

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 September 2013

OALJ Case No.: **2013-TLN-00061**

ETA Case No.: **H-400-13200-991193**

In the Matter of:

PAUL JOHNSON DRYWALL, INC.,
Employer.

Appearances:

Cole Johnson, President, Paul Johnson Drywall, Inc.,
Prescott, AZ
For the Pro Se Employer¹

Vincent C. Costantino, Assistant Counsel for Litigation,
Office of the Associate Solicitor for Employment and Training Legal Services
Washington, DC
For the Certifying Officer, U.S. Department of Labor, Chicago, IL

Before: Pamela J. Lakes
Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A. On September 10, 2013, Paul Johnson Drywall, Inc. (“Employer”) filed a request for an administrative review of the Certifying Officer’s denial of its H-2B application. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A.

¹ The Employer was assisted by Agents Iris Juarez and Jesus Raul Leon of Foremen Inc.; however, the written argument was signed by the Employer’s President.

Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"), to be heard by a panel of the Board or an individual member. 20 C.F.R. § 655.33(a). Based upon a review of the Appeal File, the request for review, and any legal briefs submitted, the Board is required (within 10 days of receipt of the appeal file and five days of receipt of the CO's brief) to either affirm the denial of temporary labor certification, direct the CO to grant the certification, or remand the case to the CO for further action. 20 C.F.R. § 655.33(a), (e). In H-2B cases, the BALCA member or panel assigned to conduct the review may only consider the Appeal File and any legal briefs submitted by the parties. 20 C.F.R. § 655.33(e).

STATEMENT OF THE CASE

On August 8, 2013, Employer filed an application with the Department of Labor's Employment and Training Administration ("ETA") for temporary labor certification for 50 Drywall Helpers, to be employed from February 10, 2013 through November 30, 2013. (AF 156-169).² The application specified that their duties would be as follows:

WORKERS WILL BE IN CHARGE OF HELPING DRYWALL INSTALLERS TO CARRY TOOLS, DRYWALL BOARDS AND CLEAN GENERAL WORK AREA.

(AF 158).

On August 15, 2013, the Certifying Officer ("CO") advised the Employer that the application was deficient, primarily because the Employer had failed to establish that its need for the nonagricultural services or labor was temporary in nature, and asked for additional information. (AF147-155). In an attachment, the CO listed deficiencies in the pre-filing requirements with respect to the prevailing wage determination and the advertisements, as well as deficiencies based upon failure to establish that the nature of the Employer's need was temporary and failure to satisfy the obligations of H-2B employers (by specifying that the workers would be employed in the same area of intended employment.)

Employer responded to the CO on August 22, 2013, providing argument relating to each claimed deficiency and supporting documentation. (AF 20-146). On the issue of the temporary nature of the employment, Employer explained that, although the application was being submitted late, its peak dates were from February to November of each year, and it had no problem "fulfilling the regular services with the permanent staff" during the months of December and January, which were its slowest months. (AF 26).

On September 6, 2013, the CO issued a Final Determination that denied Employer's application. (AF 10-16). The denial was premised upon Employer's failure to establish the nature of the Employer's need was temporary. (AF 12-16). In particular, the CO noted that the documentation did not establish that December and January were slow times for Employer's business and that Employer had failed to establish its peakload need, and the CO noted:

² Citations to the Administrative File will appear as "AF" followed by the pertinent page number.

Specifically, the payroll report for 2010 is blank. The payroll report for 2011 indicates that during the months of February and March it appears the employer had no work at all. Further the payroll report shows a continuous need for temporary workers from April of 2011 through December of 2012. The employer has indicated that its business slows in December and January; however, the total hours worked in December of 2011 were higher than during any other month of the year. Additionally, the payroll report for 2012 indicates that during the month of January total hours worked and total earnings received were higher than the months of July, September, October, and November. Finally, the employer submitted contracts indicating a need for its services. However, no explanation regarding how the submitted contracts create a peak in business during the requested period of need was submitted.

(AF 8). The CO concluded that, based on its explanation and the documentation submitted, the Employer has failed to establish its peakload need. (AF 8).

Employer filed a request for administrative review on September 10, 2013. (AF 1-9). The Director of the Chicago National Processing Center sent the Administrative File to the Board of Alien Labor Certification Appeals on or about September 16, 2013 and it was received by the undersigned administrative law judge, to act on behalf of the Board, on September 19, 2013.

Employer filed its written argument, signed by the Employer's President, by facsimile and by email on September 18, 2013; both the email and the facsimile submission included additional documentation that was not previously submitted to the CO.

The Office of the Solicitor of Labor, on behalf of the CO, filed its brief by email on or about September 24, 2013 and it was filed on September 25, 2013.

DISCUSSION

Under 20 C.F.R. §655.6(a), an employer seeking a worker under the "H-2B" program must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. The section further provides:

(b) The employer's need is considered temporary if justified to the Secretary as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security. 8 CFR 214.2(h)(6)(ii)(B).

(c) Except where the employer's need is based on a one-time occurrence, the Secretary will, absent unusual circumstances, deny an Application for Temporary Employment Certification where the employer has a recurring, seasonal or peakload need lasting more than 10 months.

20 C.F.R. §655.6(b), (c). Thus, an employer's need is considered temporary if it is either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, and absent unusual circumstances, a recurring or peakload need must last no longer than 10 months. 20 C.F.R. §655.6(b), (c).³ Under 8 C.F.R. §214.2(h)(6)(ii)(B)(3):

(3) Peakload need. The petitioner 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.

With respect to agricultural workers under the "H-2A" program, an employer may also establish a need for such employment to be performed on a temporary or seasonal basis. 20 C.F.R. § 655.161(a). The pertinent regulations define temporary or seasonal as follows:

For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

20 C.F.R. § 655.103(d). Despite the reference to one year in the H-2A regulations, ten months is typically the threshold used to determine whether a need is temporary; however, an employer exceeding that threshold may nevertheless establish that its need is, in fact, of a temporary or seasonal nature. *Grandview Dairy Farm*, 2009-TLC-00002 (ALJ, November 3, 2008). *See also Vito Volpe Landscaping*, 1991-INA-300 (Board of Alien Labor Cert. Appeals, Sept. 29, 1993) (en banc) (permanent labor certification case).

In evaluating whether a job opportunity is temporary, "[i]t is not the nature or the duties of the position which must be examined to determine the temporary need," rather, "[i]t is the nature of the need for the duties to be performed which determines the temporariness of the position." *Matter of Artee Corp.*, 18 I. & N. Dec. 366 (1982), 1982 WL 190706 (BIA Nov. 24, 1982).

In response to the Notice of Deficiency, Employer made a showing as to the temporary and peakload nature of the employment, and it reiterated those points in its recent letter brief. Specifically, Employer stated:

³ The Department of Labor sought to amend these regulations to reduce the time period in which the aliens could be employed to nine months. 77 Fed.Reg. 10147 (Feb. 21,2013). The U.S. Court of Appeals for the Eleventh Circuit affirmed a district court's grant of a preliminary injunction prohibiting the Department from enforcing these amendments, noting that the Department lacked the specific authority to issue regulations in the H-2B program that it had in the H-2A (agricultural) program. *Bayou Lawn & Landscape Services*, No. 12-12462, -- F.3d -- (11th Cir. April 1, 2013.) The Eleventh Circuit's decision also suggests that the H-2B regulations may be *ultra vires*.

Please let it be known that the Single Family Residence Construction in the Phoenix Metropolitan Area is quite similar to the Landscape Industry peak load need. It typically begins its upswing in February and increases its peak load activity in the hot summer months then it slows down during the colder winter months of December and January. It is easier for the Department's Secretary to understand the peak load need of landscape industry because the DOL is quite familiar with its peak load activity. Therefore, the justification for the landscape industry, as specified by the CFR is quite easy to prove. The housing industry in Arizona also falls under the same peak load pattern as explained above in the landscape industry. . . [Discussion of new evidence.] Furthermore, in which during the peak load period, the employer must supplement its permanent staff with a supplemental workforce due to a short term demand.

* * * * *

It must be addressed that there seems to be a miscommunication where we are not explaining our peak load need well or we are failing to clearly communicate that we are experiencing this U.S. laborers shortage and we see it as a recurrent problem in our industry and in our work area. Given our need for this supplemental workforce and the extensive labor shortage our industry in our area is showing, we must make certain that our initial petition clearly shows that we have a recurrent need for this supplemental workforce from the months of February to November of each year. But we also specified, since we are filing late, we understand that we can only obtain this supplemental workers from September 16th, 2013 to November 30 of this year.

Basically, we want to make sure we can get these 50 workers for the remaining part of our peak load period. Also, we want to position ourselves to be able to get access to this workforce at the start of our peak load period for the 2014 season.

* * * * *

We truly and accurately stated on the application the requested dates of temporary need which again it was stated as follows:

According to regulation 20 CFR 655.15(b), we understand that we are filing late for this 2013 peak load season and we cannot get our supplemental workers by our usual date of need (from February to November of each year); given this reason please process this temporary petition as soon as possible because we are extremely in need of this supplemental workforce for the years end rush with September 16, 2013 as our staring need date and with [an] end date of November 30, 2013.

The reason for temporary need was stated as follows:

Our peak load begins with natural home building season in Arizona (please check exhibit A to verify the yearly construction trend in Arizona). It starts in February of each year to years end home building rush season of publicly traded companies that usually ends by the last week of November. This is when the increase of demand for our drywall installation services begins and ends which is from February 1 to November 30 of each year.

Employer's Letter Brief of September 17, 2013. Although the new evidence is not before me, the Employer's explanation would arguably be sufficient were it not for the fact that its own records contradict the argument that it is making and call into question both the temporary nature and the peakload nature of the employment.

Specifically, in the Final Determination, the CO challenged the documentation submitted by the Employer on several bases. First, the CO stated that the payroll report (from The Weitz Company and Layton Company) failed to substantiate the assertion of the peak load period from February through November of each year, because the 2010 payroll report was blank; the 2011 payroll report indicated that during the months of February and March the employer had no work at all; and the payroll report showed a continuous need for temporary workers from April of 2011 through December of 2012. Second, the CO noted that, despite Employer's claim that business slows in December and January, the total hours worked in December of 2011 were higher than during any other months of the year and the payroll report for 2012 indicated that during the month of January total hours worked and total earnings received were higher than the months of July, September, October, and November. Finally, the CO stated that, while Employer submitted contracts indicating a need for its services, it provided no explanation regarding how the submitted contracts created a peak in business during the requested period of need.

The CO reiterated these points in the letter brief filed by the Office of the Solicitor. Citing *Kiewit Offshore Services, Ltd.*, 2012-TLN-00031 (BALCA, May 14, 2012) and 8 C.F.R. §214.2(h)(6)(ii)(B)(3), the CO stated that to establish a peakload 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 part of the petitioner's regular operation." Further, the CO noted that it was the Employer's burden of proof; that the Employer was directed to provide documentation to support its peakload need; that the Employer had failed to do so; and that the Employer did not meet its burden, mandating a denial of the application. In support, the CO cited BALCA cases issued in other H-2B cases, including *Cabellero Contracting & Consulting LLC*, 2009-TLN-00015 (BALCA April 9, 2009); *Deboer Brothers Landscaping, Inc.*, 2009-TLN-00018 (BALCA April 3, 2009); *Workplace Solutions LLC*, 2009-TLN-00074 (BALCA Aug. 10, 2009); *Eagle Industrial*, 2009-TLN-00073 (BALCA July 28, 2009); and *Baranko Brothers, Inc.*, 2009-TLN-00051 (BALCA April 16, 2009).

In its letter brief, in response to the deficiencies in documentation raised by the CO, the Employer stated:

In our response to the Request for Further Information submitted, in the deficiency 3. Failure to establish that the nature of the employer's need is temporary, we stated that:

“We have experienced, in the past couple of years, quite volatile demand due to the fact that the construction industry is picking back up (please look at payroll chart) ...”

The CO failed to admit the fact that we are coming back from a deep construction recession.

All required evidence, with the exception of a blank 2010 payroll report, was submitted on time; and it demonstrated the clear upward trend in the constructions industry that was slowly bringing us back to our normal peak load rhythm. The 2010 payroll was blank because such payroll was handled by a payroll company that did not have the sufficient resources and time to render us a report within the limiting 7 days given by the Departmental regulations. However it must be remark[ed] that 2010 was a recessionary year and workflow was not even near any normal historical mark. The CO states that the payroll report, The Weitz Company and Layton Company agreements failed to substantiate the assertion of the peak load period from February through November of each year and I beg to differ. One must show a bit of comprehension in regards to determining that the past three years must and should show a recurrent and future trend in workflow need. I must underline that we are currently and barely getting back from the great recession. Also, Phoenix was one of the most devastated economies given that it was at the epicenter of the greatest economic catastrophe since the great depression. Even more, housing is exactly what devastated our economy and construction came to an almost complete halt. Therefore, when housing started coming back, all we wanted to do is get the job done and its historical peak load was the least of our worries. We just wanted to work! Now that is the reason payroll cannot show a neat peak load chart as expected by any Departmental Regulation law abiding CO for the past three years. However the contracts do show a more define and regular peak load need trend and we expect 2014 to come to an almost complete historical normal peak load demand. Please consider the above explanation that we are barely coming out of a recessionary period and we need all the help we can get because we are considerably short handed.

Employer's Letter Brief of September 17, 2013. Thus, Employer is essentially arguing that the past few years were atypical in view of the recession and the recent recovery, under which there was a short term spurt in construction, and that the housing trends were expected to return to their typical pattern in the future. To that end, Employer submitted evidence concerning trends in housing that was not before the CO. Employer also stated that it was unable to obtain records from 2010 within the allotted time frame, but that those records would also reflect the impact of the recession. Finally, Employer argues that the contracts it submitted do show a peak load need; however, it has failed to explain how they do so.

Employer's explanation is certainly plausible; the problem is that it merely explains the erratic and volatile nature of the construction industry in the past few years and its current need for workers. What it does not establish is that its need is temporary, peakload, intermittent, or seasonal.

Accordingly, denial of certification was proper.

As a final matter, I note that my decision is based on the evidence in the Appeal File and I cannot consider the evidence submitted by the Employer in connection with this appeal. Although Employer has offered support for the lapse in hiring due to the downturn in the economy, of which I could take official notice, and it has also sought to demonstrate general trends in the industry, Employer still has not offered any explanation establishing that its own need is peakload or temporary. It has also failed to adequately explain the discrepancy in the documentation with respect to the months of December and January but, even if the explanation were deemed adequate, there is no documentation establishing that February through November are peakload months. There is thus no reason to remand in the interest of justice for consideration of the additional documentation submitted. Here, as always, the parties are free to attempt a resolution in this matter. However, on the record before me, I have no alternative but to affirm the CO's denial.

CONCLUSION

In reviewing the record before the CO, I find that Employer has failed to demonstrate that its need for H-2B workers is temporary or peakload as is required under 20 C.F.R. § 655.15. Accordingly, I find that the CO's denial should be affirmed.

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's Decision is **AFFIRMED**.

For the Board:

PAMELA J. LAKES
Administrative Law Judge