



Issue Date: 12 September 2016

BALCA Case No.: 2016-TLN-00063
ETA Case No.: H-400-16025-508999

In the Matter of:

CHIPPEWA RETREAT SPA LLC,
Employer.

Certifying Officer: ADD
Chicago National Processing Center

Appearances: Patrick Thompson, Esq.
Thompson Ryan Law PL
Orlando, FL
For the Employer

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Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Joseph E. Kane
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Chippewa Retreat Spa, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter.¹

¹ On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24042 (Apr. 29, 2015) (to be codified at 20 C.F.R. Part 655). Pursuant to this rule, the Department will process an *Application for Temporary Employment Certification* filed on or after April 29, 2015, with a start date of need after October 1, 2015, in accordance with all application filing requirements under the IFR.

The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).³ A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.⁴

STATEMENT OF THE CASE

The Employer is a resort that offers outdoor activities to guests at Chippewa Lake in Manitowish Waters, Wisconsin. AF 1.⁵ On March 22, 2016, the Employer filed with the CO an *Application for Temporary Employment Certification* (“Application”), ETA Form 9142. AF 343. The Employer requested certification for twenty-six waiters and waitresses from April 15, 2016 until January 15, 2017, based on a seasonable temporary need. AF 343. The Employer listed its temporary need as follows:

Chippewa retreat is a resort that has a tourist season that runs from May through January due to the various summer, fall, and winter activities during that time. There are no such activities during the spring months.... During the period from February through early May the melting snow prevents winter activities but the weather is still too cold to permit any summer activities. However, this petition requests that the H2B employees be permitted in April so as to have a few weeks to prepare for the start of the tourist season in May. During the summer the resort is very busy as patrons flock to experience the great outdoors. There are plenty of fishing and boating excursions. During the fall the activity continues due to a series of boating, fishing, and harvest based activities that end with Halloween and the onset of the Holiday season. During the Holiday season activities continue with sleigh riding and skiing starting in November. This continues until late January.

AF 343. The Employer later amended the starting date to June 10, 2016, based on the timing of the petition. AF 246-247.

The CO issued a Notice of Deficiency (“NOD”) on May 3, 2016, noting, among other things, that “the employer did not include adequate attestations to justify the change in dates of need from the employer’s prior certification....” The NOD also requested a description of the

Id. at 24110. The Employer filed an *Application for Temporary Employment Certification* after April 29, 2015, with a start date of need after October 1, 2015. Therefore, the IFR applies to this case. All citations to 20 C.F.R. Part 655 refer to the IFR.

² See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). The definition of temporary need is now governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113) § 113 (Dec. 18, 2015).

³ 8 C.F.R. § 214.2(h)(6)(iii).

⁴ 20 C.F.R. § 655.61(a).

⁵ In this Decision and Order, “AF” refers to the Appeal File.

Employer's business history, including a history of its activities and an explanation why the requested dates have changed from the prior application. AF 337-338.

The Employer timely responded to the first NOD on May 17, 2016. AF 310. The Employer responded that the change in dates related more so to the changing of the H-2B program which made it possible to request an expanded amount of time.⁶ The Employer also summarized the activities and festivals that occur through the various months requested.

The CO issued a second NOD to the Employer on June 15, 2016. AF 279. The CO reiterated the previous request for monthly payroll reports, gross sales reports, and other additional evidence to justify the request. The NOD requested that the Employer specify the total number of workers (full-time, part-time, temporary, and permanent), the total hours worked, and the total earnings received.

The Employer timely responded on June 28, 2016. AF 244. The Employer provided spread sheets of the gross sales for each month and of the payroll records for 2015. AF 246-247. The payroll records did not distinguish between the wait staff and other employees at the resort, or whether the employees were temporary or permanent.

On July 6, 2016, the CO issued a Minor Deficiency Notice ("MDN") in the form of an email to the Employer. AF 38. The MDN requested that the Employer provide additional payroll documentation including, job title of individuals, whether the employees were permanent or temporary, and the total hours worked and earnings received. The MDN also requested monthly gross sales for the restaurant for every month between 2014 and 2015. AF 38.

The Employer responded to the MDN by email on July 13, 2016. (AF 38). The employer submitted additional payroll data and additional documentation detailing the profits and losses for 2015. AF 41-54. Again, the biweekly payroll reports did not separate the employees between wait staff and non-wait staff. AF 55-196.

On August 2, 2016, the CO issued a Final Determination, denial of the Employer's H-2B application. The CO determined that the Employer failed to establish that the job opportunity was temporary in nature. AF 18. The CO explained that while the Employer explained the reasoning for the change in dates of the need from the previous year, the Employer failed to include supporting evidence and documentation to justify the temporary need. AF 20. The CO found that the payroll documentation submitted by the Employer did not support the twenty-six waiters and waitresses requested. AF 21. The records only supported a need of three temporary workers, one of which only worked during the months of July and August 2015.

⁶ The Employer filed its 2015 petition prior to the 2015 changes in the regulations.

On August 16, 2016, the Employer requested administrative review of the CO's Final Determination, as permitted by 20 C.F.R. § 655.61.⁷ AF 1-24. The Employer asserts that the CO should have found that the Employer provided sufficient documentation of a temporary need. *Id.*

On August 22, 2016, I issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer ("Solicitor") to file briefs within seven business days of receiving the Appeal File.⁸ BALCA received the Appeal File from the CO on August 24, 2016. The Solicitor filed a brief on September 2, 2016, urging BALCA to affirm the CO's decision to deny temporary labor certification. The Employer did not file a brief.

DISCUSSION AND APPLICABLE LAW

BALCA's standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued a Final Determination.⁹ After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action.¹⁰

Failure to Meet the Application Filing Requirements

The Employer bears the burden of proving that it is entitled to temporary labor certification.¹¹ To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent.¹² An applicant must maintain documentation evidencing the temporary need to submit if requested by the CO.¹³ While an applicant need only submit a detailed statement of temporary need at the time of the application's filing, failure to provide substantiating evidence or documentation in response to the CO's RFI "may be grounds for the denial of the application."¹⁴

⁷ Under 20 C.F.R. § 655.61(a), within ten (10) business days of the CO's adverse determination, an employer may request that BALCA review the CO's denial. Within seven (7) business days of receipt of an employer's appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO's decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO's brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

⁸ See 20 C.F.R. § 655.61(c).

⁹ 20 C.F.R. § 655.61.

¹⁰ 20 C.F.R. § 655.61(e).

¹¹ 8 U.S.C. § 1361; see also *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009).

¹² 20 C.F.R. § 655.6(b).

¹³ 20 C.F.R. § 655.6(e).

¹⁴ 20 C.F. R. § 655.21(b).

In the present case, the Employer attempted to establish a seasonal need. AF 343. To establish a seasonal need, “the petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change.”¹⁵ The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer.¹⁶

The documentation provided by the Employer failed to establish a seasonal need. Neither the gross profits and loss statements, nor the payroll records establish a seasonal need. The Employer provided gross profits for each of the months in 2015. The statements do not support a seasonal temporary need between April and January. January, April, March, November, February and then December were the lowest grossing months, in that order.

Also the payroll documentation does not support a need of twenty-six temporary waiters and waitresses. The current records only show three temporary members of the wait staff and eight permanent members in 2015. While the Employer listed the activities that occur at the resort and the festivals that will occur during the requested months, the Employer never fully explains why these employees or the amount of employees is needed in relation to these activities. In its appeal, the Employer asserts that the company is attempting to expand and that it needs the additional employees in order to expand. AK 1-2. However, the Employer never provided information to the CO regarding expansion. See AK 343, 310, 38. The Employer actually never mentioned expansion during any of the documentation with the CO. The BALCA’s review is limited to only the information located within the appeal file.¹⁷ If the Employer filed this request based on the expansion of its business, it should have presented documentation regarding this expansion to the CO.¹⁸ Had the Employer provided the CO with this additional information and documentation regarding this projected need, then it would have been possible to determine whether the Employer’s needs had increased from the prior application.

While the Employer may actually have a seasonal need for temporary workers, the record before me is unclear and the burden of proof rests squarely on the Employer. The information provided by the Employer to the CO did not establish this need. Therefore, the CO could not establish that the Employer has a seasonal need, so the certification was properly denied.

¹⁵ 8 C.F.R. § 214.2(h)(6)(ii)(B).

¹⁶ 8 U.S.C. § 1361.

¹⁷ *Erickson Constr.*, 2013-TLN-00052, * 4 (May 6, 2016).

¹⁸ *Guro Energy, LLC*, 2016-TLN-00048, *8 (June 24, 2016)(Employer failed to provide documentation and evidence regarding the projected sales goals to justify the projected need).

ORDER

In light of the foregoing, it is **ORDERED** that the Certifying Officer's decision denying certification be, and hereby is, **AFFIRMED**.

For the Board:

JOSEPH E. KANE
Administrative Law Judge