

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 20 December 2018

BALCA Case No.: 2019-TLN-00018
ETA Case No.: H-400-18260-407258

In the Matter of:

**ATP RESTAURANT INC d/b/a
COBBLESTONES OF LOWELL,**
Employer.

Before: **THEODORE W. ANNOS¹**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the labor certification process for temporary nonagricultural employment in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated implementing regulations promulgated by the Department of Labor (“DOL”) at 20 C.F.R. Part 655, Subpart A. Commonly referred to as the H-2B Nonimmigrant Visa Program, the H-2B visa classification applies to an individual coming to the United States as a temporary worker in a non-agricultural job with no plans to stay permanently. An employer who wants an H-2B visa must first obtain a “temporary labor certification” from the DOL.

ATP Restaurant Inc d/b/a Cobblestones of Lowell (“Employer”) submitted an *Application for Temporary Employment Certification* (“Application”). The Certifying Officer (“CO”) of the DOL’s Employment and Training Administration denied the Application, and Employer subsequently submitted an untimely² request for

¹ On December 12, 2018, the undersigned was designated to serve on the Board of Alien Labor Certification Appeals.

² An employer’s request for administrative review “[m]ust be sent to the BALCA ... within 10 business days from the date of determination.” 20 C.F.R. § 655.61(a)(1). The CO denied the application on November 1, 2018 and Employer did not request administrative review until, at the earliest, November 20, 2018. Appeal File (“AF”) at 1-4. Therefore, Employer’s request was untimely. Notwithstanding the untimeliness of the request, the record supports affirming the CO’s denial of the Application on the merits.

administrative review to the Board of Alien Labor Certification Appeals (“BALCA”). For the reasons that follow, I affirm the CO’s denial of Employer’s Application.

BACKGROUND

On September 23, 2018, Employer submitted an Application to hire eight nonimmigrant workers as full-time waiters or waitresses for the period December 1, 2018 to September 2, 2019.³ Specifically, Employer made the following assertion:

We are looking to add reliable team members to join our restaurant for the upcoming holiday season and into the new year. We experience a sharp increase in sales and are often challenged to find dependable workers that will deliver the quality experience that represents the Cobblestones brand. We are constantly sourcing talent locally, but the plethora of restaurants makes the talent pool seem inadequate and highly competitive. We believe the H2B program will be a great way to supplement our needs of our small independent restaurant. We ask to you [sic] grant us approval to be able to fill this gap of labor that we have through the H2B program.⁴

On October 1, 2018, the CO issued a Notice of Deficiency to Employer, identifying nine separate deficiencies under 20 C.F.R. Part 655, Subpart A.⁵ Among those deficiencies was Employer’s failure to establish the job opportunity as temporary in nature.⁶ The CO directed Employer to provide the following information:

- A statement describing the employer's business history and activities and schedule of operations through the year;
- Summarized monthly payroll reports for two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, Waiters/Waitresses, the total number of workers or staff employed, total hours worked and total earnings received;
- Summarized monthly food/beverage gross sales report for a minimum of two previous calendar years for the employer’s worksite location; and

³ AF at 101.

⁴ *Id.*

⁵ AF at 81-94.

⁶ AF at 85-86. In light of my disposition of this matter, it is unnecessary to discuss other deficiencies noted by the CO or any remedial measures undertaken by Employer.

- Other evidence and documentation that similarly serves to justify the dates of need being requested for certification.⁷

Employer responded on October 12, 2018,⁸ by providing, in pertinent part, a statement describing its business history, activity, and schedule of operations throughout the year,⁹ as well as monthly sales and hours reports for 2016, 2017 and 2018.¹⁰ Specifically, Employer provided the following statement:

Cobblestones of Lowell sees a sales increase starting in December and continuing through the summer. Our historic building is the host to many holiday parties, corporate events and celebrations in and around the holiday season. ... These are booked much more often beginning in December. We need to hire for these events and it has become harder and harder to seek out and retain quality employees. The peak of our business starts in October and continues through December and into the beginning of January. We are a very busy restaurant that needs staff year-round and would like the opportunity to add staff through the H2B program. We also see an increase in sales from the different event venues in Lowell including the Repertory Theatre, Lowell Memorial Auditorium, Tsongas Arena, Boarding House Park and City Hall. ... We continue to face staffing challenges, not only during our peak months, but throughout the year.¹¹

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⁷ AF at 86.

⁸ AF at 23-80.

⁹ AF at 23.

¹⁰ AF at 35-74.

¹¹ AF at 23.

Employer did not summarize the sales and hours reports.¹² The most recent full year of data is from 2017,¹³ and can be condensed as follows:

Month	Year	Revenue	Wait Staff Hours
January	2017	19858	1348
February	2017	20733	1293
March	2017	22533	1407
April	2017	21065	1441
May	2017	20385	1495
June	2017	25894	1821
July	2017	Not Provided	Not Provided
August	2017	17213	1229
September	2017	21031	1547
October	2017	24676	1754
November	2017	21828	1697
December	2017	26781	2154

On November 1, 2018, the CO determined that Employer had not overcome the identified deficiencies.¹⁴ Specifically, the CO stated, in relevant part, that Employer’s “statement points to a permanent need for workers rather than a temporary need[,]” and that the sales and hours reports do “not illustrate a discernable peak in revenue or worker hours during [Employer’s] requested period.”¹⁵ Because Employer failed to establish a temporary need for the number of workers requested, the CO denied Employer’s Application.¹⁶

Employer subsequently submitted a request for administrative review, which was received by BALCA on December 6, 2018.¹⁷ Employer argues that the statements and records it provided “clearly demonstrated a need for workers required to run [its] business[,]” and that such a need is “driven by the seasonality of our market.” Employer further contended that the “hospitality industry is as competitive as ever and the small

¹² AF at 23-80.

¹³ AF at 55-65.

¹⁴ AF at 3-22.

¹⁵ AF at 9.

¹⁶ AF at 3-22.

¹⁷ AF at 1-2.

operators are not only having to fight with the larger chains for sales but also are faced with a shrinking labor pool in our market. When demand goes up during our holiday and function season, there are just not enough employees. This is the busiest time of year and we continue to struggle with filling the jobs from our employment pool.”¹⁸

DISCUSSION

The scope of review for a denial of a temporary labor certification is limited to the written record, which consists of the Appeal File, the request for review, and any legal briefs submitted by the parties.¹⁹ The standard of review is *de novo*. That is, I may affirm the denial of certification only if the basis stated by the CO for the denial is legally and factually sufficient in light of the written record provided.²⁰

“The criteria for certification include whether the employer has a valid H-2B Registration to participate in the H-2B program and has complied with all of the requirements necessary to grant the labor certification.”²¹ One of those requirements is that an employer “must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.”²² An employer need is “temporary” only if it is “one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.”²³ A need is not “temporary” if it lasts for more than nine months.²⁴

Departmental regulations also constrain the ability of the CO to grant temporary labor certifications. An employer bears the burden of demonstrating eligibility for the H-2B program,²⁵ and a CO may not grant a temporary labor certification unless the employer seeking the certification has complied with all the requirements of the labor certification process for H-2B workers.²⁶

¹⁸ *Id.*

¹⁹ See 20 C.F.R. § 655.61(e).

²⁰ See 20 C.F.R. § 655.61(e); *Best Solutions USA, LLC*, 2018-TLN-00117, slip op. at 3 (May 22, 2018) (concluding that *de novo* review, as opposed to an arbitrary and capricious standard, is appropriate for administrative review under Part 655).

²¹ 20 C.F.R. § 655.51(a).

²² 20 C.F.R. § 655.6(a).

²³ 20 C.F.R. § 655.6(b).

²⁴ See *id.*

²⁵ See *D and R Supply*, 2013TLN00029, slip op. at 6 (February 22, 2013) (citing 8 U.S.C. § 1361).

Based upon the written record, I find that the evidence submitted by Employer tends to show that the need for additional workers is actually permanent. Indeed, the Employer conceded as much in its submissions when it stated, “[w]e are a very busy restaurant that needs staff year-round” and “[w]e continue to face staffing challenges, not only during our peak months, but throughout the year.”²⁷ The sales and hours reports also fail to support Employer’s contention.²⁸ As properly concluded by the CO, the reports do “not illustrate a discernable peak in revenue or worker hours during [Employer’s] requested period.”²⁹ For instance, October is presumably a “non-peak” month based on Employer’s requested period of December to September, yet Employer’s revenues in October 2017 were its third best month of the year.³⁰ Further, Employer’s submissions have been internally inconsistent. In its initial submission, it stated that it required temporary workers for the “upcoming holiday season and into the new year.”³¹ However, in responding to the CO’s notice of deficiency, Employer stated that it “sees a sales increase starting in December and continuing through the summer.”³² What is more, in that same submission, Employer again contradicted itself when it asserted that the “peak of our business starts in October and continues through December and into the beginning of January.”³³

CONCLUSION

For the reasons stated above, the CO’s denial of Employer’s Application was legally and factually sufficient in light of the written record provided. The evidence of record does not establish that Employer’s need was temporary, and the CO cannot certify an application if Employer has not met all the requirements of Subpart A of Part 655.³⁴

²⁶ 20 C.F.R § 655.50(b).

²⁷ AF at 23.

²⁸ AF at 35-74

²⁹ AF at 9.

³⁰ AF at 55-65.

³¹ AF at 101.

³² AF at 23.

³³ *Id.*

³⁴ See 20 C.F.R. § 655.60(b).

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's determination is **AFFIRMED**.

SO ORDERED.

For the Board:

THEODORE W. ANNOS
Administrative Law Judge

Washington, DC