

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 April 2013

BALCA Case No.: 2013-TLN-00041
ETA Case No.: H-400-13031-541462

In the Matter of:

A-1 SEALING, INC.,

Employer

Certifying Officer: Chicago National Processing Center

DECISION AND ORDER

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

BACKGROUND

The H-2B non-immigrant 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].” *See* 8 U.S.C. § 1101(a)(H)(ii)(b). Employers who seek to hire foreign workers through this 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”) prior to filing a petition for an H-2B visa. *See* 8 C.F.R. § 214.2(h)(6)(iii). To apply for such certification, employers must file an *Application for Temporary Employment Certification* (ETA Form 9142) with ETA’s Chicago National Processing Center. 20 C.F.R. § 655.20 (2008). After an application has been accepted by ETA for processing, it is reviewed by a Certifying Officer who will either request additional information or issue a determination granting or denying the requested labor certification. 20 C.F.R. § 655.23. If the Certifying Officer denies the employer’s application for temporary labor certification, in whole or in part, then the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

Procedural History

A-1 Sealing, Inc. (“the Employer”) filed an *Application for Temporary Employment Certification* with ETA’s Chicago National Processing Center on January 31, 2013, seeking H-2B temporary labor certification for twelve Highway Maintenance Worker positions from April

1, 2013 to February 2, 2014, based on a peakload standard of temporary need. AF 186.¹ In the application's statement of temporary need, the Employer explained:

A-1 Sealing, Inc. is a highway maintenance company and these months consistently prove to be its peakload months. Highway maintenance contracts escalate during these months and more sealing material is used. A-1 does employ permanent staff to perform year-round services and labor. However, due to a peakload for the months above, temporary employees are needed to supplement the workforce. In the past, A-1 has experienced an influx in business during these months.

Due to the lack of interest in temporary work in Richton, Mississippi and surrounding areas, A-1 has found it increasingly difficult to find temporary employees for the peakload demands during this time of year.

AF 186.

On February 7, 2013, the CO issued a *Request for Information* ("RFI") informing the Employer that its application failed to meet all of the requirements of the H-2B program. The CO identified four deficiencies in the RFI, three of which remain at issue upon appeal. AF 178-185. I will only address one: the Employer's alleged "failure to establish that the nature of [its] need is temporary." With respect to this deficiency, the CO stated:

The employer was previously certified for 12 Highway and Maintenance Workers from July 15, 2011 to November 30, 2011 [in] Perry County Mississippi based on a seasonal need (case C-11181-55136). The employer was previously denied (case H-400-12313-823208) requesting 12 Highway Maintenance Workers from February 1, 2013 to November 1, 2013 to work in Perry County, Covington County, and Lamar County Mississippi based on a seasonal need.

The employer is presently requesting 12 Highway and Maintenance Workers April 1, 2013 to February 1, 2014 based on a peakload need in Perry County, Covington County and Neshoba County, Mississippi. It is unclear how the employer has determined its dates of need. Based on the employer's filing history, it is unclear how it determined its dates of need.

AF 183. To resolve this ambiguity, the CO directed the Employer to review the four standards of temporary need, choose the standard that best fit its need, and submit an updated temporary need statement containing: a description of the employer's business history and activities (*i.e.*, primary products or services) and schedule of operations through the year; an explanation regarding why the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need; 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; and an explanation regarding how the employer has

¹ Citations to the Appeal File will be abbreviated "AF" followed by the page number.

determined its dates of need and why its dates of need are inconsistent with its filing history. AF 157. The CO further instructed the Employer to submit documentation that justifies its chosen standard of temporary need, including, but not limited to the following: current 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; summarized monthly payroll reports for a minimum of three previous calendar years 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; and a statement explaining how the submitted documentation supports the requested temporary need. AF 184.

The Employer responded to the RFI on February 13, 2013. AF 106-177. The Employer's response included an "Updated Temporary Need Statement." In this statement, the Employer explained how its needs have evolved since 2011. Specifically, the Employer stated:

Historically, most of A-1 Sealing's work has been as a sub-contractor to large paving companies, for which most work occurs toward the middle and end of jobs. Most paving and related work will not be allowed by the State of Mississippi unless the temperature is 50 degrees and above, which is why the 2011 dates of need fell between July and November, and the last filing dates fell between February and November. A-1 Sealing has need of temporary labor during these months of warmer weather when their permanent employees are not fully able to fulfill the seasonal demands of the paving contracts. A- 1 Sealing employs 5 regular hourly full-time employees on a permanent basis, and the fluctuation hourly monthly payroll arises due to temporary workers. This need therefore, is peakload, because A-1 Sealing employs permanent workers to perform the labor, yet needs to supplement its permanent staff on a temporary basis due to a seasonal demand. The temporary additions to staff will not become a part of A-1 Sealing's regular operation. These factors therefore create a seasonal peakload demand for paving jobs.

As projected for the winter of 2013 and early 2014, however A-1 Sealing will also have the opportunity to perform more diverse highway jobs than simply paving-related, such as grinding, bridge joint sealing and repair and other non-paving functions. For the upcoming winter, these non-paving types of jobs will necessarily have to be performed during cooler months, primarily because A-1 Sealing's temporary labor needs during warmer months must remain focused on paving related jobs. It is due to this peakload seasonal need for non-paving related jobs that A-1 Sealing's instant filing requests dates of need have been extended to 2/1/2014.

In short, due to a temporary influx of non-paving business, there is a necessity for temporary workers through the month of January. The need for the use of temporary workers for this type of work should conclude by February 2014, as the permanently hired workers should be able to handle the normal work load thereafter. A-1 Sealing would characterize this type of upcoming work also as a

peakload need because) although it regularly employees permanent workers, it needs to supplement its permanent staff due to the above described short term demand. These temporary additions to staff will not become a part of A-1 Sealing's regular operation.

A-1 Sealing would therefore respectfully submit that its filing history is not inconsistent, but simply reflects its evolving temporary needs. Moreover, although the paving and non-paving jobs described above involve different job duties, both are peakload needs. The needs are contiguous in time, and job duties fall under the ambit of Highway Maintenance Workers and were all addressed in A-1 Sealing's ads and SWA Job order.

AF 14.² In support of this statement, the Employer provided the following documentation: a subcontract between A-1 Sealing and W.E. Blain & Sons, Inc. which was signed in January and involves work which must be completed between April and September 2013; a subcontract between A-1 Sealing and Mallette Brothers Construction signed in the fall of 2012, for which work must begin in April 2013; miscellaneous subcontracts by A-1 Sealing to perform jobs during the late spring and summer of 2013; and, a summary of its payroll records for 2009, 2010, and 2011.³

Upon reviewing the Employer's response to the RFI, the CO determined that the Employer failed to establish that its need for the requested positions was temporary in nature, as required by 20 C.F.R. §§ 655.6 and 655.21(a). Specifically, the CO stated:

In its RFI response, the employer included payroll summaries from January 2009 to December 2011. The employer did not include payroll from 2012. The employer stated that they "[m]aintain five full time permanent hourly employees who receive a total monthly wage of about \$12,000.00 combined." The employer stated its peakload need is "reflected by an increase in hourly payroll, particularly during late spring, summer and early fall . . ." However, the hourly wage totals indicated in the payroll summaries do not support the employer's explanation, or requested dates of need. The submitted payroll indicates only hours and rates, and fails to indicate how many employees are employed as Highway Maintenance Workers, and how many are permanent versus how many are temporary.

The employer's submitted documentation failed to indicate a peakload need for 12 Highway Maintenance Workers from April 1, 2013 to February 1, 2014. The deficiency remains with the application. Therefore, the application is denied.

² The original copy in the Appeal File is obscured. Accordingly, we cite to the copy that the Employer provided in its request for review.

³ With respect to the summary of its payroll records, the Employer stated: "As to hourly rate wages reflected in said records, A-1 Sealing, Inc. maintains 5 full time permanent hourly employees on a regular basis, who in total receive a total average monthly wage of about \$ 12,000,00 combined. These payroll records reflect an increase in hourly payroll, particularly during late spring, summer and early fall due to the need to maintain temporary employees during the peakload paving period of the year." AF 15.

AF 105. Consequently, the CO issued a *Final Determination* denying certification on February 28, 2013. AF 95-105.

The Employer petitioned BALCA for administrative review on March 6, 2013, arguing that the bases for denial cited by the CO were “clearly erroneous” AF 1-94. AF 1-94. The undersigned issued a Notice of Docketing providing the parties an opportunity to submit briefs on an expedited basis. Counsel for the CO filed a brief asserting that the Employer did not demonstrate a peakload need from April through January. In particular, Counsel for the CO maintains:

A-1 explained that it has been expanding its business to obtain non-paving work which is done throughout the winter, therefore, it needs more workers to perform work during the winter than it previously did. AF 14. However, this explanation seems to call into question its claim of peak load need and the payroll records it submitted. If the peak load was previously from the summer until the beginning of winter, and the employer is now expanding its business to continue throughout the winter, how can a peakload need remain?

....

Here it is clear from the employer's own statements that its need for the duties to be performed is not temporary because it is expanding its business to include activities year-round rather than its previous business which clearly had a peak-load during specific months each year.

Accordingly, Counsel for the CO urges the undersigned to affirm the CO’s denial in this matter.

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.” 8 U.S.C. §1101(a)(15)(H)(ii)(b). Accordingly, the Department requires an employer petitioning for H-2B labor certification to “include attestations regarding temporary need in the appropriate sections.” 20 C.F.R. § 655.21(a). Section 655.21(a) specifically instructs employers to include a detailed statement of temporary need containing: (1) a description of the employer’s business history and activities (*i.e.*, primary products or services) and schedule of operations throughout 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. *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). In deciding whether an employer's stated need for service or labor is temporary in nature, we defer to the implementing regulations promulgated by the Department of Homeland Security ("DHS"). Pursuant to these regulations:

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). Absent unusual circumstances, the Secretary will deny an *Application for Temporary Employment Certification* when an employer has a recurring, seasonal or peakload need lasting more than 10 months. 20 C.F.R. § 656.6.

In the instant case, the Employer purports to have a peakload need for twelve Highway Maintenance Worker positions from April 1, 2013 to February 2, 2014. To qualify under a peakload standard of need, the 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 asserts that it has a temporary peakload need for Highway Maintenance Workers due to a seasonal increase in demand. But, as Counsel for the CO notes, it is not clear that the Employer's need for additional labor is limited to the purported temporary peakload period. After examining the explanation the Employer provided in its Updated Statement of Temporary Need, it appears that the Employer's purported increase in need for labor will likely be permanent, rather than temporary, in nature.

Specifically, the Employer stated that it has traditionally experienced a seasonal increase in demand for labor during the spring, summer, and fall months. This year, however, the Employer requested workers until February 2014 because it is expanding its business to "perform more diverse highway jobs" during the winter months, and anticipates that its increased need for labor will last longer than it has in the past. But the Employer did not provide any explanation as to how this opportunity would lead to an extended peakload period of need, rather than a permanent need for increased labor. Moreover, the Employer's supporting documentation failed to establish that the purported increase in demand for labor would last throughout the winter months of late 2013 and early 2014, or explain why this need would cease suddenly on February 2, 2014.

In sum, the Employer failed to adequately explain or document its alleged peakload temporary need for twelve Highway Maintenance Worker positions from April 1, 2013 to February 2, 2014. Accordingly, I affirm the CO's denial of certification based on the Employer's failure to meet its obligations under 20 C.F.R. §§ 655.6 and 655.21(a).⁴

⁴ As the record supports the CO's denial of certification on this basis, I decline to address the Employer's remaining arguments in support of certification.

ORDER

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

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge