



Issue Date: 15 August 2016

BACLA CASE NO.: 2016-TLN-00059

ETA CASE NO.: H-400-15341-038521

In the Matter of:

MICHAEL J. DOAK,
Employer.

DECISION AND ORDER
AFFIRMING DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) on Employer’s request for review of the Certifying Officer’s denial of an H-2B temporary labor certification. Under the H-2B program, employers may hire foreign workers to do temporary nonagricultural work within the United States for a one-time occurrence, seasonal, peakload, or intermittent need (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”.¹

Employers wishing to hire foreign workers under this program must apply for and receive a “temporary labor certification” from the U.S. Department of Labor (“DOL”).² Applications for temporary labor certifications are reviewed by a Certifying Officer of the Department’s Office of Foreign Labor Certification.³ If the Certifying Officer denies certification in whole or in part, the employer may seek administrative review before BALCA.⁴

STATEMENT OF THE CASE

This is Employer’s third H-2B Application for temporary labor certification for a full-time nanny.⁵ In the first application, Employer stated that he needed a nanny from January 1, 2016 to

¹ 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(2008).

² 8 C.F.R. §214.2(h)(6)(iii).

³ 20 C.F.R. §655.32(2008).

⁴ 20 C.F.R. §655.33(2008).

⁵ The Certifying Officer who processed the first application issued a Notice of Deficiency. Employer then filed a second application, which the Department approved. As discussed in the text below, it turned out that no visa issued

October 20, 2016 on a one-time basis “to watch children as family [transitions] into new location having just moved from Bermuda to Dallas.”⁶ The second application covered a somewhat later period: March 17, 2016 to December 20, 2016, also to watch the children during the transition having just moved from Bermuda to Dallas.⁷ Employer stated on the second application,

There will be no need for assistance after December 3, 2016, as the children will be in school and the family will be fully relocated Since the family is relocating back to the United States this one time and does not plan to live abroad again in the future this job is a one-time occurrence. The necessity [is] to assist the family in their efforts to relocate, accommodate the children to a new location and school, [and] assist the parents.⁸

The Department of Labor granted the second application, but Employer was unable to employ the temporary worker. This was because the limit on the number of annual H-2B visas was reached before the Department of Homeland Security issued the visa.

Employer then filed the third and current application. This time, Employer asserts a need for assistance to watch the children from August 1, 2016 through May 1, 2017, again having just moved from Bermuda to Dallas. This time he states: “Employment is not needed after May 1, 2017, because the family will be established in Dallas and constant care of the children will not be needed.”⁹

Thus, according to all three applications, Employer had “just moved” from Bermuda to Dallas all three times and needed help for his children.

Notice of Deficiency. On May 23, 2016, the Certifying Officer on the current application issued a Notice of Deficiency.¹⁰ The Notice identified five specific deficiencies. As it is undisputed that Employer cured four of these, I focus on the only disputed deficiency, which is denominated number 2.

On Deficiency 2, the Certifying Officer concluded that the application failed to establish that the job opportunity was temporary in nature.¹¹ As the Certifying Officer wrote: “The employer’s indicated dates of need vary significantly from those listed on the employer’s two previous

based on the DOL certification, and thus Employer was unable to hire the temporary worker. He therefore filed the current application.

⁶ Administrative record (“AR”) at 65.

⁷ AR at 71. Employer explained that he needed the nanny for eight months. He acknowledged that the first application covered dates too soon after the date of application. The second application was for an eight-month period that began no less than 75 days after the application. *Id.*

⁸ AR at 71.

⁹ AR at 19.

¹⁰ AR at 33. The Notice of Deficiency includes a request for information and for supporting evidence.

¹¹ AR at 38.

applications It is unclear to the Department how the employer determined its dates of need for this application given the change in the dates in the employer's filing history."¹²

The Notice specified how Employer could remedy Deficiency 2. Employer was to provide:

- An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need, and must specifically address what event determines the end of the employer's period of need;
- The ages of the children; and
- An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need.

The Certifying Officer also stated that Employer must supply supporting evidence and documentation that justifies the chosen standard of temporary need (one-time occurrence, seasonal, etc.).¹³

Employer's response to the Notice of Deficiency. Employer responded to the Notice on June 7, 2016.¹⁴ Employer asserted a new temporary need to justify the application, a need that he characterized as "a one time occurrence on account of a seasonal need."¹⁵ As he had moved from Bermuda several months earlier, he no longer asserted that the nanny was needed to assist in the transition and would no longer be needed once the children were in school. Now he stated that the nanny was needed "to assist the children before and after school by preparing the children's breakfast, dinner, and snacks, and watching them."¹⁶ The season was the school year, which would end in June. But, since he stated on the application that the need for the employment would end, not in June 2017, but on May 1, 2017, he needed another explanation. He stated that because regulatory standards "usually" limit seasonal temporary workers to nine months' employment, he sought certification only for the nine months from August 1, 2016 through May 1, 2017, though the "season" (*i.e.*, the school year) would continue into June 2017. Employer states that he has not hired nannies in the past to prepare meals or watch his children.¹⁷

¹² AR at 39.

¹³ AR at 39.

¹⁴ AR at 26. The Solicitor does not dispute that Employer's response to the Notice of Deficiency was timely.

¹⁵ AR at 27.

¹⁶ AR at 27-28.

¹⁷ AR at 28. Shortly before, on May 16, 2016, Employer signed a job description that stated that both of the two children are under age five, and the nanny would be working on weekends and overnight and would be required to feed and transport the children and to educate them. He also stated in the application (signed May 16, 2016) that the worker would have to be able to administer emergency medical attention to children. AR 29-30, 44-50.

ETA denial of application. On July 12, 2016, the Certifying Officer notified Employer that the Department was denying the application.¹⁸ The denial letter stated that Employer had failed to establish that the need for the worker's services or labor was temporary.¹⁹ The Certifying Officer acknowledged that the Department had previously found that the Employer had established a one-time occurrence need for the period March 17, 2016 through December 3, 2016. But Employer's current application and response to the notice of deficiency did not establish a one-time occurrence. One reason was that Employer had not adequately explained why the dates of employment had changed. Nor had the Employer explained the new need for a temporary worker or submitted the requested evidence to support it.²⁰ If anything, Employer now seemed to be describing a seasonal need, not a one-time occurrence need, and the seasonal need might be permanent, not temporary.²¹

LEGAL STANDARDS

Burden of proof. An employer seeking to hire employees under the H-2B program bears the burden of proving that it is entitled to a temporary labor certification.²²

Requirement to comply with Certifying Officer's requests for information and evidence. During an application process, an employer must supply a detailed statement of the temporary need, including an explanation of why the nature of the job opportunity reflects a need that is temporary.²³ The employer must specify whether the need is a one-time occurrence, seasonal, peakload, or intermittent, and how it meets the regulatory standard for such a need.²⁴ When the Certifying Officer requests evidence or documentation substantiating the employer's temporary need, employer must timely furnish the requested evidence or documentation; a failure to supply it timely may result in a denial of the application.²⁵

Review of the Certifying Officer's determination. On appeal, BALCA may consider only the administrative record on appeal (the "Appeal File") and any legal briefs submitted; no hearing, amendment of the application, or new evidence is permitted.²⁶ BALCA may affirm the denial of the application; direct the Certifying Officer to grant certification; or remand to the Certifying Officer for further action.²⁷

¹⁸ AR at 5-18.

¹⁹ AR at 8.

²⁰ For example, Employer could have submitted evidence that the children, though both under age five, were enrolled in a school that began its school year on or about August 1, 2016.

²¹ AR at 9-10.

²² 8 U.S.C. § 1361.

²³ 20 C.F.R. §655.21(a)(2) (2008).

²⁴ 20 C.F.R. §655.21(a)(3) (2008).

²⁵ 20 C.F.R. §655.21(b) (2008).

²⁶ 20 C.F.R. § 655.33(e) (2008).

²⁷ *Id.*

ANALYSIS

Based on the administrative record, I conclude that the Employer has failed to meet his burden to establish an entitlement to a temporary labor certification under the H-2B program.

First, the history of Employer's three applications brings into question any asserted one-time occurrence need. I understand that to establish a one-time occurrence need, the Employer must show either: (1) that he has not employed workers to perform the services or labor in the past and will not need workers to perform it in the future, or (2) that the employment is permanent, but there is a temporary event of short duration that has created the need for a temporary worker.²⁸ The concept is that a newly arising need has occurred and has a foreseeable end, making temporary the need to hire a nonimmigrant alien.

Here, Employer has presented a shifting series of supposed one-time events that are said to justify three different periods of time, during which he needs the same nanny. The time periods overlap into a continuous, expanding period of supposedly temporarily needed employment. Because there is no adequate explanation for the expanding, ongoing need over time, I find that Employer's need is not temporary; it has no credible, established end.

In particular, Employer represented that all three periods of need for a nanny were connected to his move from Bermuda to Dallas. But he had "just moved" before the first time period. He offers no explanation for why the need that he said in that application would end on October 20, 2016, took longer and still continues.

Second, after stating in the current application that he needed the nanny for the transition from Bermuda to Dallas, he shifted reasons while the application was being processed. He now asserts that he needs the nanny to prepare breakfast, dinner, and snacks for the children and to watch them before and after school.

This assertion of a new explanation brings Employer's credibility into question. It begins to appear that he is able to conjure up an explanation for a nonimmigrant alien nanny month-after-month whenever a new explanation is needed.

Moreover, the new reason is not a one-time occurrence need. Employer's two children are under age five and may be expected to continue going to school for many years.²⁹ Employer attempts to avoid this problem when he refers to his need as some kind of hybrid "one time occurrence on account of a seasonal need."

The difficulty with this is twofold: (1) the question is how much time the employer has a "need" for the temporary worker, not how long he will keep the temporary worker employed, and (2) failing to comply with the Certifying Officer's request for evidence and documentation, Employer offers nothing to show that his need for a nanny will not recur every school year or why his need for a nanny will be less when his children are not in school.

²⁸ See, e.g., 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

²⁹ Employer failed to supply his children's ages as the Certifying Officer requested, but he said both children were under age five.

Employer has not met its burden of showing that he is entitled to a temporary labor certification for a nanny. By trying to assert a hybrid seasonal and one-time occurrence need, Employer has not specified which of them he is asserting. Nor has he shown his need fits within the regulatory standard for either. His shifting date lines negate the one-time occurrence need and leave his representations in his application less than credible. His “offer” to end the employment early (on May 1, 2017, rather than June 2017) to avoid exceeding nine months does not reflect a change in his purported need for the nanny; it does not make *the need* temporary, only the employment. Employer’s failure to submit the evidence and documentation that the Certifying Officer requested is itself a basis to deny the application, especially where Employer’s credibility is in question. On this record, I am left unpersuaded that Employer’s perceived need for a nanny is temporary.

CONCLUSION AND ORDER

For the foregoing reasons, the denial of Employer’s application for temporary employment certification is AFFIRMED. 20 C.F.R. § 655.33(e)(1).

SO ORDERED.

STEVEN BERLIN
BALCA Administrative Law Judge