



Issue Date: 15 September 2016

BALCA Case No.: 2016-TLN-00065

ETA Case No.: H-400-16187-071352

In the Matter of:

EMPIRE ROOFING OF OKLAHOMA, INC.,
Employer.

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: Sandra McGlothlin, Treasurer
Empire Roofing of Oklahoma, Inc.
Tulsa, Oklahoma

and
Sayde Rangel, Director
Infinity Labor Source, Inc.
Buda, Texas
For the Employer

Jeffrey L. Nesvet, Associate Solicitor
Vincent C. Costantino, Senior Trial Attorney
Office of the Solicitor, U.S. Department of Labor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: Morris D. Davis, Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arose under the temporary non-agricultural employment provisions of the Immigration and Nationality Act (“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.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within

¹ On April 29, 2015, the Department of Labor (DOL) and the Department of Homeland Security (DHS) jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) (“2015 IFR”). The 2015 IFR applies if an employer filed its temporary labor certification application after April 29, 2015 and requested a start date after October 1, 2015. The 2015 IFR applies in this matter.

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 United States Department of Labor (“DOL”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). For the reasons set forth below, the Certifying Officer’s (“CO”) denial of temporary labor certification is affirmed.

STATEMENT OF THE CASE

H-2B Application

On July 5, 2016, Empire Roofing of Oklahoma, Inc., (“Employer”) filed an H2-B Application for Temporary Employment Certification, ETA Form 9142B, for occupation title “Helpers-Roofers” with Standard Occupational Classification code 47-3016.² (P701).³ The Application was for 75 new employees for the period October 1, 2016, to June 30, 2017, to enable the Employer to meet its peakload demand to perform roofing work in the Tulsa County, Oklahoma, area. (*Id.*). As Employer explained in its Application:

Currently we do not have a full staff to handle the upsurge in the new peakload season. In order to complete these orders, we need the services of 75 Roofer-helpers. The job opportunity is Peakload under the H-2B classification due to the fact that our company has receives [sic] a large number of contracts during our peakload season. We have several projects in the area of Tulsa, Wagoner, Creek Okmulgee, Rogers, Pawnee and Osage Counties, OK. These projects will be finalized by June of next year. (P701, 707).

Notice of Deficiency, Response and Denial

The CO issued a Notice of Deficiency (“NOD”) on July 13, 2016, informing the Employer of four deficiencies in its Application. (P692-700). Employer responded on July 22, 2016. (P217). The response included a three-page letter addressing the alleged deficiencies (P232-234) and approximately 450 pages of payroll records, contracts, bids and other business related documents. (P235-690). The CO issued a Non-Acceptance Denial letter on August 11, 2016, informing the Employer that its Application was denied. (P198-210). The denial was based on only one of the deficiencies listed in the NOD:

Deficiency: Failure to establish the job opportunity as temporary in nature

Applicable Regulatory Citations: 20 CFR 655.6(a) and (b)

In accordance with Departmental regulations at 20 CFR 655.6(a) and (b), an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.

² Employer was represented by an Agent, Infinity Labor Source, Inc., on this Application. (P204).

³ Citations are to Bates numbers shown at the bottom right corner of each page in the Appeal File.

The employer's need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.

The employer did not sufficiently demonstrate the requested standard of temporary need.

The employer is requesting 75 Helpers-Roofers from October 1, 2016 to June 30, 2017 based on a peakload need. In order to establish a 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.

Specifically, Section B., Item 9 of the ETA Form 9142 indicates the following:

Currently we do not have a full staff to handle the upsurge in the new peakload season. In order to complete these orders, we need the services of 75 Roofer-helpers. The job opportunity is Peakload under the H-2B classification due to the fact that our company has receives a large number of contracts during our peakload season. We have several projects in the area of Tulsa, Wagoner, Creek Okmulgee, Rogers, Pawnee and Osage Counties, OK. These projects will be finalized by June of next year.

The employer did not demonstrate how its need is temporary based on one of the four standards. The employer has not explained what events cause the seasonal need and the specific period of time in which the employer will not need the services or labor.

Also, the employer's requested dates of need, October 1, 2016 through June 30, 2017 are not consistent with the employer's previously certified applications (H-400-15005-970793, H-400-15061-113634, H-400-15335-058939 and H-400-15335-977571) which have dates of need from mid-March through mid-January. The employer did not provide an explanation for the change in the requested dates of need.

Additional Information Requested:

The employer must submit an updated temporary need statement containing the following:

1. A description of the employer's business history and activities (i.e. primary products or services) and schedule of operations through 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;
3. An explanation regarding the change in the requested dates of need; and
4. 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. (P199-200).

Appeal

On August 17, 2016, Employer and Employer's Agent both submitted requests for review before the Board of Alien Labor Certification Appeals ("BALCA"). (P002, 009-011). The two requests are consistent, but the one Employer submitted is a bit longer and goes into greater detail. I will refer to it herein.⁴

Employer's request for review discusses the alleged deficiency and it includes approximately 180 pages of supporting documents. (P009-193). BALCA docketed the case on August 18, 2016, and the Appeal File arrived on August 26, 2016. I issued an Order on August 24, 2016, giving the parties seven days from receipt of the Appeal File to submit final briefs if they desired to do so. I received the CO's Brief on September 7, 2016. I did not receive any additional submissions from the Employer.

Employer's request for review addresses each of the four areas the CO said needed to be updated in Employer's temporary needs statements. (P009-011).

(1) Employer's Business History: Employer is located in Tulsa, Oklahoma, and provides a wide range of roofing services for commercial, industrial and institutional properties. It has been in business since 1982 and is licensed to operate in 19 states. It has 40 employees and generates a gross annual income of \$30 million in Oklahoma.

(2) Nature of Job Opportunity: Tornado season in Oklahoma extends from May through September. High winds during that period make worksites dangerous; therefore, the peak season for roofing work is from October to June. Employer has sent several of its permanent workers to help sister companies in Texas and Colorado, thus it needs the help of 75 temporary workers to supplement its remaining permanent Oklahoma workforce over the nine month Oklahoma peakload period.

(3) Explanation of Change in Dates of Need: Employer (Empire Roofing of Oklahoma) is a separate company from other Empire Roofing companies in other states. Empire Roofing, Inc., of Texas submitted an application for 30 temporary Helpers-Roofers in Texas that is independent of Employer's application for 75 temporary workers in Oklahoma. The peakload period for Empire Roofing in Texas extends from March to January, after the Texas rainy season

⁴ The Request for Review submitted by Employer's Agent was two pages in length. Only the first page was included in the Appeal File. (P002). A copy of the missing second page is attached at the end of this decision.

ends. Since these are two separate companies operating in geographic areas that have different peakload periods, there is no inconsistency in the dates of need in their applications.

(4) Regulatory Standard for Peakload Needs: Employer contends that it established: (i) it regularly employs permanent workers to performs services at its place of employment, (ii) it needs to supplement its permanent workforce on a temporary basis due to a seasonal or short-term demand, and (iii) the temporary additions will not become part of the its regular operations. Employer states that it has approximately 50 workers and needs to supplement its staff with 75 temporary workers to complete backlogged roofing work before the next tornado season begins in the summer of 2017.⁵

The CO's Brief

The Associate Solicitor for Employment and Training Legal Services (“Solicitor”) filed a brief on September 7, 2016. The Solicitor contends that the Employer failed to submit sufficient information to the CO to establish that it had a temporary peakload need for H2-B workers. (Solicitor’s Brief (“SB”) at 1) The Solicitor argues that the performance periods in the contracts the Employer provided did not demonstrate a need for temporary workers during the peakload period (*Id.* at 5-6); the documents showed the Employer had a substantial amount of work but did not establish how that would necessitate employing temporary workers during the peakload period (*Id.* at 6); the payroll data did not differentiate between permanent and temporary workers and did not establish a need for additional temporary workers in the peakload period (*Id.* at 7); and there was no evidence that the work in the peakload period had increased over Employer’s normal operational demand (*Id.* at 8).

SCOPE OF REVIEW

BALCA has a limited standard of review in H-2B cases. Specifically, 20 C.F.R. § 655.61(e) states:

The BALCA must review the CO's determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted and must:

- (1) Affirm the CO's determination; or
- (2) Reverse or modify the CO's determination; or
- (3) Remand to the CO for further action.

BALCA reviews a CO’s denial of an H-2B application using an “arbitrary and capricious” standard. *Brook Ledge, Inc.*, 2016-TLN-00033, at 5 (May 10, 2016); *see also J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016).

⁵ Employer says here that it has approximately 50 employees, but in paragraph one of the same document it says it has 40 employees and on the ETA Form 9142B it said it had 200 full-time equivalent employees. (P009, 011, 203).

DISCUSSION

Employer submitted approximately 180 pages of documents with its request for review. (P009-P193). Some of those documents were submitted to the CO for consideration prior to her final determination. For instance, a contract document dated April 26, 2016, between National Steak & Poultry and Empire Roofing of Oklahoma was provided to the CO in reply to the NOH (P339-346) and the same document was included with the request for review. (P073-080). Other documents included with the request for review contained information that was not provided to the CO prior to her final determination. For example, a bid submitted on a Haskell Company form that was signed by a representative of Empire Roofing of Fort Worth, Texas, on July 19, 2016, was not provided to the CO prior to her determination. (P188-193). Still other information that was submitted to the CO prior to her final determination was also included with the request for review, but with alterations. For example, Employer submitted to the CO earnings data for 24 workers on its payroll in the month of October 2015 showing all were in permanent status. (P309-310). Employer submitted with its request for review payroll data for the same 24 workers for the same month, but in this version it shows 17 workers in permanent status and the rest of the workers in temporary status. (P022). Discrepancies among documents were not explained.

Since BALCA's task is to review the CO's decision, BALCA only considers the evidence upon which the CO's final determination was made along with the request for BALCA review (which may not contain evidence that was not submitted to the CO for consideration before she made a final determination) and briefs. 20 C.F.R. § 655.61(a)(5) and (e); *see also Bassett Construction, Inc.*, 2016-TLN-00023, at 4 (Apr. 1, 2016); *A B Controls & Technology, Inc.*, 2013-TLN-00022, at 5 (Jan. 17, 2013). Accordingly, I have not considered the documents Employer submitted with its request for review except to the extent the same exact information was submitted to the CO prior to her final determination.

An employer bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, at 7 (Jan. 10, 2011); *Andy and Ed, Inc., dba Great Chow*, 2014-TLN-00040, at 2 (Sep. 10, 2014); *Eagle Indus. Prof'l Services*, 2009-TLN-00073, at 5 (July 28, 2009). To do so, the employer must establish the temporary nature of its need for the worker to perform the labor or service. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); *see also Tampa Ship*, 2009-TLN-00044, at 5 (May 8, 2009). A bare assertion without supporting evidence is insufficient to satisfy the employer's burden of proof. *AB Controls & Tech., Inc.*, 2013-TLN-00022 (Jan. 17, 2013). Likewise, an employer may not satisfy its burden to establish the temporary nature of the need by simply providing reams of data without analysis. An employer is not required to prove the particular requirements of each and every job or position, but it must establish a bona fide temporary need. *Tampa Ship, LLC*, 2009-TLN-00044, at 6 (May 8, 2009).

In *BMC West Corp.*, 2016-TLN-00043 and 2016-TLN-00044, at 7 (May 31, 2016), BALCA found that while the employer explained why its needs changed seasonally, submitting over 5,000 pages of invoices without summary or analysis did not substantiate that it had a peakload need for temporary workers. Similarly, in another decision involving the same employer, *BMC West Corp.*, 2016-TLN-00034, at 6 (May 6, 2016), BALCA observed that

invoices the employer provided suggested there may have been support for its workload argument, but the significance of the information was not clearly established. BALCA said:

As the burden is on the Employer to establish its peakload need, it is not reasonable for the Employer to attempt to transfer its obligation to prepare and support its application to the CO by submitting 60 pages of unsummarized invoices. This is analogous to a taxpayer submitting a bag of unsummarized receipts to the IRS with a tax return, and expecting the IRS to determine the appropriate deductions.

In the current case, the CO explained in an attachment to her denial letter why the Employer's Application was denied and what the Employer was required to address to cure the deficiencies (P200-201):

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. Signed monthly invoices from previous calendar years clearly showing that work will be performed for each month during the requested period of need on the ETA Form 9142, Section B., Items 5. and 6.; and/or
2. 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 in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. 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.

In response to the NOD, the employer submitted contracts with National Steak and Poultry, Spring Creek Retail and Bank SNR.

The submitted contracts did not demonstrate a peakload need. The contracts show work is to be completed in June 2016, which is several months prior to the start date of need requested in this application.

The employer also submitted a Backlog Schedule, Oklahoma Security Commission Quarterly Contributions Reports, Oklahoma Quarterly Wage Withholding Tax Return forms and a Permanent Employee Tax Return Spreadsheet.

These documents do not support a temporary, peakload need. The documents do not differentiate between permanent and temporary workers and the CNPC is unable to determine if there is a peakload need. Therefore, the employer did not overcome the deficiency.

Also, the employer's requested dates of need, October 1, 2016 through June 30, 2017 are not consistent with the employer's previously certified applications (H-400-15005-970793, H-400-15061-113634, H-400-15335-058939 and H-400-15335-977571) which have dates of need from mid-March through mid-January. The employer did not provide an explanation for the change in the requested dates of need.

In accordance with Departmental regulations at 20 CFR § 655.51, Subpart A., the Department of Labor has made a final determination on your Application for Temporary Employment Certification. Based on the foregoing reason, the employer's application is denied.

The CO's and the Solicitor's assessments of the documents Employer submitted in response to the NOD were construed more liberally than necessary. The CO and the Solicitor said that Employer provided three contracts – National Steak & Poultry, Spring Creek Retail and Bank SNB⁶ – with contract completion dates in June 2016. (P201, SB at 5). It appears that only one of the three was actually a contract. Employer had a signed contract with Bank SNB to waterproof a balcony for \$86,500.00. The period of performance was between April 19, 2016 and June 3, 2016. (P347-353). The other two documents were only signed by one of Employer's representatives, which would make the documents offers that would have to be accepted before they were transformed into contracts.⁷ (P346, 374). Regardless, even if all three of the documents were binding contracts, the performance periods required Employer to complete the work well before the start of the purported peakload period.⁸ Employer submitted what is labeled a "backlog schedule" that is dated July 21, 2016, but it does not show when any of the work will be performed, how many workers are required for any of the projects and for how long, or any other information that might tend to substantiate its claim of a peakload need. (P336-338). None of these documents establish that the Employer had a peakload requirement for temporary workers from October 2016 through June 2017.

The other contracts, offers and bids that Employer submitted were documents for its sister company, Empire Roofing, Inc., of Texas, and, as Employer explained in its request for review, these are "two separate companies" that filed their own applications for temporary workers. (P010). While those documents may help the sister company in Texas establish that it has a valid peakload need for workers, it does not help Employer to do so here.

Likewise, the payroll and tax documents submitted in response to the NOH do not establish a temporary peakload need. What the documents show is that Employer's workforce fluctuated in size, with fewer workers in the summer and more in the winter, and that overall Employer's workforce had grown over time. For instance, the fewest number of workers on Employer's payroll was 14 in July 2014 (P269) and the most was 48 in January and February 2016. (P314-323). As an example of Employer's growth, the July workforce numbers went from 14 in 2014 to 23 in 2015 to 29 in 2016. (P269, 303, 334). What the documents fail to do is

⁶ The document is barely legible and it appears the CO misread the letter "B" as an "R."

⁷ Restatement (Second) of Contracts § 22 (1981).

⁸ The performance period in the offer on the National Steak & Poultry job was 75 days from April 26, 2016, which would be July 10, 2016.

establish a peakload need for temporary workers from October 2016 through June 2017. Even though Employer says that “several of our permanent workers” were sent to Texas and Colorado to assist sister companies with their work backlogs, how many workers were gone and for how long was not specified. (P010). The most recent payroll data showed 29 workers as of July 2016, which was more than double the number of workers on Employer’s payroll in July 2014. There was no evidence to show that there had been a change in circumstances from the 2014 and 2015 periods to 2016 that would validate a peakload need for workers from October 2016 through June 2017.

The CO determined that the Employer failed to explain why the dates in the current Application differed from the dates in previously certified applications. (P201). Employer explained in its response to the NOD that it and Empire Roofing, Inc., of Texas are separate companies and submitted separate applications. Employer also explained that the two companies have different peakload need periods due to the differences in weather in the two areas, with tornado season being the predominate factor in Oklahoma. (P233-234). Employer and Employer’s Agent made the same representations in their requests for review with respect to the two separate companies and different peakload needs based upon weather. (P002, 010-011). There is no evidence in the Appeal File that contradicts Employer’s claim.

The CO’s determination denying Employer’s Application must be affirmed unless it was arbitrary or capricious. *Brook Ledge, supra*. That means the determination must be affirmed if it was “made rationally and in good faith—not whether it was right.” *Griffis v. Delta Family-Care Disability*, 723 F.2d 822, 825 (11th Cir. 1984), *cert. denied* 467 U.S. 1242 (1984), quoting *Riley v. MEBA Pension Trust*, 570 F.2d 406, 410 (2nd Cir. 1977).

The CO’s determination that the Employer failed to explain the difference in the dates of peakload need for this Application and prior certified applications does not pass the test. Employer provided an explanation in the response to the NOD, as well as in its request for review, that the CO apparently overlooked and did not address. I am unable to find that there is a rational connection between the facts and the CO’s decision and I must reverse her determination on this specific ground. *Motor Vehicle Mfrs. Assoc. of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

The CO’s determinations in all other respects are rational, connected to the evidence of record, made in good faith, and for the reasons set forth above they are affirmed.

This case is similar to *BMC West Corp., supra*, where the record suggested that there may have been support for the employer’s argument, but the connection between the evidence and the argument was not clearly established. Here, Employer may, with some effort, be able to demonstrate a peakload need for temporary workers. The 727 page Appeal File is in some respect like a 727 piece puzzle. Having now spent hours looking at those pieces, it appears that some of the pieces fit, some of the pieces are missing, some of the pieces belong to another puzzle, and there is no guidance on how the pieces should fit together to arrange them into a clear picture. An employer cannot just toss hundreds of puzzle pieces – or hundreds of pages of documents – on the table and expect a CO to see if he or she can fit them together. The burden is

on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers.

ORDER

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

For the Board:

MORRIS D. DAVIS
Administrative Law Judge

ATTACHMENT

This is Page 2 of the August 17, 2016, letter from Infinity Labor Source, Inc., to the Office of Administrative Law Judges. It should follow after P002 in the Appeal File.

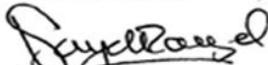
that OK is the number one state for Tornadoes, in which season the employer does not require the help of temporary workers. And Texas company has a Peakload need after the spring rains. Therefore, both companies will not have the same Peakload need and will not have the same dates of employment.

Please see attached the following documents in support to these statements:

- a. Statement from Empire Roofing of Oklahoma, Inc., confirming the business history and activities;
- b. Copies of monthly payroll journals for the years 2015 to 2016 along with a data sheet, establishing that the employer regularly employs permanent workers to perform the services at the place of employment and confirming that the employer has a high demand for temporary workers on the established dates of employment requested;
- c. Copies of State Quarterly Payroll reports that cover the period of 2015 to 2016, supporting the employer's payroll journals;
- d. Copies of signed work contracts between the employer and its contractors, confirming that the employer has work for permanent and temporary workers, and supporting the statement as *"the employer needs to supplement its staff with temporary workers for a SEASON or period of time, and that at the expiration of H-2B visas of the temporary workers, they will go back to their country of nationality and they will not become part of the regular operations of the employer;*
- e. List of backlogged projects along with signed contracts, to confirm that the employer has a backlog just to complete before it can send workers to their new projects;
- f. List from Empire Roofing of Oklahoma, Inc. confirming outstanding proposals,;
- g. Copies of outstanding projects that Empire Roofing of Oklahoma, Inc. has for the Peakload season from October, 2016 to June of 2017. If several or all are approved, the employer will not have enough workers to complete these jobs. At the same time the employer will not have enough workers to complete the backlogged projects

We respectfully request approval of this H-2B nonimmigrant visa petition on behalf of the named beneficiaries. Thank you. If you have any questions or require any further documentation, please do not hesitate to contact me.

Very truly yours,


Sayde Kangel
Director