boom. . . Z & L DIRT's need to hire temporary workers in order to fulfill the services of construction is closely tied to a peakload period of the year by a pattern of recurring nature in that Z & L DIRT has numerous growing contractual obligations and has not been able to hire any local workers. . . (AF 539).

The CO requested an explanation for the Employer's dates of need and documentation supporting the requested period, in light of the Employer's prior labor certification. (AF 332). "Except where the employer's need is based on a one-time occurrence, the Secretary will, absent unusual circumstances, deny an *Application for Temporary Employment Certification* where the employer has a recurring, seasonal or peakload need lasting more than 10 months." (AF 326). Initially, the Employer applied for and received approval for a one-time, temporary need of 10 months from April 1, 2014 through February 1, 2015. Now, the Employer is requesting an additional 10 months, from February 16, 2015 through December 16, 2015, on the basis of a peakload need. (AF 326).

The Employer submitted more than 150 documents in its response to the RFI including the statement, "We are now requesting dates of need to be changed from its prior filing because we did not anticipate our turnover rate to continue to be extremely high . . . we need to supplement our permanent staff in order to fulfill our upcoming projects. . ." (AF 478). The response did not explain the importance of the time period of February 16, 2015 through December 16, 2015, nor did the Employer describe the upcoming projects. The Employer's response to the RFI did not provide the CO with the required documentation.

The Department's H-2B regulations provide that "failure to comply with an RFI, including not providing all documentation within the specified time period, may result in a denial of the application." § 655.23(d). On its face the regulation permits the CO to deny an application based solely on the failure to provide all the documentation requested in an RFI. The CO's RFI required "An operational chart summarizing all contracts from 2014 and 2015, including the contracted dates, duties, and the number of workers needed each month for both years." (AF 551). The Employer submitted payroll records, operation charts, and project invoices all of which precede February 16, 2015. (*see* AF 387, 414, 476). There are no contracts or project descriptions of any work for the requested period of need. Thus, there is no basis for the CO to determine the validity of the Employer's temporary, peakload need. Further, the Employer's nearly continuous dates of need indicate a year round demand for labor. The Employer did not demonstrate that it has a temporary need based on a recurring peakload period. Accordingly, the CO's denial is appropriate.

CONCLUSION

I conclude that the Employer did not provide enough additional documentation to demonstrate that there are not sufficient numbers of qualified U.S. workers available for the job opportunity, and that the employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.

ORDER

It is hereby **ORDERED** that the Certifying Officer's **DENIAL** of the Employer's January 20, 2015, *Application for Temporary Employment Certification* is **AFFIRMED**.

KENNETH A. KRANTZ
Administrative Law Judge

KAK/jpd/mrc