

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 26 October 2017

BALCA Case No.: 2018-TLN-00001

ETA Case No.: H-400-16322-558132

In the Matter of:

DIAMOND MOUNTAIN RETREAT CENTER

Employer

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Erin Lynn Schaad, Esquire
Erin Schaad Law
Sedona, Arizona
For the Employer

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For the Certifying Officer

Before: **CLEMENT J. KENNINGTON**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h) and 20 C.F.R. Part 655 Subpart A. This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Diamond Mountain Retreat Center’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 affirms the CO’s denial of certification.

BACKGROUND

On July 10, 2017, Employer applied for temporary employment certification through the H-2B program to fill three positions for a “Grounds Maintenance Worker” for the period of October 1, 2017 through August 1, 2018. (AF 93-105).¹

On July 18, 2017, the CO issued a Notice of Deficiency citing deficiencies regarding 20 C.F.R. §§ 655.6(a) and (b), 655.16, 655.18, 655.20(e), 655.9(a) and (b), and 655.15(a).² (AF 77-86). Specifically, the CO notified Employer that its H-2B application was deficient pursuant to Sections 655.6(a) and (b) because Employer did not explain why it has a need for workers during the winter and summer months or how it operated without temporary workers during its seasonal period of need in prior years. (AF 80-81). The CO also determined that Employer failed to submit the job order to the SWA serving the area of intended employment at the same time it submitted its application as required by 20 C.F.R. § 655.16. The CO also noted that the Arizona SWA confirmed Employer did not place a job order for the requested position. Further, the job order did not contain all of the required language as required by 20 C.F.R. § 655.18. (AF 82-83).

In addition, the CO found 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 as required by 20 C.F.R. § 655.20(e). (AF 84-85). Next, the CO noted Employer’s application did not include any agreements between itself and an agent or recruiter engaging in the recruitment of H-2B workers. (AF 85-86). Finally, the CO requested the Employer provide a complete and accurate ETA Form 9142 as required by 20 C.F.R. § 655.15(a). (AF 86).

On July 25, 2017, Employer responded to the CO’s Notice of Deficiency and submitted a summarized payroll report of 2015-2017, the SWA job order, and email correspondence regarding the prevailing wage determination and suitable job title. (AF 23-76).

On September 11, 2017, the CO made its final determination regarding Employer’s H-2B application. (AF 3-20). The CO denied Employer’s application due to its failure to establish that the job opportunity is temporary in nature pursuant to 20 C.F.R. §§ 655.6(a) and (b). (AF 6).

Specifically, the CO found that Employer did not submit sufficient information in its application to establish its requested standard of need or period of intended employment. While Employer stated it experiences a seasonal period of need between the fall and spring months of the year, the CO noted it did not sufficiently specify the time during the year in which it does not need temporary workers or why it has a need for workers during the winter and summer months. In addition, the CO found Employer did not sufficiently explain how it operated without temporary workers during its seasonal period of need in prior years or whether it had previously hired temporary workers. (AF 6-7).

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

² 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. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015). These rules are effective and govern this case.

While Employer attested its need for three temporary workers is due to limited financial resources that prevents it from hiring three permanent workers and due to an increase in business, the CO found Employer did not indicate whether the job opportunity is recurring. Rather, the CO noted the nature of the job opportunity does not appear to reflect a seasonal temporary need or that its need for workers to perform services is traditionally tied to a season of the year by an event or pattern. Also, the CO found Employer did not specify the period of time during each year in which it does not need the services or labor. Thus, the CO determined Employer failed to meet the regulatory requirements at 20 C.F.R. §§ 655.6(a) and (b) and denied Employer's application. (AF 8-10).

On September 25, 2017, Employer submitted a request for administrative review to the Board of Alien Labor Certification Appeals ("BALCA") appealing the CO's Final Determination in the above-captioned H-2B matter. (AF 1-2). On October 11, 2017, BALCA docketed the appeal and issued a Notice of Case Assignment. Pursuant to the Notice of Case Assignment, the CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services ("the Solicitor") in accordance with 20 C.F.R. § 655.33(b) on October 12, 2017. Because H-2B appeals are expedited, and in accordance with 20 C.F.R. § 655.33, the parties were given a brief due date of October 23, 2017. Thereafter, both parties informed the undersigned that briefs would not be submitted.

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. 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 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).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 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). The CO may only grant the Employer's application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

After considering all evidence, BALCA must take one of the following actions in deciding the case:

1. Affirm the CO's denial of temporary labor certification, or
2. Direct the CO to grant temporary labor certification, or
3. Remand to the CO for further action.

20 C.F.R. § 655.61(e)(1)-(3).

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis. *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); 20 C.F.R. § 655.11(a)(3). Employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary." 20 C.F.R. § 655.6(a). The regulations provide that employment "is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future." 8 C.F.R. § 214.2(h)(6)(ii)(B). That period of time is usually limited to less than one year but may last up to three years in cases of a one-time event. (*Id.*) The employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); *see Tampa Ship*, 2009-TLN-44, slip op. at 5 (May 8, 2009).

Employer alleges it has a seasonal need for three general resort maintenance workers from October 1, 2017 until August 1, 2018. In order to establish a seasonal need, Employer 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. 8 C.F.R. § 214.2(i)(F)(2)(ii)(B)(2). In addition, Employer must specify the period of time during each year in which it does not need the services or labor. *Id.* The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees. *Id.*

In this matter, the CO found Employer failed to provide sufficient information to prove a temporary need and requested additional information, including a description of its business history and activities, a schedule of its operations through the year, an explanation regarding why the nature of the job opportunity and number of foreign workers being requested for certification

reflect a temporary need, specific summarized monthly payroll reports for a minimum of two previous calendar years, and any other evidence and documentation that similarly serves to justify the requested dates of need. (AF 81). After reviewing the record in this matter, I find that Employer submitted insufficient evidence to establish that it has a seasonal need for temporary workers.

In its request for review, Employer alleges it has a seasonal need for workers based upon the weather patterns in southern Arizona and due to its busy season in the fall and spring months. However, upon review, Employer's own records fail to establish that Employer has an increased need for general maintenance during these months. Specifically, Employer submitted its payroll records, which do not support Employer's argument that there is a seasonal need from October through August. While the payroll records separate volunteers from full-time employees as well as provide monthly totals of the hours worked, it shows Employer utilized 11-12 volunteers in March and April as well as in September and October of 2015, 2016, and 2017 and utilized 1-2 volunteers in all remaining months throughout the year. As a result, it is difficult to determine whether Employer actually has a temporary need for three maintenance workers during the winter and summer months.

Moreover, the nature of the job opportunity does not reflect a seasonal temporary need. Employer attests that its need for three temporary workers is due to its limited financial resources and increase in business, which has resulted in a need to increase its staff and make infrastructure improvements to its facilities. These statements by Employer do not establish a temporary need. To the contrary, it appears that Employer is attempting to create a permanent workforce through use of the H-2B program rather than supplementing its permanent workforce due to an increased need for workers caused by a seasonal occurrence.

Employer's requested dates of need as stated in its application are between October 1, 2017 and August 1, 2018, a period of ten months. These dates of need essentially reflect a year round need rather than a seasonal need. Employer bears the burden of establishing why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. *See, e.g. Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

It has been determined that an employer cannot establish a temporary seasonal need if its need for the labor or services is present year-round. *See Marco LLC d/b/a Evergreen Lawn Care & Rainmaker Irrigation*, 2009-TLN-00043 (Apr. 9, 2009) (analyzing whether a landscaping business has permanent employees year-round in order to determine whether it established a seasonal need). *See also Fegley Grain Cleaning*, 2015-TLC-00067 (Oct. 5, 2015) (“[i]n determining whether the employer's need for labor is seasonal, it is necessary to establish when the employer's season occurs and how the need for labor or services during this time of the year differs from other times of the year”). *See also Larry Ulmer*, 2015-TLC-00003, at *3 (Nov. 4, 2014).

To the extent that Employer's need covers a period of ten months, it is no longer consistent with a “seasonal” need or a temporary need as defined by the DHS and DOL

regulations which implement the H-2B program. The DHS regulation specifies that “[e]mployment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future.” 8 C.F.R. §214.2(h)(6)(ii)(B). Employer’s payroll summary and its statement of its employment need indicate that its employment need is continuous and is not based on seasonal occurrences. It is clear that the H-2B program regulations do not contemplate certification of workers for a permanent rather than a temporary employment need. The DHS and DOL jointly issued preamble to the most recently passed H-2B regulations, applicable to this H-2B application, also known as the Interim Final Rule (“IFR”), makes it clear that the purpose of the H-2B program is to address temporary and not permanent employment needs.

Routinely allowing employers to file seasonal, peakload or intermittent need applications for periods approaching a year would be inconsistent with the statutory requirement that H-2B job opportunities need to be temporary. In our experience, the closer the period of employment is to one year in the H-2B program, the more the opportunity resembles a permanent position ... Recurring temporary needs of more than 9 months are, as a practical matter, permanent positions for which H-2B labor certification is not appropriate.

(82 Fed. Reg. 24056 (April 29, 2015)).

For the reasons stated above, Employer has failed to meet its burden of showing how its employment need for three workers covering ten consecutive months is temporary or seasonal, as defined by the applicable regulation at 8 C.F.R. §214.2(h)(6)(ii). Therefore, I find the CO’s determination is neither arbitrary nor capricious. Accordingly, the denial of Employer’s H-2B certification must be affirmed.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

ORDERED this 26th day of October, 2017 at Covington, Louisiana.

CLEMENT J. KENNINGTON
Administrative Law Judge