



Issue Date: 08 November 2016

BALCA Case No.: 2017-TLN-00003
ETA Case No.: H-400-16257-881613

In the Matter of:
MARINA TAILOR,

Employer.

Before: **LARRY S. MERCK**
Administrative Law Judge

DECISION AND ORDER AFFIRMING NOTICE OF DEFICIENCY

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to a request for review by Marina Tailor (“Employer”) of the Certifying Officer’s (“CO”) Notice of Deficiency (“NOD”) in the above-captioned H-2B temporary labor certification matter. The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States on a one-time, seasonal, peakload, or intermittent basis, as defined by U.S. Department of Homeland Security regulations. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.1(h)(6); 20 C.F.R. § 655.6(b). Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor. 8 C.F.R. § 214.2(h)(6)(iii). A CO 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. 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

Employer, Marina Tailor, is a tailor, dressmaker, and custom alteration service company located in Brooklyn, New York. (AF 80, 84, 94).¹ On September 13, 2016, Employer submitted an Application for Temporary Employment Certification, including: ETA Form 9142B; Appendix B to ETA Form 9142B; Google search results showing the location of the business; Business Certificate; IRS documentation; Attestation regarding permission to amend application dated May 17, 2016; Agent Contract; SWA job order form; and Prevailing Wage Determination P-400-16230-281440. (AF 71-96). The Employer requested one-time occurrence certification for an “Alteration Tailor”² to conduct training in the “invisible mending technique,” between December 10, 2016 and September 9, 2017, after which time the Employer would have sufficient knowledge to put this line of business “on the trails” on his own. (AF 71).

Between April 27, 2016 and September 22, 2016, the Certifying Officer (“CO”) issued two Notices of Application Returned Without Review and five Notices of Deficiency (“NOD”), pursuant to 20 C.F.R. § 655.10 *et seq.* In the NOD before me, issued on September 22, 2016, the CO stated that the Employer did not sufficiently demonstrate the requested standard of temporary need for a one-time occurrence, as required by DHS regulation. (AF 62-70). The CO set forth four deficiencies: (1) Failure to establish the job opportunity as temporary in nature; (2) Failure to submit an acceptable job order; (3) Disclosure of foreign worker recruitment; (4) Job order assurances and contents. After each deficiency, the CO requested additional information. (AF 62-70). The September 22, 2016, NOD states, in pertinent part:

The employer is requesting one Tailors, Dressmakers, and Custom Sewers from December 10, 2016, to September 9, 2017, based on a one-time occurrence. In order to establish a one-time occurrence, the petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

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

The training in invisible mending technique will take up to one year, after that the employer does not have a need to keep the foreign workers since he will have sufficient knowledge to put this line of business on the trails on his own This kind of case institutes 100% the one-time occurrence, since the petitioner has not employed workers to perform this labor in the past, because there is a new line of business and he will not need workers to perform this kind of services in the future, due to described above circumstances.

¹ The appeal file, which will be referred to as “AF,” was received by the Court on November 2, 2016, via email from the Office of the Solicitor.

² SOC (O*Net/OES) occupation title “Tailors, Dressmakers, and Custom Sewers” and occupation code 51-6052. (AF 71).

In the job order, and Section Fa, Item 5 of the ETA 9142 however, the employer lists the job duties as completing all alterations, fittings, and sewing services, perform invisible mending, and all types of alterations. No mention is made that the worker will be training.

(AF 62-70).

By letter dated September 27, 2016, Employer requested administrative review of the CO's September 22, 2016 NOD, as permitted by 20 C.F.R. § 655.61.³ Employer's request for administrative review was received by this office on October 11, 2016.⁴ On October 14, 2016, I issued an *Amended Notice of Docketing*, permitting the Employer and the Solicitor to file briefs in time to reach the undersigned no later than the close of business on the seventh business day after they receive the appeal file. 20 C.F.R. § 655.61(c). The CO filed *Certifying Officer's Motion to Dismiss, or, in the alternative, For Summary Judgment* on October 31, 2016, stating that the Employer had not sufficiently demonstrated its proposed standard of need, and, that the request for review was untimely.

DISCUSSION AND APPLICABLE LAW

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”), 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. After an employer's application has been accepted for processing, it is reviewed by the CO, who will either request additional information, or issue a decision 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 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

³ Under 20 C.F.R. § 655.61(a), within ten (10) business days of the CO's determination, employer may request an administrative review of a CO's determination before the BALCA. Within seven (7) business days of an employer's request for review, the CO will assemble and submit to BALCA, the 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 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.

⁴ Ten (10) business days from September 22, 2016 falls on October 6, 2016, however the request for review was received by this office on October 11, 2016. Because I have affirmed the CO's determination, the issue of lateness or equitable tolling will not be addressed.

request for administrative review, which may only contain legal arguments and evidence that was actually submitted to the CO before the date the CO issued a Final Determination. 20 C.F.R. § 655.61. 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. 29 C.F.R. § 655.61(e).

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. *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). 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 Request for Information ("RFI") "may be grounds for the denial of the application." 20 C.F.R. § 655.21(b). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

In the instant case, Employer attempted to establish a one-time occurrence need from December 10, 2016 to September 9, 2017. To show a one-time occurrence, the petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). Unsubstantiated assertions by Employer that its need is temporary is not sufficient to meet Employer's burden to establish eligibility for a temporary alien labor certification. *See BMC West Corporation*, 2016-TLN-00039 (May 18, 2016) (citing *AB Controls & Technology, Inc.*, 2013-TLN-00022 (Jan. 17, 2013) ("A bare assertion without supporting evidence is insufficient to carry the employer's burden of proof."); *Guzzino Leasing & Rentals, Inc.*, 2016-TLN-00002 (Nov. 6, 2015) (finding that the employer's unsupported assertions of temporary need were insufficient to establish temporary need).

In the September 22, 2016 NOD, the CO requested that Employer provide: (1) an updated temporary need statement; (2) supporting evidence and documentation that justifies the chosen standard of temporary need; (3) an amended job order with language to correct the deficiencies, including information describing the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed; (4) copies of all agreements with any agent or recruiter with whom it engages or plans to engage in the recruitment of H-2B workers or notification to the Department that they will not utilize any agent or recruiter for these purposes; and (5) an amended ETA Form 9142 to include all job requirements that are listed in the employer's job order or an amended job order that contains all benefits and wages offered to H-2B workers, and is consistent with the employer's ETA Form 9142. (AF 61-70).

The Employer did not comply with the requirements of the September 22, 2016 NOD, which requested specific documentation to support the application. As discussed above, Employer stated that it seeks a one-time occurrence need for a worker to train in the invisible mending technique. As the CO correctly pointed out, Section Fa, Item 5 of the ETA 9142 does

not mention that the worker will be training in the invisible mending technique. (AF 65, 73). Furthermore, the Employer failed to provide an explanation as to why the specific dates requested, December 10, 2016 through September 9, 2017, are necessary based on a one-time occurrence of training in the invisible mending technique, and did not submit supporting evidence and documentation to justify the one-time temporary need. I agree with the CO that the Employer did not meet its burden of establishing a one-time occurrence temporary need for the dates requested.

Accordingly, I find that the CO's September 22, 2016 determination is proper. It is Employer's burden to demonstrate eligibility for the H-2B program, and Employer failed to provide documentation that demonstrates its temporary one-time occurrence need for an "Alteration Tailor" to conduct training in the "invisible mending technique," between December 10, 2016 and September 9, 2017.

ORDER

Therefore, **IT IS HEREBY ORDERED** that the Certifying Officer's decision denying Employer's application is **AFFIRMED**.

LARRY S. MERCK
Administrative Law Judge