

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 11 March 2014

OALJ Case No.: **2014-TLN-00015**

ETA Case No.: **H-400-13364-396865**

In the Matter of:

**NATRON WOOD PRODUCTS LLC/
AKA JASPER WOOD PRODUCTS, LLC**
Employer.

Appearances:

Gretel M. Ness, Esq., Parker, Butte & Lane, PC, Portland, OR
For the Employer

Vincent C. Costantino, Esq., Office of the Solicitor, Washington, D.C.
For the Certifying Officer, U.S. Department of Labor, Chicago, IL

Before: Pamela J. Lakes
Administrative Law Judge

ORDER OF REMAND

This matter arises under the temporary nonagricultural (H-2B) employment provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A (2008).¹ On February 18, 2014, Natron Wood Products LLC, (“Employer”) filed a request for an administrative review of the Certifying Officer’s (“CO”) denial of its H-2B application. The H-2B program permits employers to hire

¹ The Department of Labor sought to amend the Part 655 regulations after the 2008 rule took effect in January 2011, 76 Fed. Reg. 3452 (Jan. 19, 2011), and February 2012, 77 Fed. Reg. 10038 (Feb. 21, 2012), but they have since stayed the implementation of these rules pending federal court litigation. *See* 78 Fed. Reg. 53643 (Aug. 30, 2013) (indefinitely delaying effective date of 2011 amendment); 77 Fed. Reg. 28764 (May 16, 2012) (indefinitely staying effective date of 2012 amendment); *see also* *Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (Apr. 26, 2012) *aff’d* 713 F.3d 1080 (11th Cir. 2013) (temporary injunction from implementation of 2012 rule). Notwithstanding the stay, an interim final rule (that is inapplicable here) amended 20 C.F.R. § 655.10(b)(2), 78 Fed. Reg. 24047, 24061 (April 24, 2013). Accordingly, all references in this Order are to the regulations promulgated in 2008, 73 Fed. Reg. 78020 (Dec. 19, 2008).

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 (2008).

Following the CO's denial of an application under 20 C.F.R. § 655.32 (2008), 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 ten 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 January 10, 2014, Employer filed an application with the Department of Labor's Employment and Training Administration ("ETA") for temporary labor certification for ten Millwrights, to be employed from February 1, 2014 through November 30, 2014. (AF 171-187).² Employer specified that three workers were to be used for new employment, while seven workers were needed for a continuation of previously approved employment, without change. (AF 171). Employer further indicated that the nature of the temporary need was "peakload."³ *Id.* The application included a statement of temporary need, in an Addendum, which specified that:

(b) Millwrights are generally needed during the month of March through November, as those are typically the strongest months for commercial construction, which is the largest market component of our firm's plywood sales. During 2013/2014, however, our firm has been engaging in two capital improvement projects; specifically, the tear down and installation of two veneer dryers, and the construction of another plywood press. These two construction projects necessitate that our firm retain additional millwrights through the end of the year and into 2014, as we anticipate these projects will have lives of 9 and 12 months, respectively.

(c) This request is a peakload need because (1) our company regularly employees 225 permanent workers to perform labor at our place of employment, (2) our company needs to temporarily supplement its permanent staff at the place of employment due to seasonal and short-term demand as we process plywood for customers in construction and as we tear down and install new equipment,

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

³ Employer checked the box for "Peakload." There are also boxes for "Seasonal," "One-Time Occurrence," and "Intermittent or Other Temporary Need"; however the form specifies that only one of the standards may be chosen. (AF 171).

resulting in increased workload into 2014, (3) these temporary additions to staff will not become part of our regular operations because of the seasonal nature of the processed plywood market and the short-term nature of the tear down and installation of new equipment. [Emphasis added.]

(AF 177). Thus, to establish the temporary nature of the employment, Employer asserted that it had a “peakload” need for additional employees due to the nature of its work and the increased workload during the months of March through November and it has also asserted that it is involved in two short-term (9- to 12-month) capital improvement projects (involving the tear down and installation of two veneer dryers, and the construction of another plywood press). Another Addendum to the application specified that worker duties would be as follows:

Insert shims, adjust tension on nuts and bolts, or position parts, using hand tools, and measuring instruments, to set specified clearances between moving and stationary parts. Align machines and equipment, using hoists, jacks, hand tools, squares, rulers, micrometers, and plumb bobs. Assemble, install and repair new and modified equipment, using hand tools and power tools. Lay out mounting holes, using measuring instruments, and drill holes with power drill. Signal crane operator to lower basic assembly units to bedplate, and align unit to centerline. Replace defective parts of machine or adjust clearances and alignment of moving parts. Level bedplate and establish centerline, using straightedge, levels, and transit. Dismantle machines, using hammers, wrenches, crowbars, and other hand tools. Attach moving parts and subassemblies to basic assembly unit, using hand tools and power tools. Move machinery and equipment, using hoists, dollies, rollers, and trucks. May supervise up to 3 laborers.

(AF 178). Lastly, Employer specified the required experience, and required that the workers “[m]ust be authorized to work permanently in the US.” (AF 179).

On January 7, 2014, the CO issued a Request for Further Information (“RFI”) and advised the Employer that the application was deficient because (1) Employer had failed to establish that its need for the nonagricultural services or labor was temporary in nature, (2) Employer failed to establish that the number of worker positions requested was justified and represented all bona fide job opportunities, and (3) Employer failed to satisfy all of the H-2B requirements. (AF 165-170). In an attachment, the CO specified the 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 requiring that the applicants must be authorized to work permanently in the U.S.), and the CO specified documentation that would be needed.

Employer responded to the CO on January 23, 2014, providing arguments relating to each claimed deficiency and supporting documentation. (AF 91-164; AF 17-90)⁴. On the issue of the temporary nature of the employment, Employer explained that its peakload dates are from March through November of each year. (AF 27). Employer further indicated that its firm “has

⁴ Employer transmitted an e-mail response to the RFI on January 23, 2014. (AF 91-164). Employer also submitted a copy of its response, received by mail on January 27, 2014. (AF 17-90).

been engaged in two capital improvement projects; specifically, the tear down and installation of two veneer dryers, and the construction of another plywood press.” *Id.* Employer explained that it requested foreign worker Millwrights to supplement permanent staff during the high-volume months of March through November, because the new capital investments “have created a short-term demand for additional Millwrights in the winter of 2013/2014.” *Id.* In response to the request for documentation, Employer submitted a January 23, 2014 letter from Mr. Rick McDougal, President of Employer (AF 39-40); a copy of its Lane Regional Air Protection Agency Title V Operating permit (AF 41-65)⁵; a January 18, 2013 invoice for \$100,000 in dryers (AF 66); pictures and diagrams of the dryers (AF 67-68); a 1-797B Notice of Action from U.S. Citizenship and Immigration Services approving ten H2B workers from June 27, 2013 until January 31, 2014 (AF 69-70); the ETA’s May 31, 2013, Final Determination certifying Employer’s *Application for Temporary Employment* for ten Millwrights from May 31, 2013 until January 31, 2014 (AF 71-72); February 19-20, 2014 e-mail correspondences from the National Prevailing Wage Center (AF 73-75); plywood production totals from 2011-2013 (AF 76-77); and Employer’s 1099 Monthly Reports for 2013 (AF 78-89).

On February 7, 2014, the CO issued a Final Determination that denied Employer’s application. (AF 11-16). The denial was premised upon Employer’s failure to establish the nature of the Employer’s need was temporary and therefore that (1) there were not sufficient U.S. workers available and capable of performing the temporary services at the time of filing and place where the foreign workers are to perform, and (2) the employment of foreign workers would not adversely affect the wages and working conditions of the U.S. workers similarity employed. (AF 11). The Final Determination indicated that Employer corrected one of the two deficiencies identified in the RFI, however, the issue of temporary nature remained. (AF 13). In particular, the CO noted that taken together with Employer’s previous application for Millwrights from May 31, 2013 through January 31, 2014 and with the current application request of Millwrights between February 1, 2014 and November 30, 2014, Employer requested a need of 18 months and did not establish that the position was temporary in nature, as defined by Departmental Regulations. The CO noted:

While the employer has explained why it may have a need for an additional two months based on the worker delay, the explanation does not justify why the employer has a continuous need for workers for a total of 15 months. The employer is requesting dates of need that, when coupled with the previous certification, exceeds a 10 month period and covers periods previously established as low demand periods.

(AF 15-16). The CO concluded that the Employer submitted documentation did not establish a peakload need that does not exceed ten months. (AF 16).

Employer filed a letter brief requesting redetermination/administrative review [hereafter “request for review”] on February 18, 2014. (AF 1-10). The Director of the Chicago National

⁵ The Lane Regional Air Protection Agency Title V Operating permit, and Review Report only contains odd numbered pages, every even page of the permit has been excluded from the submission. Additionally an attachment submitted with the Review Report only contains even numbered pages, omitting all odd pages. (AF 41-65).

Processing Center sent the Administrative File, by way of a password-protected CD, to the Board of Alien Labor Certification Appeals on or about February 25, 2014 and it was received by the undersigned administrative law judge, to act on behalf of the Board, and opened on February 26, 2014.

On February 28, 2014, the undersigned, on behalf of the Board, issued a Notice of Docketing and Order, which noted that the password-protected CD had been received instead of transmittal of a copy of the appeal file to BALCA, as required by 20 C.F.R. §655.33(b). The CO was directed to immediately provide a copy of the file to the Employer and the Solicitor, as required by the regulations, and the parties were permitted to file their briefs by email or otherwise by no later than the close of business on the fifth business day after they received the appeal file.

The Office of the Solicitor of Labor, on behalf of the CO, timely submitted its brief by email on March 4, 2014 and it was filed on March 5, 2014. No additional briefing was submitted by the Employer.

APPLICABLE LAW

Under 20 C.F.R. §655.6(a) (2008), 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 C.F.R. 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).⁶ Under 8 C.F.R. § 214.2(h)(6)(ii)(B):

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.

⁶ 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*.

8 C.F.R. § 214.2(h)(6)(ii)(B).

A one-time occurrence is defined under 8 C.F.R. §214.2(h)(6)(ii)(B)(1):

To establish a one-time occurrence, the employer must demonstrate “that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.”

8 C.F.R. § 214.2(h)(6)(ii)(B)(1). A peakload need is defined under 8 C.F.R. §214.2(h)(6)(ii)(B)(3):

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.

8 C.F.R. §214.2(h)(6)(ii)(B)(3). Despite the reference to one year in the 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).

DISCUSSION

The issue is whether the Employer failed to establish that its need for nonagricultural services or labor was temporary in nature. Specifically, when the prior approved certification is combined with the instant application, the Employer has a back-to-back need lasting more than ten months. (AF 15-16). *See* 20 C.F.R. § 655.6(c).

In its request for redetermination (“request for review”), Employer argues that the CO erred by (1) failing to consider all of the submitted evidence in support of the Employer’s temporary need and (2) by erroneously counting the requested time periods in the cumulative rather than as two separate time periods. (AF 1-3). Specifically, Employer explained that, by focusing only on the two-month delay, the CO had failed to consider that there had been delays in the original project due to the late arrival of the foreign workers, the fact that it was only able

to obtain six out of the ten requested, and unanticipated stringent air quality standards that further complicated the initial project:

[T]he installation of this additional equipment led to the further changes in the projects timeline and workload needs. . . . There were indeed sufficient and justifiable reasons in support of the one time, peakload need by the employer. The verifiable fact remains that the employer's peakload need is tied to a specific one-time occurrence: the installation of veneer dryers costing between \$500,000 and \$750,000 is a substantial expense dictating that the capital improvement be on a one-time peakload basis. The project has a set completion timeline. While the timeline may shift as a result of delays and unanticipated permitting and paperwork requirements, it is uncontroverted that the equipment must be installed. As such, there is a set start and end date connoting temporariness rather than permanence. [Emphasis added.]

(AF 2). Likewise, the Employer argued that the CO had erroneously counted the requested time periods in the cumulative rather than as two separate time periods, noting that the original project relating to the dismantling of the dryers and site preparations had been extended due to delays. (AF 2). Employer argued:

The specific nine month period of February 2014 to November 2014 requested by the employer in its second H2b filing is a period of time separate and apart from the five month period actually utilized by the employer from its first H2b certification. Rather than viewing this time period as a sign of permanence, this time period, instead, clearly connotes the temporary nature of the project, given that a set installation schedule was provided by the employer in its response to the RFI covering the month by month project timeline. As previously stated, the very fact that the employer's one-time, peakload need is tied to an installation project means that there is a set end date. Once the installation is complete, the temporary need ends.

In its January 14, 2014 response to the RFI Employer outlined its anticipated timeline to completion of the investment projects as follows:

January – March: Site Prep
April: Weld dr[y]ers back into one piece as they are shipped in 3 separate pieces
May-July: Further welding on required parts to get machines running
August: Installation of internal parts for dr[y]er
September: replacement/re-welding of dr[y]er doors
October: Air system installation
November: Plumbing and piping complete project

(AF 18-19). With respect to the period involved in the first application as compared to the period covered by the instant application, Employer indicated that during August 2013 and January 2014 workers dismantled and shipped older dryers, as well as prepped for the new

dryers, while during the months of February through November 2014 workers would be installing the equipment. (AF 3; AF 18-19).

In the Certifying Officer's Letter Brief, the CO argued that the Employer had not adequately responded to the RFI or documented its temporary need. (*Certifying Officer's Letter Brief* p. 3, citing AF 13-16). Specifically, the CO found that the Employer's explanation did not "justify why the employer has a continuous need for workers for a total of 15 months" and indicated that "the employer is requesting to resume work on the same project for the same job opportunity in the same area of the intended employment, which exhibits a continuous need." (*Certifying Officer's Letter Brief* p. 2-3, citing AF 15-16). The CO noted that Employer's request extends into its "low demand periods." *Id.* Addressing Employer's explanation concerning the two periods, the CO argues that the project covered by the previous application and the current application were "actually the same project," with the first part extending from June 2013 to January 2014 and the second part extending from February 2014 to November 2014. (*Certifying Officer's Letter Brief* p. 4.) The CO also argued that the documentation submitted was insufficient, particularly in view of the absence of payroll records or specific worker documentation to support its peakload need. *Id.* at p. 3-4. With regard to the documentation provided, the CO stated that the Plywood Production totals from 2011-2013 failed to substantiate the assertion of the peak load period from February through November of each year; specifically because the totals "are not significantly different from the alleged 'normal' work time period to the alleged 'peakload' time period." *Id.* at p. 4. Furthermore, the CO noted:

[A] review based on the dates of need noted in the employer's current and previous application demonstrates no significant pattern that proves a peakload need. Moreover, without information about permanent workers, it is impossible to garner any clear indication of the employer's normal versus alleged increased temporary need. Payroll records were not supplied here, but even where such records are supplied, failure to supply information regarding permanent workers in contrast to the temporary workers requested requires denial of the application.

Id. Finally, the CO noted that it was the Employer's burden of proof and that the Employer did not meet its burden, mandating a denial of the application. *Id.* at p. 6.

After reviewing the arguments of both parties, it is clear that the Employer is now focusing, at least in part, on a one-time occurrence as opposed to a peakload need, while the CO has focused on the peakload need for the workers. Under the regulations, Employer is permitted to have a one-time occurrence that could extend past a ten-month period. 20 C.F.R. §655.6(c). Employer's original application, H-400-13101-627428, for Millwrights is not in front of me, and I cannot determine whether the need was certified under a one-time occurrence standard or as a peakload need. Here, Employer selected a "peakload" standard for its current application; however, Employer listed two groups of workers, one of which (involving seven workers) was to continue the initial project while the other (involving three workers) was to engage in "new employment." and Employer did not differentiate between the two separate needs in its application. Furthermore, the duties listed include that of both the "peakload" need and the installation project need, without separately listing what the seven workers' duties would be

versus the three new employment workers' duties. (AF 177-178). Although Employer has listed its needs as "peakload" in the current application, if Employer's investment projects are truly one-time occurrences, Employer's needs should be separated and also reviewed under the one-time occurrence standard. Additionally, it is unclear if the project time line dates are inclusive of both the installation of the two veneer dryers and the construction of the plywood press, as it only makes mention to dryers.

If Employer strictly will only have a one-time need for the seven additional workers to install dryers and a plywood press, it can apply under the one-time standard and be afforded workers past the ten month period. Employer previously applied for workers during its non-peak time and was approved; while I do not have the application before me, this approval reflects that Employer demonstrated a valid need, inclusive of non-peak colder months.⁷ Employer argues that the delay in receiving workers for its previous certification, has delayed the one-time project to run concurrently with its normal peakload time creating a need for more workers to assist with the one-time installation projects, as well as to supplement permanent workers during peak season. As noted, Employer requested three workers to be used for new employment, while seven were to be a continuation of previously approved employment, without change. However, Employer consistently stated its need is a "one-time, peakload need," without differentiating between the two. (AF 1, 2, 3).

I agree with the CO's contention that Employer does not sufficiently demonstrate a peakload or seasonal need for the ten months of February through November 2014. If the application were premised solely upon a peakload or seasonal need, it was properly denied. In this appeal, Employer focused its argument on the need to have workers assist in its installations projects, and it neglected to demonstrate a peakload need to supplement permanent workers during peak months.

Inasmuch as the need for workers to assist with installation projects on a one-time basis was not addressed by the CO, I find that a remand would be appropriate.⁸ While I find, on the record before me, that Employer has failed to demonstrate that its need for H-2B workers is peakload, it has made a showing of a possible one-time occurrence need for H-2B workers to assist with its equipment installation projects. On remand, the CO should consider the current application, along with the previously certified application, H-400-13101-627428, to determine if Employer's needs are distinguishable (*i.e.*, one-time occurrence as opposed to peakload) to use the one-time occurrence standard in analyzing the need of workers, under 8 C.F.R. §214.2(h)(6)(ii)(B)(1).

⁷ Employer indicated that during cold months, construction projects and demand for plywood slow down, with peak months occurring between March and November. (AF 39). The previous ten H2B workers were approved from June 27, 2013 until January 31, 2014 (AF 69-70)

⁸ The CO in its brief stated: "Moreover, the employer's arguments and information submission in the employer's appeal cannot be considered by the court. As noted in *Earthworks, Inc.*, 2012-TLN-00017 (February 21, 2012), '[t]he scope of the Board's review is limited 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).'" See *Certifying Officer's Letter Brief* pg. 6, nt. 2.

CONCLUSION

In view of the above, I am remanding this matter to the CO to allow the CO to address the standard to be applied in the application with the Employer to see whether the existing application is subject to correction. On remand, the CO shall determine if the Employer's need for an additional seven workers to assist in installation projects can be severed from the asserted peakload need and whether Employer can establish a one-time need.

ORDER

IT IS HEREBY ORDERED that the instance case, be and hereby is, **REMANDED**, to the CO for further processing.

For the Board:

PAMELA J. LAKES
Administrative Law Judge