



Issue Date: 09 June 2016

BACLA CASE NO.: 2016-TLN-00046

In the Matter of:

GPA ACQUISITIONS COMPANY,
INC.

Employer.

DECISION AND ORDER
AFFIRMING DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) on the Employer’s request for review of the Certifying Officer’s denial in this H-2B temporary labor certification matter. Under the H-2B program, employers may hire foreign workers to perform temporary nonagricultural work within the United States, either *ad hoc*, seasonally, or intermittently (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); *see also* 8 U.S.C. §1101(a)(15)(H)(ii)(b); 8 C.F.R. §214.2(h)(6)(ii)(B); 20 C.F.R. §655.1(a).¹ Employers wishing 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. §655.50. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. §655.53.

¹ The Interim Final Rule revising federal regulations related to the H-2B program, 20 C.F.R. Part 655, Subpart A, was published in Vol. 80 Fed.Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015) and are effective as of April 29, 2015.

STATEMENT OF THE CASE

In this case, the Employer, GPA Acquisitions Company, Inc., filed an H-2B Application for Temporary Employment Certification (ETA Form 9142B) on or about April 1, 2016, (AF² p. 87), seeking to hire a full-time printing-press operator from April 1, 2016, to April 1, 2017 (AF p. 89). In the application, Employer stated the printing-press operator had to speak English, Catalan, and Spanish (AF pp. 92, 101). In fact, Employer asserted “[t]he Printing Press Operator will need to come from Arcovent S.A. in Spain in order to train and assist the local operators . . . as it is imperative that the Operator speaks Catalan” (AF p. 102).

On April 12, 2016, the CO issued a “Notice of Deficiency” (AF pp. 74-86). As relevant here, the CO notified Employer of two concerns about the pending application. First (AF pp. 83-84),

In accordance with Departmental regulations at 20 CFR 655.20(e), each job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.

The employer did not include qualifications for its job opportunity that are normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.

Specifically, the employer indicated in Section F.b., Item 5. that it requires employees to speak Catalan and Spanish. The Catalan language is spoken mainly in the Northeast region of Catauna, Spain. This is very specific requirement *[sic]* that does not appear to be normal and accepted for the occupation of Printing Press Operators. The employer did not provide any supporting documentation to establish that these requirements are consistent with the normal and accepted qualifications for the position requested.

Second (AF pp. 84-85),

In accordance with Departmental regulations at 20 CFR 655.6(a) and (b), an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job in permanent or temporary.

² “AF” refers to the Appeal File.

The employer's need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.

The employer did not sufficiently demonstrate the requested standard of temporary need.

...

Specifically, Section B., Item 9 of the ETA Form 9142 indicates the following:

GPA Acquisitions Company INC is opening a subsidiary in Cerritos, California and needs a Printing Press Operator with domain in operating a 78.74" wide capacity slitter rewinder, specifically to train local staff to manage the day to day smooth running of a pressure sensitive roll converting machine.

The employer did not demonstrate how its need is temporary based on one of the four standards. The employer has not explained what events cause the seasonal need and the specific period of time in which the employer will not need the services or labor.

In each case, the CO asked Employer to submit specific information to address these deficiencies (AF pp. 84, 85-86).

On April 26, 2016, the Employer submitted its response to the Notice of Deficiency (AF pp. 55-72). With respect to the CO's first objection, Employer replied (AF p. 72; *see also* AF p. 59),

The Company certifies the requirement for speaking Catalan. Arconvert Spa (the sister company of GPA, and that of which is leading this start-up) is a Spanish company where the language of Catalan is primarily spoken. Due to the learning of several different processes by way of policies, manual, trainers, and direct supervision, it is imperative to the success of our production that this be listed as a requirement for this position.

Employer did not address the question of whether "the employer's requirements for the job opportunity are consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment" (AF p. 84).

With respect to the CO's second point, Employer stated that it

. . . certifies the need for services or labor being performed is temporary in nature for this position. Our intent is to train local labor under the leadership and knowledge of one of our current employees with experience in the specifics of our machinery, and the daily duties of a Printing Press Operator. The company's project is to bring some staff from Arconvert SpA, a sister company of GPA, who have been identified between the leaders of both Companies to help start up and train GPA staff (current and prospective) specific to the production standards that Arconvert has successfully developed in Spain. The need for their involvement at this time is temporary and intermittent, and will be based on the continuous need of our staff and production, as identified by our most senior management (AF p. 72; *see also* AF p. 60).

Employer did not provide any of the detailed documentation the CO had requested on this point (AF pp. 85-86).

On May 4, 2016, the CO sent Employer a Non Acceptance Denial letter (AF pp. 37-44) denying Employer's Application for Temporary Employment Certification. Thereafter, Employer requested administrative review (AF pp. 9-35).

DISCUSSION

On appeal to BALCA, I may consider only those documents upon which the CO bases his or her determination (that is, the AF), the request for BALCA review (which may not include new evidence), and the arguments submitted by the parties. 20 C.F.R. §655.61(e). The Solicitor filed a brief on behalf of the CO on June 6, 2016.

The fundamental problem in this case is that the H-2B program is not the solution to the problem Employer is trying to address.

The purpose of the H-2B program is to allow an employer to hire foreign workers temporarily when there are not enough U.S. workers who are qualified and able to perform the temporary labor for which the employer wants to hire foreign workers. And in those cases, the hiring of foreign workers must not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. §655.1.

In this case, the Employer is not trying to remedy any general unavailability of U.S. workers. For all I can determine from the record, there may well be plenty of qualified domestic Printing Press Operators in and around Cerritos, CA. Certainly Employer does not claim otherwise. But Employer has decided "to bring some staff from Arconvert SpA, a sister company of GPA, who have been identified be-

tween the leaders of both Companies to help start up and train GPA staff (current and prospective) specific to the production standards that Arconvert has successfully developed in Spain” (AF p. 72). It is this decision to use Arconvert personnel for training which drives this application, and not any shortage of U.S. workers.³

Thus, Employer does not even contend, much less demonstrate, that fluency in Catalan is consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. Likewise, Employer does not show that it occasionally or intermittently needs temporary workers for short periods. The CO’s decision on both these points is correct. The only reason Employer advances for needing to hire a foreign worker in this case is to facilitate a training program that Employer has already decided to conduct. That problem is a square peg to the H-2B program’s round hole.

ORDER

The Certifying Officer’s decision denying certifications is AFFIRMED.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge

³ I am uncertain whether Employer is seeking an H-2B visa in this case in order to allow a specific trainer from Arconvert to enter the United States, or whether it is seeking an H-2B visa in order to hire a Catalan-speaking Printing Press Operator who can more readily converse with a trainer or trainers from Arconvert. The application suggests the former: “The Printing Press Operator will need to come from Arcovent S.A. in Spain in order to train and assist the local operators in GPA’s new office at 16001 Arthur Street, Cerritos, CA 90703, as it is imperative that the Operator speaks Catalan, and knows how to operate a 78.74” wide capacity slitter rewinder” (AF p. 102). But whether Employer wants the visa for an Arcovent employee, or for someone to speak with an Arcovent employee, the “need” for a foreign worker is entirely unrelated to the unavailability of qualified U.S. workers.