



Issue Date: 05 March 2015

BALCA Case No.: 2015-TLN-00016

ETA Case Nos.: H-400-14335-672351

In the Matter of:

TARILAS CORPORATION

Before: KENNETH A. KRANTZ
Administrative Law Judge

DECISION AND ORDER - AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

On January 9, 2014, the Employer sent a request for Administrative Review of the Certifying Officer's (CO) denial of the Employer's application for temporary labor certification. The Board of Alien Labor Certification (BALCA) issued a Notice of Docketing on January 15, 2015. BALCA received the Appeals File (AF) on January 15, 2015. A Decision and Order was issued on January 22, 2015, affirming the denial. On February 3, 2015, counsel for the Employer filed a motion with the Chief Administrative Law Judge which requested that the decision be vacated and that counsel be permitted to file a brief. The request was granted, and the decision was vacated on February 12, 2015. The parties have submitted briefs which were received on February 23, 2015.

BACKGROUND

The Employer, Tarilas Corporation, specializes in structural metal fabrication in the commercial construction industry. (AF 42).¹ On November 30, 2014, the employer filed an H-2B application with the Department seeking 125 full time workers to be employed as Solderers and Brazers for the period from January 1, 2015, to October 31, 2015. (AF 42, 53). The Employer provided the following explanatory statement:

This temporary, peak-load, seasonal need is expected, recurring annually, to supplement our permanent staff at the place of employment. Winter weather conditions limit the amount of work that can be done during the months of November and December each year, the fabrication process is diminished, and we reduce our staff to our permanent workers who are tasked with completing other projects, tying up loose ends or maintaining equipment, preparing for the heavier work load during the peak load periods.
(AF 54).

¹ Citations to the Appeal File are abbreviated as AF followed by the page number.

On December 8, 2014, the Certifying Officer (CO) issued a *Request for Further Information* (RFI) stating broadly that the Employer failed to establish that its need for labor is temporary in nature; the employer failed to establish that the number of worker positions being requested for certification is justified and represents any and all bona fide job opportunities; and the employer failed to satisfy all the requirements of the H-2B program. (AF 33). In “Attachment A” of the RFI, the CO specified the reasons why the application was not sufficient to grant temporary labor certification and what documents the Employer needed to submit to overcome the deficiencies. The CO cited specific regulations, 655.6 *Temporary Need* and 655.21(a) *Supporting Evidence for Temporary Need*,² which the Employer needed to address. (AF 36).

The Employer responded to the RFI on December 18, 2014, with additional documents. (AF 8-32). On December 30, 2014, the CO denied certification in accordance with 655.1, stating that the Employer failed to show:

- There are not sufficient numbers of qualified U.S. workers available for the job opportunity for which temporary labor certification is sought and/or
 - The employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.
- (AF at 3)

Specifically, the CO denied certification based on 20 CFR §§ 655.6 and 655.21(a) for failure to establish that the nature of the Employer’s need is temporary. (AF at 5).

The Employer sent a Request for Administrative Review on January 9, 2014 and a brief in support on February 23, 2015. The Employer argues the denial of its certification should be reversed because the Employer successfully addressed the deficiencies in its application meeting the regulatory standard for approval. Further, the Employer states the CO’s decision conflicts with the regulations and is arbitrary and capricious.

The Associate Solicitor submitted a brief in support of the CO’s decision. The brief argues the Employer did not adequately respond to the RFI and sufficiently explain its temporary need for 125 workers. Thus, denial should be affirmed.

STATEMENT OF THE CASE

An employer seeking certification to employ H-2B nonimmigrant workers bears the burden of establishing eligibility. The Employer must show that there are not sufficient numbers of qualified U.S. workers available for the job opportunity for which temporary labor certification is sought. The Employer must also show that the employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. § 655.1(b).

Where an employer has submitted an application for temporary labor certification, and that application fails to meet all of the obligations required by 20 C.F.R. §655.22 or other requirements of the H-2B program, “the CO must issue a RFI [Request for Further Information] to the employer” setting forth the deficiency in the application and permitting the employer to

² The other regulations and defects raised in the RFI are no longer at issue in this proceeding.

submit supplemental information and documentation for consideration before issuance of a final determination on the application. Failure to comply with a RFI, including not providing all documentation within the specified time period, may result in a denial of the application and also result in the CO requiring supervised recruitment in the future. 20 C.F.R. §655.23(c).

Upon appeal to BALCA, only that documentation upon which the CO's final determination was made (the Appeal File), the request for BALCA review (which may not contain evidence that was not submitted to the CO for consideration in the underlying determination), and submitted legal briefs may be considered. 20 C.F.R. §655.33.

DISCUSSION

The Employer argues the denial of certification is “arbitrary and capricious”, in part, because the CO's stated basis for denial in the “Final Determination” letter cites deficiencies that were not at issue in the RFI. In particular, the Employer argues a denial based on 655.1 is incompatible with the identified deficiencies in 655.6 and 655.21(a). The Employer's argument misconstrues the broad language of 655.1 as being a distinct and separate regulation from the more specific language of 655.6 and 655.21(a).

The CO's Final Determination letter first cites the broad language of 655.1 which states that the scope and purpose of temporary labor certification is to ensure the following:

- There are not sufficient numbers of qualified U.S. workers who are available for the job opportunity for which temporary labor certification is sought; and/or
- The employment of the H-2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed. (AF 3).

This regulation restates and references the broad requirements of the enabling statute as defined in 8 U.S.C. 1101(a)(15)(H)(ii)(b). Essentially, the regulations in Part 655 get their authority and derive from 655.1 via the enabling statute. Thus, the specific requirements of 655.6 and 655.21(a) serve to achieve the aims of 655.1, and a deficiency in these regulations is necessarily a deficiency in the broad scope and purpose of temporary labor certification as described in 655.1. In any temporary labor certification request for information, the scope and purpose in 655.1 implicitly apply. That the CO referenced 655.1 in the Final Determination was not arbitrary and capricious. Though 655.1 was not explicitly referenced in the RFI, the Employer was not prejudiced by the inclusion of 655.1, after the Employer responded to the RFI, in the CO's Final Determination denial. There are no specific steps in 655.1 for an Employer to follow in order to ensure compliance with the application regulations. If the CO found the Employer remedied the deficiencies in 655.6 and 655.21(a), cited in the RFI, compliance with the scope and purpose of 655.1 would have also been fulfilled.

The Employer also argues that it did comply with the requirements in 655.6 and 655.21(a). The regulation at § 655.6 states 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 sec 214.2(h)(6)(ii)(B). Further, 655.21(a) requires an employer to include attestations regarding temporary need in the appropriate sections, including a detailed statement of temporary need.

In accordance with §655.23(c), the CO's RFI requested a detailed statement of temporary need establishing the dates employer requested, as well as information regarding the employer's business cycles and their relationship to the requested dates and need for 125 workers per §655.21. (AF 36). In order to assess the Employer's temporary need for 125 workers, the CO's RFI directed "The employer must submit supporting evidence and documentation that justifies the chosen standard of temporary need. The employer's response must include, but is not limited to [the following]:"

- (1) a chart detailing lost contracts from 2014, the scope of work, and contracted dates of need;
 - (2) a chart detailing the business operations for the upcoming 2015 season. The chart must include the number of contracts broken out by month for the year;
 - (3) a summarized monthly payroll for 2014, separated by full-time permanent workers and temporary workers, that identifies each month the number of workers employed, the total hours worked, total earnings received, IRS form 941, Employer's Quarterly Tax Return covering all quarters for the past two years; and
 - (4) a written explanation as to how the employer determined its dates of need.
- (AF at 37).

On December 18, 2014, the employer responded to the RFI and attached:

- (1) a payroll chart for 2014;
 - (2) payroll estimates for 2015;
 - (3) a copy of its work project contract with start and stop dates; and
 - (4) the following statement, "[T]he need for 125 workers is based upon a review of the itemized projects to be completed, the time frame that the job must be completed, and the employers (sic) best estimate of need based upon prior experience in the industry."
- (AF at 10 & 26-32).

The CO denied the application on the basis the submitted documentation did not satisfy the requirements of 655.6 and 655.21(a). (AF 5). The information supplied did not establish that it has a bona fide peak load need. The CO requested the Employer to submit evidence justifying its chosen standard of temporary need. (AF at 37). The Employer's ETA Form 9142B shows the Employer selected the "peakload" standard. (AF at 42). To meet this standard:

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.

214.2(h)(6)(ii)(B)(3).

The Employer argues it provided the CO with extensive information in its response to the RFI in support of its temporary need. Additionally, the Employer states, the regulatory provision at 655.21(a) is impermissibly vague, and the CO's interpretation is arbitrary and capricious because it fails to apprise the employer in advance of what specific evidence may be required and what objective standard will be utilized to judge its application.

I am not persuaded by the Employer's argument. The Department's H-2B regulations provide that "failure to comply with an RFI, including not providing all documentation within the specified time period, may result in a denial of the application." § 655.23(d). On its face the regulation permits the CO to deny an application based solely on the failure to provide all the documentation requested in an RFI. The Employer did not provide much of what the CO requested. The Employer did not provide an explanation for failing to produce the requested documentation, nor did the Employer provide alternative evidence. It was not an abuse of the CO's discretion to deny certification on the basis of the Employer's failure to carry its burden. Further, the CO's application of the regulations, requested documentation, and subsequent denial of the Employer's application was reasonable and not "arbitrary and capricious".

The CO requested an explanation as to how the Employer determined the nature of its temporary need as peakload. The CO requested information explaining how the employer determined the need for 125 workers with an explanation of the employer's business cycles and their relation to the dates of need of January 1, 2015, through October 31, 2015. (AF 36, 37). In its response, the Employer claims that it:

[H]as provided a copy of the contract, copy of the projects to be completed between 01/01/2015 and 10/31/2015 and has detailed how the need for 125 was calculated. The employer has experience in this field, and based upon the amount of work to be done, the time frame, calculated that 125 workers would be the number required for these temporary seasonal workers. (AF 21).

Despite this assertion, there is nothing in the record detailing how the Employer calculated its peakload need for 125 workers. A review of the Employer's contract shows an agreement that the Employer will undertake portions of constructing nine "jack-up platforms" from January 1, 2015, through October 31, 2015. (AF 27). An additional document lists the names of the nine projects, while a third document lists the start and completion dates of the nine projects. (AF 30 and 32). The Employer also submitted an estimated payroll for 2015 which listed 125 temporary workers for each month January through October with corresponding hours worked and expected payroll received. (AF 26). There is nothing, beyond the Employer's "prior experience in the industry", indicating how nine platform projects correspond to a need for 125 workers. "A bare assertion without supporting evidence is insufficient to carry the Employer's burden of proof." *A B Controls & Technology, Inc.*, 2013-TLN-00022 (January 17, 2013).

Throughout the certification process the Employer bears the burden of demonstrating that its need is temporary. It is not the CO's job to extrapolate conclusions in support of the Employer based on interpretations and inferences of the various documents submitted. Even if the CO had attempted to do so, the sparse documentation the Employer submitted would make it impossible. There is no way to ascertain the size and scope of any of the nine projects. The contract and estimated payroll lack any details allowing one to conclude how the Employer determined a need for 125 workers. Further, there is nothing showing the Employer has permanent workers performing "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." 214.2(h)(6)(ii)(B)(3).

Rather than provide the required information, or offer an explanation as to why the information could not be provided, the Employer took umbrage with the CO's request for specific documentation:

The Certifying Officer, in framing the alleged deficiencies as well as the suggested documentation to resolve those deficiencies, appears to think that commerce, the economy, business environment never changes, is set in stone. . . Likewise, the underlying assumptions of the Certifying Officer, by requesting proof of the employers (sic) signed attestation of future needs upon past reaction to prior market conditions [implies] that growth, change, expansion and development of business opportunities are not allowed for those employers who augment their U.S. workforces with temporary, peak load, seasonal workers. (AF 8-9).

As discussed, part of labor certification is to ensure that qualified, willing, and able U.S. workers are not overlooked, and that the wages of similarly employed U.S. workers won't be adversely affected. The Employer regularly employs three workers. The request for 125 temporary workers is an increase in the Employer's labor force of more than 4,000%. The CO's request for documentation supporting an increase of that magnitude warrants more support than the Employer's "experience in this field."

The Employer's "review of the itemized projects" was not explained to the CO. The documentation submitted did not explain the breakdown of each project: *e.g.* whether each project requires the same number of workers and hours; and whether each project will be worked on simultaneously from January through October. The Employer did not explain why it could not provide the information the CO requested. As such, the Employer failed to submit information that was necessary for the CO to determine the validity of the Employer's temporary peak load need per 655.6 and 655.21(a). Thus, the CO could not determine whether the Employer's request would adversely affect the wages and working conditions of U.S. workers similarly employed. § 655.1(b).

I find the CO's denial is appropriate based on the Employer's failure to show that its need is temporary and for failing to submit the requested additional information. Contrary to the Employer's assertion, the CO's bases for denial conform to a rational application of the regulations. The CO cited the applicable regulation for each deficiency and listed what was expected to remedy the deficiency. The Employer failed to provide the specific and standard request for documentation, and the Employer failed to explain why said information was not, or could not, be provided.

CONCLUSION

In conclusion, it is this court's opinion that the employer did not provide enough additional documentation to demonstrate that there are not sufficient numbers of qualified U.S. workers available for the job opportunity, and that the employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.

ORDER

It is hereby ORDERED that the Certifying Officer's **DENIAL** of the Employer's December 30, 2014 Application for Temporary Employment Certification is **AFFIRMED**.

KENNETH A. KRANTZ
Administrative Law Judge

KAK/jpd/mrc