

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 April 2015

BALCA Case No.: 2015-TLN-00038

ETA Case No.: H-400-15022-817083

In the Matter of:

***PRONTO SANDBLASTING &
OILFIELD SERVICES CO., INC.***
Employer.

Before: Theresa C. Timlin
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary nonagricultural employment provisions of the Immigration and Nationality Act (“INA,” or “the 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. The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States “if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(15)(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 U.S. Department of Labor (“DOL,” or “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii).¹ For the reasons set forth below, I affirm the Certifying Officer’s (“CO”) denial of certification.

STATEMENT OF THE CASE

On January 22, 2015, Employer submitted for filing its ETA Form 9142B, H-2B Application for Temporary Employment Certification for the position of Mechanic Assistant, and selected the peakload

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).

temporary need standard. (AF 329-41.)² The CO sent a Request for Further Information (“RFI”) to Employer on January 29, 2015. (AF 324-28.) Specifically, the CO noted two deficiencies. First, Employer failed to establish that its need for nonagricultural services or labor is temporary in nature. Second, 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. With respect to the first deficiency (the only deficiency at issue here³), the CO specified that Employer’s application was further deficient in two ways: failure to establish that the nature of the employer’s need is temporary pursuant to 20 C.F.R. § 655.6; and, failure to provide adequate documentation to establish temporary need for number of workers requested pursuant to 20 C.F.R. §§ 655.22(n), 655.23(b).

Regarding the failure to establish that the nature of the employer’s need is temporary, the CO determined that the requested dates of need in the current application overlap with Employer’s previously certified application for the designated occupation. (AF 326.) The CO explained that the previous certification was for ten Construction Laborers in the same area of intended employment for the dates of April 4, 2014 to January 31, 2015. “The employer’s current application, when taken together with the employer’s previous certification, demonstrates a continuous need covering approximately 20 months, minus the first two weeks of February 2015.” Accordingly, the CO directed Employer to submit the following evidence:

- (1) An explanation regarding how the employer’s need for labor is temporary if it is employing temporary workers on a year-round basis;
- (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 this request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need.

(AF 327.)

Regarding the failure to provide adequate documentation to establish temporary need, the CO cited Employer’s previous certification, in which Employer indicated that it required the services of temporary workers based on a contract with the San Antonio Water Systems; in its current Statement of Temporary Need, Employer cites four contracts, including contracts from the City of San Antonio and San Antonio Water System. Thus, the CO determined that Employer does not have a need for temporary workers. Accordingly, the CO directed Employer to submit the following evidence:

- (1) Complete, signed copies of the employer’s “four large construction contracts,” including the contract with the San Antonio Water System, from previous calendar year(s) clearly showing when work will be performed for each month during the requested period of need on the ETA Form 9142, Section B, Items 5 and 6;
- (2) Complete, signed copies of the employer’s “four large construction contracts,” including the contract with the San Antonio Water System, specifying the actual dates when work will commence or has commenced and end during each year of service and clearly

² In this decision, “AF” is an abbreviation for Appeal File.

³ Employer corrected the other deficiency as noted on the Attachment to the CO’s Final Determination. (AF 13.)

- showing work will be performed for each month during the requested period of need on the ETA Form 9142, Section B, Items 5 and 6;
- (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 . . . Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
 - (4) Other evidence and documentation that similarly serves to justify the chosen standard of temporary need.

(AF 327-28.)

Employer responded to the RFI on February 5, 2015 and attached an addendum to its ETA Form 9142. (AF 16.) In this addendum, Employer detailed its recruitment report for the position designated. (AF 340.) In its response to the RFI, Employer explained that its "normal yearly workload begins to peak around March and April, but states that it currently has more work than it can perform without extra labor due to the early spike in work proposals." (AF 16.) Employer attached four contracts recently awarded, in addition to previous contracts and copies of monthly payroll summary for the past year. (AF 16-17.) Employer stated, "This current and expected work schedule shows that [Employer] will have steady work throughout the period requested for 2015." (AF 17.) Employer also pointed out the difference between the occupation for which Employer previously requested, Construction Laborers, and the occupation for which Employer currently requests temporary workers, Mechanic Assistant. (AF 17.) Employer further stated that it "expects that its workload will decrease at the end of the year to the point that this extra help for their mechanic's [sic] will no longer be needed" as "this is not an ongoing, permanent need." (AF 17-18.)

On February 25, 2015, the CO issued a Final Determination, finding that Employer still failed to provide adequate documentation to establish temporary need for number of workers requested pursuant to 20 C.F.R §§ 655.22(n), 655.23(b). (AF 11-15.) The CO again cited Employer's contracts with the City of San Antonio and San Antonio Water System, included in Employer's current and previous Statements of Temporary Need, and determined, "Based on the employer's Statement of Temporary Need, the employer does not appear to have a need for temporary workers." (AF 14.) The CO further determined that Employer's response to the RFI failed to adequately address the deficiency because Employer's "supporting documentation does not show that it has a peak in the need." (AF 14.) Specifically, the CO pointed to the June 2013, November 2013, and December 2014 contracts, which provided that all work "shall be completed within 365 calendar days from the construction start date or until funds are exhausted, whichever comes first." (AF 14.) The August 2013 and September 2014 contracts provided that all work "shall be completed within 730 calendar days from the construction start date or until funds are exhausted, whichever comes first." (AF 15.) Based on these contracts, the CO concluded that the yearlong and two-year-long contracts do not establish any peak in the need for the services requested in the application. (AF 15.)

By letter dated March 4, 2014, Employer appealed the Final Determination and submitted its Brief in Support of Request for Administrative Review of Temporary Labor Certification Denial. (AF 1-10.) Employer argues that the "new and ongoing contracts" have put a strain on the company's construction equipment and vehicles such that two mechanic assistants are needed to help with repairs and maintenance "during our heaviest workload." (AF 2, 6.) Employer cites the explanation it provided in its response to the RFI, that the "majority of work on major projects in this area tends to get done during the warm and hot months of spring and summer, with jobs winding down some in late fall and winter . . . The peak load for our mechanics begins this month, February." (AF 6.) Employer also

highlights the difference between the completion date of the contracts and the alternative condition, “until funds are exhausted.” (AF 7.)

The Board of Alien Labor Certification Appeals (“BALCA”) received and docketed the appeal file on March 9, 2015. By Order issued March 13, 2015, BALCA placed the matter in abeyance in light of the district court’s decision in Perez v. Perez, No. 3:14-cv-682 (N.D. Florida, Mar. 4, 2015). By Order dated March 20, 2015, BALCA lifted the stay on the proceeding. On March 23, 2015, the case was referred to my office, and on March 24, 2015, the case was reassigned to me.

By facsimile dated March 31, 2015, the CO submitted his brief and statement of position. The CO maintains that Employer failed to adequately address all of the deficiencies identified in the RFI. Specifically, the CO argues that Employer has not complied with the criteria for peakload temporary employment, pursuant to 8 C.F.R. 214.2(h)(6)(ii)(B), because “the contracts submitted by the employer indicated that the employment could last for years, where the threshold for scrutiny of ostensible temporary employment is 10 months.” The CO further noted that “the denial pinpointed the language in the employer’s contracts that called the temporary nature of the job opportunity into question.” Accordingly, the CO’s Final Determination was proper and should be affirmed.

APPLICABLE LAW

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 Department’s ETA. 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an “Application for Temporary Employment Certification” (“ETA Form 9142”) with ETA’s CNPC. 20 C.F.R. § 655.20 (2008). After an employer’s application has been accepted for processing, a CO will reviewed it, and either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

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).⁴

⁴ 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

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. 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

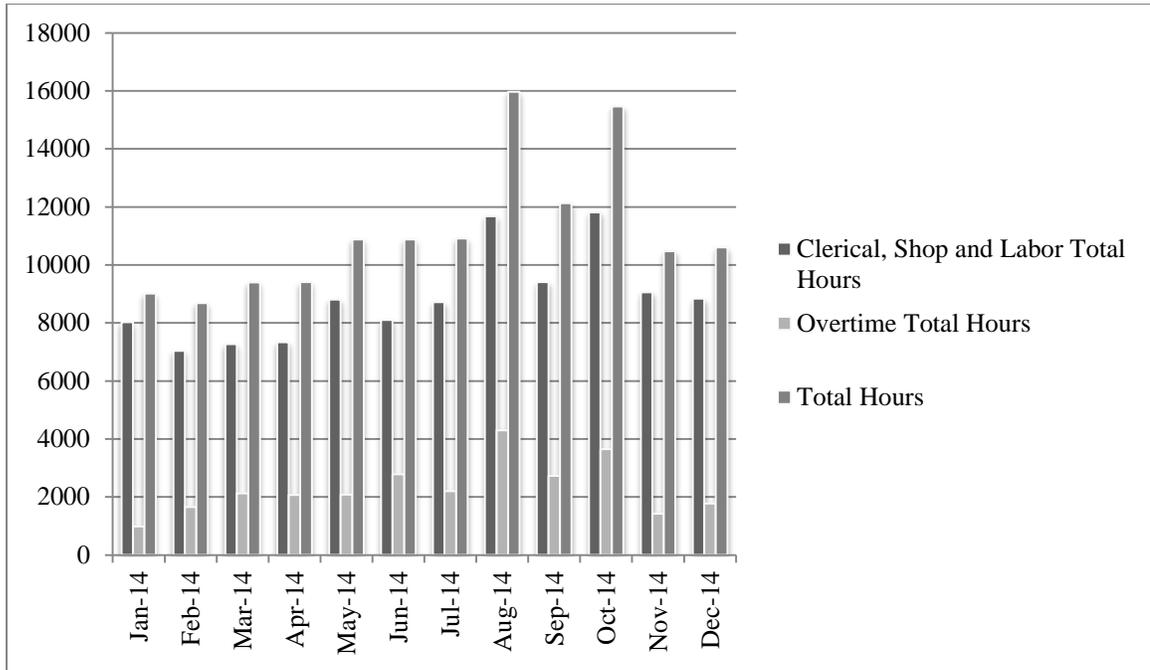
The issue is whether the Employer failed to establish that its need for nonagricultural services or labor was temporary in nature. Specifically, the CO determined that Employer failed to provide adequate documentation to establish a temporary need for two mechanic assistants because the supporting documentation submitted did not show that Employer has a peak in its need.⁵

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*.

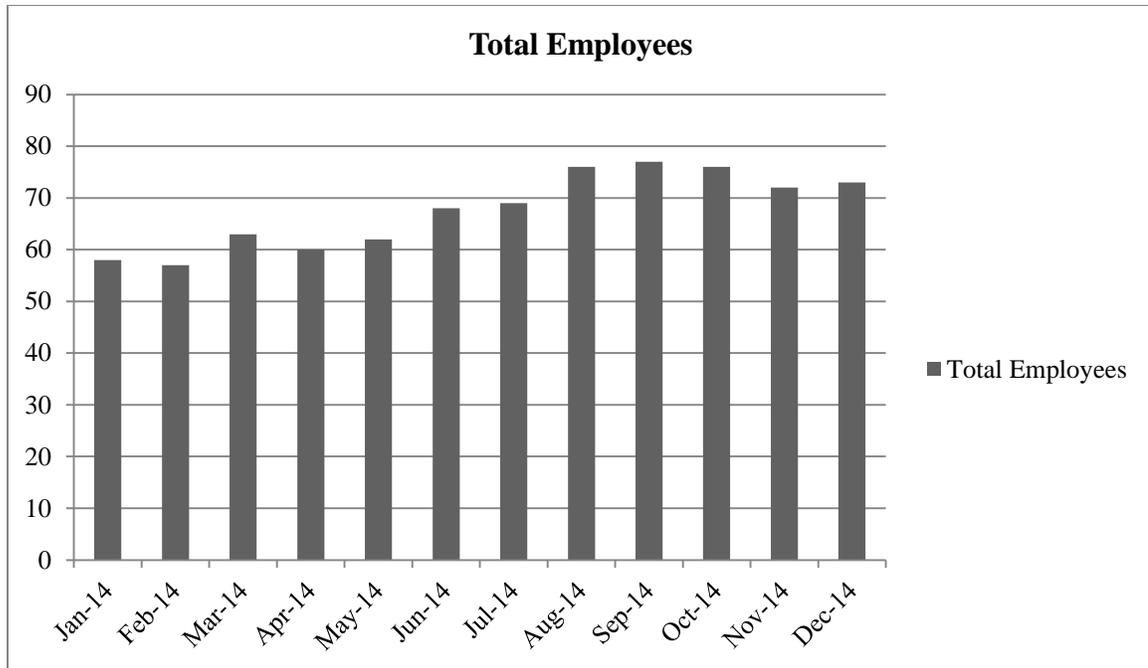
⁵ I note that the CO relied in part on Employer’s prior approved request for temporary labor as a basis for denying this request for certification. That reliance was in error, however, as the prior request was for ten general construction laborers who would be working at the jobsites. This request is for two

Employer's response to the RFI included payroll reports showing hours worked by its employees in 2014. (AF 181-308.) I find that Employer's payroll records fail to show that its need is temporary in nature. From the 2014 payroll records, I have compiled the following charts:

Hours



mechanic assistants who would be assigned to work with the existing mechanics to repair equipment. The jobs are not comparable and Employer's previous temporary need is unrelated to the current request.



Based on the payroll record information, as summarized above, the overtime data in 2014 does support Employer’s contention that there is a seasonal component to its work, as there is a general bell curve with less overtime hours worked in the winter months and greater hours between August and October. However, aside from the two spikes in total hours worked in August and October, there is a general progression leading to an overall increase in the total number of hours worked from the beginning of 2014 to the end of the year. This pattern is replicated by the chart showing the total number of employees per month in 2014, which demonstrates an overall increase from the beginning of the year to the end, without any readily discernable peaks.

Unfortunately, it is not possible to analyze the payroll records in a meaningful way, as Employer did not separately identify full-time permanent and temporary employment in the requested occupation. The reports list workers alphabetically by first name, but there is no labeling to show distinction between permanent and temporary employees, or full-time and part-time workers; adequately showing this distinction is important in light of the definition of peakload need as set forth in 8 C.F.R. §214.2(h)(6)(ii)(B)(3). Because it is the employer’s burden of proof to establish eligibility for temporary labor certification, the petitioning employer should present its documentation in a way that at least complies with the RFI’s instructions.

More importantly, however, Employer’s inventory of equipment and the contracts it submitted do not fit well with the definition of peakload need, which emphasizes a seasonal or short-term demand.⁶ I note that despite Employer’s characterization of its temporary increased workload given the contracts it entered into in 2014, Employer has not raised any argument that it will need to increase its inventory of equipment, requiring increased work for the mechanics. A comparison of the contracts awarded in 2013 with the contracts awarded in 2014 also does not establish that Employer is experiencing a new,

⁶ See 8 C.F.R. §214.2(h)(6)(ii)(B)(3), defining “peak load” as a need to supplement an employer’s permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand.

temporary increase in its workload. Employer's cycle of contracts appears to be continuous in nature. There is nothing unique about the 2014 contracts as compared to the 2013 contracts in terms of the timeframe, contract price, and date entered. I observe:

2013 Contracts			
Contract	Date Entered	Duration (days)	Price
San Antonio Water System	November 18, 2013	180	\$1,728,831.50
San Antonio Water System	November 18, 2013	365	\$1,209,150.00
San Antonio Water System	June 4, 2013	365	\$1,196,985.00
San Antonio Water System	August 13, 2013	730	\$1,234,717.00
2014 Contracts			
San Antonio Water System	September 29, 2014	730	\$2,148,097.00
San Antonio Water System	September 29, 2014	730	\$2,105,877.00
San Antonio Water System	December 2, 2014	365	\$1,983,635.00
San Antonio Water System	November 17, 2014	210	\$1,761,731.00

Although Employer's highway construction work may be seasonal (they do more work in warm weather months than in cold weather months), Employer has not shown that they are currently subject to a peakload. The awarded contracts in 2014 are very similar to the contracts awarded in 2013. A seasonal increase in overtime hours does not establish a peakload. The definition of peak load contemplates a situation where an employer regularly has people doing the work but needs to supplement permanent staff because of short-term demand. Employer has not shown this because there is nothing unique about the 2014 contracts as compared to the 2013 contracts. Employer has a set amount of inventory that could need mechanical upkeep and Employer has not shown that this need will change. Furthermore, the payroll records strongly suggest that the company is increasing in size, without any indication that the increase is temporary. In light of the foregoing, Employer has failed to show that unusual circumstances would justify an exception to 20 C.F.R. §655.6(c).

ORDER

In light of the foregoing, it is hereby ORDERED that the Certifying Officer's Final Determination denying Employer's ETA Form 9142, H-2B Application for Temporary Employment Certification for the position of Mechanic Assistant is AFFIRMED.

For the Board:

THERESA C. TIMLIN
Administrative Law Judge