

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 November 2012

In the Matters of:

ALTER AND SON GENERAL ENGINEERING, **OALJ Case No.: 2013-TLN-00003**
ETA Case No.: C-12250-59737

ALTER AND SON GENERAL ENGINEERING, **OALJ Case No.: 2013-TLN-00004**
ETA Case No.: C-12236-59652

ALTER AND SON GENERAL ENGINEERING, **OALJ Case No.: 2013-TLN-00005**
ETA Case No.: C-12256-59770

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER

The above-captioned matters arise under the temporary nonagricultural labor or services provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations at 8 C.F.R. Part 214 and 20 C.F.R. Part 655, Subpart A. These provisions, referred to as the “H-2B program,” permit employers to bring foreign nationals to the United States to fill temporary nonagricultural jobs when there are not sufficient domestic workers who are able, willing, qualified, and available to perform such services or labor. *See* 8 C.F.R. § 214(2)(h)(1)(ii)(D).

Prior to applying for a visa under the H-2B program, employers must file an *Application for Temporary Employment Certification* (ETA Form 9142) with the U.S. Department of Labor (“DOL” or “the Department”), Employment and Training Administration (“ETA”). 20 C.F.R. § 655.20. Employers’ applications are reviewed by a Certifying Officer (“CO”), who makes a determination to either grant or deny the requested labor certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, an employer may appeal that decision and request administrative review before an Administrative Law Judge on the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a). The Board’s scope of review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the Employer’s request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the Employer’s application. 20 C.F.R. § 655.33(a), (e).

BACKGROUND

The instant appeals arise from *Applications for Temporary Employment Certification* that the above-captioned Employer, Alter and Son General Engineering, (“the Employer”), filed with ETA this past August and September. AF 82; AF2 60; AF 3 60.¹ In each of the applications, the Employer sought temporary labor certification under the H-2B program for thirty-five to forty “Electric Line Installer” positions. *Id.* The Employer attested that its need for these positions was based on a seasonal standard of temporary need. *Id.*

After reviewing the Employer’s applications, the above-captioned Certifying Officer (“CO”) issued three separate *Requests For Further Information* (“RFI”), informing the Employer that its applications did not meet all of the requirements of the H-2B program. AF 75-81; AF2 53-59. The RFIs identified several deficiencies in the Employer’s applications, including the Employer’s failure to explain “the nature of the temporary need based on the [its] business operations,” or “how [it] has determined its need for the number of workers requested for the entire period of need requested.” AF 80. To remedy these deficiencies, the CO directed the Employer to submit “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.” *Id.* The CO additionally directed the Employer to submit supporting evidence and documentation to justify its chosen standard of temporary need. *Id.* He specifically instructed the Employer that such evidence *must include*, but is not limited to the following: (1) Signed work contracts and/or monthly invoices from previous calendar years clearly showing work will be performed for each month during the requested period of need; (2) annualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of services and clearly showing work will be performed for each month during the requested period of need; and (3) other evidence and documentation that similarly serves to justify the chosen standard of temporary need and number of workers. AF 80-81; AF2 58-59.

The Employer timely responded to the RFIs, submitting, *inter alia*, several statements signed by Partner Necole Sparkman, and a letter signed by a managing member of DCCI, LLC, stating that the Employer “is currently under contract with DCCI, LLC to provide the resources necessary to complete their contract on a high voltage transmission power project in which they are signatory.” The Employer did not provide a copy of this contract, or any other contract, to justify its chosen standard of temporary need or the number of positions requested in its applications.

After receiving the Employer’s RFI responses, the CO determined that the enclosed statements and supporting documentation failed to justify the Employer’s chosen standard of temporary need (seasonal) or the number of positions requested in its applications. AF 37-40;

¹ Citations to the Appeal File submitted in connection with 2013-TLN-00004 (ETA case number C-12236-59652) will be abbreviated as AF followed by the page number. Citations to the Appeal File submitted in connection with 2013-TLN-00005 (ETA case number C-12256-59770) will be abbreviated as AF2 followed by the page number. Citations to the Appeal File submitted in connection with 2013-TLN-00003 (ETA case number C-12250-59737) will be abbreviated as AF3 followed by the page number. Where appropriate, only one page number reference will be given.

AF2 37-40. Accordingly, the CO issued a *Final Determination* denying each of the Employer's applications.

The Employer timely appealed the denials to BALCA on October 11, 2012. AF 1-26; AF2 1-26. The Board issued a Notice of Docketing on October 15, 2012, setting forth an expedited briefing schedule. At the parties' request, this briefing schedule was extended, and the Board ultimately received briefs from both parties on November 2, 2012.

On November 1, 2012, the Employer submitted a request to withdrawal its appeal in 2013-TLN-00003 (ETA Case No. C-12250-59737). Accordingly, this appeal is dismissed, and the remainder of this Decision pertains only to the appeals in 2013-TLN-00004 (ETA Case No. C-12236-59652) and 2013-TLN-00005 (ETA Case No. C-12256-59770).

DISCUSSION

Scope of Review

The Employer's request for review cites evidence that was not included with its application or in its response to the RFI. Since the regulations limit the Board's scope of review to evidence that was not submitted before the CO, I cannot consider this additional evidence in my adjudication of the instant appeals. *See* 20 C.F.R. § 655.33(a), (e).

Temporary Need

To obtain certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor is temporary, *i.e.*, that its need for the duties to be performed by the requested worker(s) "will end in the near, definable future." 8 C.F.R. 214.2(h)(6)(ii). This need must meet one of the following regulatory standards: a one-time occurrence, a seasonal need, a peak load need, or an intermittent need. 8 C.F.R. 214.2(h)(6)(ii)(B).

Employer's counsel argues that the CO erred in denying the Employer's applications because the evidence before the CO "shows that the job opportunities described in the application[s] are temporary." *See, e.g.*, AF 5. Notably, Employer's counsel does not appear to maintain that the record demonstrates a seasonal need, as defined at 8 C.F.R. 214.2(h)(6)(ii)(B). Rather, he argues that the Employer demonstrated a *prima facie case* of temporary need—specifically, that the record demonstrates the Employer needed H-2B workers to complete projects that are "are one-time occurrences, limited to particular seasons by the weather." Employer's Brief at 5. According to Employer's counsel, employers seeking H-2B certification are only required to demonstrate two elements: a "temporary event" of some kind that is of a "short duration." Employer's Brief at 6. Based on this assertion, Employer's counsel argues that the CO inappropriately focused on whether the evidence before him established a seasonal temporary need. Employer's counsel asserts that the CO should have instead evaluated the record as a whole to determine the true nature of the Employer's need, and accordingly, asks the Board to remand these matters to the CO so that he may determine the true nature of the Employer's need.

In making the above argument, Employer's counsel fails to cite any authority, regulatory or otherwise, to suggest that the CO erred in denying the Employer's applications when the Employer's statement of temporary need and supporting documentation did not establish its chosen standard of need (seasonal). In fact, the H-2B regulations promulgated by the Department of Homeland Security ("DHS") clearly place the burden of establishing a particular standard on petitioning employers. Specifically, the DHS regulations provide: "The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need." 8 C.F.R. 214.2(h)(6)(ii)(B). The definition for each of these standards begins with "the petitioner *must establish . . .*" *Id.* (emphasis added). In addition to this clear burden allocation, the Department of Labor's H-2B regulations explicitly require a petitioning employer to provide a detailed statement of temporary need containing, *inter alia*, "an explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need." 20 C.F.R. § 655.21(a). As discussed below, the Employer did not provide an explanation regarding how its request fit within one of these regulatory standards. It is unclear why, despite clear regulatory language to the contrary, Employer's counsel believes that the burden to provide this explanation falls upon the CO, particularly in cases like the instant appeals, where the Employer was represented by an agent.

In the RFIs, the CO clearly instructed the Employer to select the regulatory standard that best fit its need for Electric Line Installers, and directed the Employer to provide supporting evidence and documentation to justify the chosen standard. AF 81; AF2 59.² The CO specifically stated that such evidence was to include, among other things, signed work contracts or monthly invoices clearly showing that work will be performed for each month during the requested period of need. *Id.* Despite these explicit instructions, the Employer failed to explain how its request for Electric Line Installers met the regulatory standard for seasonal need (its chosen standard), and instead made only unsupported assertions about how "weather conditions and contract patterns cause job openings to fluctuate." AF 64. A seasonal need, by definition, cannot be unpredictable or subject to change. 8 C.F.R. 214.2(h)(6)(ii)(B)(2).³ Since the Employer did not provide an explanation or documentation to justify its chosen standard of temporary need, the CO reasonably concluded that the Employer did not comply with the requirements of the H-2B program. Accordingly, I find that the CO properly denied certification on this basis.

Moreover, Employer's counsel does not provide a compelling argument as to why certification should have been granted under any other regulatory standard. Although Employer's counsel maintains that the Employer's need for the requested positions meets the regulatory standard for a one-time occurrence, the evidence of record does not support such a finding. Most notably, the Employer failed to submit signed contracts or monthly invoices to

² In fact, one RFI even specifically provided all four regulatory definitions. AF2 58.

³ This provision provides the following definition for a "seasonal need": "The petitioner 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. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. 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."

justify *any* temporary need, despite the CO's specific request for such information. The Employer additionally failed to respond to the CO's request for documentation justifying the number of requested positions. Accordingly, there is no need to remand these appeals even if, as Employer's counsel suggests, the CO should have considered the entire record to determine whether the Employer established any one of the four regulatory standards of temporary need.

ORDER

In light of the foregoing, it is hereby ORDERED that the Employer's appeal in 2013-TLN-00003 (ETA Case No. C-12250-59737) is DISMISSED. It is further ORDERED that the Certifying Officer's decision to deny the *Applications for Temporary Employment Certification* at issue in 2013-TLN-00004 (ETA case number C-12236-59652) and 2013-TLN-00005 (ETA case number C-12256-59770) is AFFIRMED.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge