

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 22 February 2013

BALCA Case No.: 2013-TLN-00029
ETA Case No.: H-400-12363-381729

In the Matter of:

D AND R SUPPLY

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Ashley Foret Dees, Esquire
Lake Charles, LA
For the Employer

Gary M. Buff, Associate Solicitor
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Washington, DC
For the Certifying Officer

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

DECISION AND ORDER

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”) pursuant to Employer D and R Supply’s request for review of the Certifying Officer’s *Final Determination* denying temporary labor certification under the H-2B non-immigrant program. For the reasons discussed below, the Certifying Officer’s *Final Determination* in this matter is **AFFIRMED**.

BACKGROUND

The H-2B Program

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 such 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 (2008).¹ After the employer’s application has been accepted for processing, it is reviewed by a Certifying Officer, who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the Certifying Officer denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

Procedural History

Employer D & R Supply (“Employer”) operates a supply house that furnishes material to companies and individuals. AF 47.² On December 28, 2012, the Employer filed an application with the CNPC seeking H-2B temporary labor certification for four (4) Stocker Clerks and Order Fillers, based on a “peakload” standard of temporary need. AF 86. The application lists a period of intended employment beginning on March 1, 2013 and ending on November 30, 2013. *Id.* The statement of temporary need provides: “Peak season is from March to November. Crawfish, oilfield, and agricultural clients are very active during this time requiring that the warehouse is stocked to provide for their needs during their peak seasons.” *Id.* The Employer did not provide any additional explanation in support of its purported temporary peakload need.

The Certifying Officer (“CO”) issued a *Request for Further Information* (“RFI”) on January 4, 2013, informing the Employer that its application failed to meet the requirements of the H-2B program. AF 81-85. The RFI identified the following deficiency in the Employer’s application: failure to demonstrate a temporary need for the requested H-2B workers, as required by 20 C.F.R. §§ 655.6 and 655.21(a). AF 83. In particular, the CO found that the Employer failed to include adequate attestations to establish that it had a peakload temporary need for the Stock Clerks and Order Fillers. *Id.* In arriving at this conclusion, the CO identified the following issues:

¹ All citations to 20 C.F.R. Part 655 refer to the Final Rule promulgated in 2008. Although the Department promulgated a new Final Rule in February 2012, the U.S. District Court for the Northern District of Florida has issued an order enjoining the Department from implementing or enforcing this rule. *See Bayou Law & Landscape Services et al. v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (April 26, 2012). Accordingly, on May 16, 2012, the Department announced the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the district court’s order. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Guidance*, 77 Fed. Reg. 28764, 28765 (May 16, 2012).

² Citations to the Appeal File will be abbreviated “AF” followed by the page number.

1. The Employer did not adequately explain its temporary needs, justification for the number of workers, or how it selected its dates of need. The employer indicated that “peak season is from March to November. Crawfish, oilfield, and agricultural clients are very active during this time requiring that the warehouse is stocked to provide for their needs during the peak seasons.” It remains unclear how the crawfish, oil field, or agricultural industries impact D&R Supply’s business activities or why the need for four Stock Clerks and Order Fillers does not exist in December through February. No evidence or supporting documentation was submitted.
2. The statement of temporary need did not adequately explain how the employer’s request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need as defined by 8 CFR 214.2(h)(6)(ii)(B);

Id. To remedy this deficiency, the CO instructed the Employer to submit an updated temporary need statement containing the following:

1. “A description of the employer’s business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. An explanation regarding why the nature of the employer’s job opportunity and number of foreign workers being requested for certification reflect a temporary need; and
3. 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; and
4. An explanation regarding why the employer does not need temporary workers December through February.”

AF 84. The CO also directed the Employer to submit supporting evidence and documentation that justified its chosen standard of temporary need, including, but not limited to:

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 service and clearly showing work will be performed for each month during the requested period of need; or
3. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received.”

AF 85.

The Employer responded to the RFI via e-mail on January 10, 2013. AF 55-80. The response included an updated statement of temporary need signed by the Employer's owner, Janet Ward. Specifically, Ms. Ward stated:

D&R Supply is a supply house that furnishes material to companies and individuals. D&R stocks and delivers, during these busy times. D&R Supply is contingent on farmer's [sic] such as crawfishermen, agriculture, oilfield, construction, pipeline and offshore industries. During the months of December through February, my sales go down mostly due to weather, and the season of planting, fishing, drilling, and construction are also slow during those times. D&R's peakload need lasts from March through November.

AF 56. The Employer's response also included Louisiana Sales Tax Returns from July 2011 to June 2012, which provided the following data on the Employer's monthly gross sales:

MONTH	GROSS SALES
July 2011	\$ 379,277
Aug. 2011	\$ 382,502
Sept. 2011	\$ 379,746
Oct. 2011	\$ 320,981
Nov. 2011	\$ 268,435
Dec. 2011	\$ 305,001
Jan.2012	\$ 324,766
Feb. 2012	\$ 308,925
Mar. 2012	\$ 390,407
Apr. 2012	\$ 471,274
May 2012	\$ 509,822
June 2012	\$ 455,249

AF 57-80.

The CO issued a *Final Determination* denying certification on January 25, 2013, citing the Employer's failure to establish a temporary need. AF 49-54. The CO confirmed receipt of the RFI response materials, but found that the Employer's evidence failed to establish that the employer's need for H-2B workers is temporary, as required by 20 C.F.R. §§ 655.6 and 655.21(a). AF 54. In particular, the CO noted it was "unclear how the crawfish, oilfield, or agricultural industries impacted D&R Supply's business activities or why the need for four Stock Clerks and Order Fillers did not exist in December through February." AF 52. The CO additionally stated: "The employer's gross sales of tangible property for January 2012, which is considered the employer's slow time, was \$324,766.00. However, the gross sales of tangible property for October 2011 was \$268,435.00 and \$305,001.00 for November 2011. This indicates lower revenues for these two months that are during the employer's requested dates of need." *Id.* In conclusion, the CO noted that the Employer had not provided any additional documentation, specifically contracts or summarized payroll as requested, to support its request for four Stock Clerks and Order Fillers based on a peakload standard of need.

The Employer requested administrative review by letter dated February 1, 2013. AF 1-48. In this request, the Employer argued that its sales tax reflects a dramatic increase in sales between March and November, and that the months of December to February reflect lower sales when taking the entire year into account. AF 3. The Employer reiterated that it is only requesting temporary certification for the peak months of March to November, which yield higher gross sales as compared to the months of December to February.

The undersigned issued a Notice of Docketing on February 4, 2013, notifying the parties that BALCA docketed the above-captioned appeal and providing the parties an opportunity to submit briefs on an expedited basis. BALCA received the Appeal File (AF) on February 8, 2013. Both parties filed briefs on February 14, 2013. Counsel for the Employer reiterated the arguments in the Employer's request for administrative review. Counsel for the CO argued that the facts and documentation of record do not adequately support the Employer's temporary need. He did not dispute that the Employer's sales data evidences increased sales during certain months of the Employer's purported peakload period of need; however, he noted that the month of January shows higher gross sales than months during the Employer's busy season. And while he admitted that the CO incorrectly stated the gross sales for October 2011 and November 2011, he nevertheless maintained that the trend of higher sales during the alleged off-peak period remained. He additionally noted that the Employer failed to provide requested documentation, such as contracts or summarized payroll to support its temporary need.

DISCUSSION

Scope of Review

The H-2B regulations limit the scope of the Board's review 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).

Temporary Need

The H-2B program is, by definition, limited to temporary service or labor. *See* 8 U.S.C. §1101(a)(15)(H)(ii)(b). Accordingly, employers who seek temporary labor certification under the H-2B program must establish that their need for the labor or services of H-2B workers is temporary in nature. 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). The applicable regulation provides:

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. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

8 C.F.R. § 214.2(h)(6)(ii)(B). In the instant case, the Employer maintains that it has a temporary, peakload need for four Stock Clerks and Order Fillers from March 1, 2013 through November 30, 2013. To qualify for the H-2B program under a “peakload” standard of temporary need, an employer “must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.” 8 C.F.R. §214.2(h)(6)(ii)(B)(3). The Employer failed to meet this burden.

Significantly, the Employer never addressed whether it regularly employs permanent Stock Clerks. Nor did it provide payroll records to demonstrate such a finding. It was thus impossible for the CO to determine whether the Employer needs to “supplement its permanent staff . . . on a temporary basis due to a seasonal or short-term demand.” Moreover, although the Employer suggests that its business activities are impacted by the crawfish, oilfield, and agricultural industries, it provided no evidence or explanation as to how these industries impact the Employer’s business during the purported period of temporary need. Furthermore, the Employer’s sales tax returns—the only evidence of record other than the Employer’s brief statement of temporary need—do not support the Employer’s alleged increase in need throughout the entire “peakload” period (March 1st through November 30th). Indeed, the Employer experienced its lowest monthly gross sales in November 2011. And the Employer’s gross sales in October 2011 were lower than its gross sales in January 2012, and only marginally greater than its gross sales in December 2011 and February 2012.

The Employer bears the burden of demonstrating eligibility for the H-2B program. 8 U.S.C. § 1361. As discussed above, the Employer failed to sufficiently explain how its request for temporary labor certification meets the regulatory criteria for a peakload, temporary need. Accordingly, the CO did not err in finding that the Employer failed to establish that the nature of its need is temporary. I therefore affirm the CO’s denial of certification on this basis.

ORDER

In light of the foregoing, the Certifying Officer’s *Final Determination* denying certification is hereby AFFIRMED.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge