

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 03 December 2015

CASE NO.: 2016-TLN-00005

ETA CASE NO.: H-400-15272-379039

In the Matter of:

BRIAN R. KESSEN,
Employer

Certifying Officer: Chicago National Processing Center

Appearances: Howard S. (Sam) Myers, III, Esquire
Myers Thompson, PA
Minneapolis, Minnesota
For the Employer

Vincent C. Costantino, Esquire
Senior Trial Attorney
Employment and Training Legal Services
Office of the Solicitor
Washington, D.C.
For the Solicitor

Before: **LARRY W. PRICE**
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Brian R. Kessen’s (Employer) request for administrative review of the Certifying Officer’s (CO) denial of temporary labor certification under the H-2B program. For the following reasons, the Board reverses the CO’s denial of certification.

BACKGROUND

On September 25, 2015, the Certifying Officer (“CO”) accepted for filing the Employer’s ETA Form 9142, H-2B Application for Temporary Employment Certification for a full-time nanny position. The Employer requested waiver of the ordinary deadlines due to an emergency

situation, specifically, that his wife suddenly died during childbirth and the recent string of failed nannies demonstrates that the U.S. market for nannies is unstable. (AF 142-203).¹

The CO sent a Notice of Deficiency to the Employer on October 8, 2015, denying the emergency situation waiver and requiring the Employer to amend the application to comply with the regulatory time requirements, submit a prevailing wage determination, and provide the rate of pay for the position. (AF 134-41). On October 21 and 27, 2015, the Employer responded to the Notice of Deficiency, arguing that his wife's sudden death and the lack of viable applicants work together to constitute his emergency situation. He supplemented his response to inform the CO that his nanny abruptly resigned, further exacerbating the emergency need for full-time childcare and creating a second vacant position. (AF 116-33).

On October 28, 2015, the CO denied certification, finding that the basis of the Employer's need was the sudden death of his wife a year previously. The CO determined that the Employer could have filed the H-2B application earlier, and the recent resignation of the children's nanny does not constitute an emergency situation.² (AF 106-15).

The Employer requested administrative review on November 10, 2015. He argued that the CO failed to consider whether the totality of the circumstances constituted good and substantial cause to waive the regulatory time limitations. (AF 1-105). BALCA docketed the appeal file and issued a briefing schedule. The Solicitor filed a brief on behalf of the CO on December 1, 2015. The Employer requested that the undersigned accept his request for administrative review as his brief.

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 United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“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 Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20.³ After an employer's application has been accepted for processing, it is reviewed by a Certifying Officer (“CO”), who will either request additional information, or issue a decision

¹ In this decision, AF is an abbreviation for Appeal File.

² The CO also denied certification because the Employer failed to submit a prevailing wage determination and rate of pay for the position. These bases do not apply if the Employer is entitled to the emergency situation waiver request.

³ On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. § 655, Subpart A. 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015). These rules are effective and govern this case.

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).

BALCA's review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012), "[t]he scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e)."

Under 20 C.F.R. § 655.17, an employer may request waiver of the time periods for filing an H-2B application for "good and substantial cause..." 20 C.F.R. § 655.17(a).

Good and substantial cause may include, *but is not limited to*, the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside of the employer's control, unforeseeable changes in market conditions, or pandemic health issues.

20 C.F.R. § 655.17(b) (*supplied*).

In this case, the CO determined that the Employer did not demonstrate good and substantial cause for waiving the regulatory time periods, finding that the Employer's situation, specifically "the dismissal of one of the employer's two nannies...and the resignation of the 2nd nanny..." does "not rise to the level of unforeseeable emergency situation as the regulations contemplate." (AF 112). However, while typical employers certainly do expect turnaround in their workforces, the present Employer is not so typical. His workforce consists of one or two employees, and his situation is such that the sudden departure of an employee leaves him virtually stranded and without the necessary help.

I recognize that the regulation cited above provides examples of widespread catastrophes. But, by its wording, "good and substantial cause" is not limited to those examples. Instead, the essential question is whether the claimed emergency situation is outside of the Employer's control. Here, I find that it is. Employer certainly could not prevent the sudden departure of his children's nanny, and the detailed history of the few U.S. workers who have applied for the nanny position reveals a dearth of qualified and capable domestic employees.

Accordingly, I find and conclude that the CO abused her discretion and failed to consider the present Employer's unique situation. Employer has a one or two person workforce and the abrupt departure of that person coupled with the lack of available childcare, particularly considering his working hours, his nearly year-long attempts to hire a reliable worker, and his wife's sudden passing, work together to constitute an emergency situation and good and substantial cause. Given that situation, the Employer presented good and substantial cause to waive the time requirements for his H-2B application.

ORDER

In light of the foregoing, the Certifying Officer's Final Determination denying the Employer's ETA Form 9142, H-2B Application for Temporary Employment Certification for the position of full-time nanny is **REVERSED**, and this matter is **REMANDED** to the Certifying Officer for processing under the emergency situation regulation, 20 C.F.R. § 655.17, consistent with this Decision and Order.

For the Board:

LARRY W. PRICE
Administrative Law Judge