PUBLICATION

Federal Judge Dismisses Union Challenge to H2-B Application

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A federal judge in Maine recently dismissed a challenge by two unions to a construction company's H-2B petition for nonimmigrant workers on oil rigs under construction in Portland harbor. The unions had argued that the lawsuit was filed to remedy the Department of Labor's pattern and practice of failing to apply union wage rates to the temporary labor certification applications needed in H-2B visa petitions, as opposed to a direct challenge to the company's immigration petition. (The construction company was not named as a defendant in the suit.) The court dismissed the complaint, finding that the unions lacked standing to pursue the claim and that the complaint failed to state any claim upon which relief could be granted. This case demonstrates some of the potential benefits of the use of the H-2B visa, and also serves as yet another example of the apparent up tick in immigration-related litigation cases that has arisen during the most recent economic downturn.

In Maine State Building and Construction Trades Council v. Chao, a construction company sought temporary labor certifications for up to 120 foreign workers to serve as structural and pipe welders on two oil rigs under construction in Portland Harbor. The temporary labor certification applications were required before the company could file H-2B petitions with the Bureau of Citizenship and Immigration Services (BCIS). Employers may file H-2B petitions for temporary nonagricultural workers in short supply whom the employer needs temporarily (usually one year or less) because of the employer's one time, seasonal, peak load or intermittent need. In this case, DOL certified the construction company's temporary labor certification (apparently for a smaller number of positions), and BCIS ultimately approved numerous H-2B petitions.

The unions argued that DOL used a prevailing wage rate that was below the applicable union wage rate for the Portland area. (A prevailing wage rate is used to set the floor below which U.S. workers would not be willing to take a job; if the company seeking temporary labor certification is offering to pay less than the prevailing wage, then DOL will determine that U.S. workers would be adversely affected and deny labor certification.) They also attempted to amend their complaint to allege that DOL has engaged in a pattern or practice of not using union contract-based wage rates when setting prevailing wages.

The court disagreed with the unions, instead finding that BCIS' approval of the H-2B visa petitions rendered the lawsuit moot, and that the unions' "bald, conclusory assertion that the DOL has engaged in the unlawful pattern and practice" was insufficient to state a claim upon which relief could be granted. As a result, the court dismissed the unions' lawsuit. The construction is now permitted to use the H-2B petitions to fill its essential need for structural and pipe welders.

How We Can Help

Baker Donelson's Immigration Team is aware of the thin supply of "essential workers" in the U.S., particularly for jobs that have unpleasant aspects. We are familiar with the arcane process of obtaining approval for workers in temporary positions, and we have a good sense of what will work and what will not. Thus, we can avoid useless and costly efforts and focus an employer's attention on obtaining workers for the kinds of jobs for which H-2B status can be obtained. We can organize a plan of attack and move the case through its unavoidable series of steps, being ready for each subsequent step before it comes up. We can manage cases for large numbers of workers for a single employer or employer group, coordinating with worker locators and

U.S. consulates in sending countries, and with employment services within the U.S. We can also assist in those rare cases that immigration-related immigration issues may arise, and to counsel clients on the best practices to avoid potential litigation concerning immigration-related matters.