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Issue Date: 06 May 2016

BALCA Case No.: 2016-TLN-00034
ETA Case Nos.: H-400-16020-971544

In the Matter of:

BMC West Corporation,

Employer

Before: Richard A. Morgan
Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary non-agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A.¹ 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 United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). For the reasons set forth below, I affirm the Certifying Officer’s (“CO”) denial of temporary labor certification.

STATEMENT OF THE CASE

H-2B Application

On January 20, 2016, BMC West Corporation (“Employer”) filed an H-2B Application for Temporary Employment Certification for the job title of “helper of plasterer.” AF 261-286.² Employer requested - 40 full time workers from April 5, 2016 to December 15, 2016 to “help

¹On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that have a start date of need after October 1, 2015.” IFR, 20 C.F.R. §655.4(e). As the application in this case meets these conditions, the IFR applies to this case. All citations to 20 C.F.R. Part 655 in this order are to the IFR.

²For purposes of this opinion, “AF” stands for “Appeal File.”

plasterers by performing duties requiring less skill like manual and physical duties, use, supply or hold materials and tools, and clean work area and equipment in residential construction.” AF 261-263. Employer indicated that the job was a “peakload need.” AF 261. The basic hourly rate for the 40-hour week was \$12.76 per hour with no applicable overtime rate. AF 263,265. Employer required three months of experience as a “helper of plasterer” for all applicants. AF 264. No job training was required. AF 264.

Employer filed a request for Emergency Handling and Departmental approval notice under 20 C.F.R. §655.17 on March 3, 2016, in which it requested expedited treatment of its application. It cited the Chicago “National Processing Center’s current application backlog, which has been generated by unforeseen events wholly outside of [Employer’s] control, including unforeseen market conditions,” as good and substantial cause for the emergency treatment of Employer’s application. Employer incorporated by reference its prior application into this request. AF 258-260.

Notice of Deficiency

By letter dated March 14, 2016, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) for “Failure to establish the job opportunity as temporary in nature” as required by the regulations at 20 C.F.R. §655.6(a) and (b). AF 252-257. The NOD stated that Employer did not submit sufficient information in its Application for Temporary Employment Certification to “establish its requested standard of need or period of intended employment.” The CO pointed out that Employer stated in the ETA Form 9142 “that it operates on a year-round basis between the months of April and mid-December.” Employer also provided the following explanation for why the nature of the job opportunity and number of foreign workers being requested for certification reflect a temporary need: “because we work in a fast pace environment and the lath needs to be installed, stucco applied and finished before it cures or is hardened which is in a very short period of time.” The CO concluded in the NOD that “no supporting documentation was submitted to substantiate how the employer identified its peakload temporary need period and [Employer] did not adequately explain the nature of the temporary need based on its business operations.”

The CO requested additional information from the Employer including a description of the employer's business history and activities (primary products or services) as well as a schedule of operations through the year, an explanation for why the nature of the job opportunity and number of foreign workers reflected a temporary need, and an explanation of how the Employer’s TLC request meets one of the regulatory standards of a peak load need. The CO also requested other specified information which included documentation of specific contracts and monthly invoices to establish its period of need, as well as summarized monthly payroll reports for a minimum of one previous calendar year separately establishing permanent and temporary employment in the requested occupation. (emphasis added).

Employer’s Response

Employer responded to the Notice of Deficiency on March 26, 2016 by email (AF 176-251) and in hard copy on April 1, 2016 (AF 16 – 175). Employer provided a general statement of its business history and activities including its statement that its business is tied to the new

construction industry which has an increase in production due to the new home construction starts in April through December with demand decreasing January through March. Employer further asserted that it meets the regulatory standards of a peakload because “we regularly employ permanent workers to perform the services of labor ... and only need to supplement our permanent staff during our established peakload.” Employer also provided statements from the Nevada Subcontractors Association and the Southern Nevada Home Builders Association in support of the peak load swing of the residential construction industry in the Las Vegas Metropolitan area. In addition Employer submitted 60 pages of listings of invoices from different clients dated January 2014 through December 2015, without summaries or explanations of how they support its position.

Certifying Officer’s Final Determination

By letter dated April 8, 2016 the CO notified Employer that its application for Temporary Employment Certification failed to meet the criteria for acceptance because it failed to establish the job opportunity as temporary in nature. AF 9-15. The CO informed the Employer that it had supplied insufficient information to establish its peakload need from April 5, 2016 through December 15, 2016. The CO reiterated the information requested in the Notice of Deficiency. In addition the CO stated in regard to the information submitted by the Employer:

Specifically, the invoices indicate the employer entered into contracts with other builders and provided its services at substantially the same rate on a year-round basis. The invoices do not indicate an appreciable increase in the employer's business during the requested peakload months of April through December from the months of January, February and March. Similarly, the statements from the two trade associations include line graphs depicting an increase in building activity in Nevada. However, the "peaks" in the graphs do not coincide with the entirety of the employer's requested period of need. Further, as stated in the documents, the graphs illustrate the issuance of permits for home building, not the actual construction of the homes. Since building permits are issued in advance of the start of construction, the graphs do not show with any certainty that work was performed during the time shown in the graphs.

(AF 15)

The CO further indicated that specific documentation substantiating its need for temporary labor during the stated period had been requested but the information supplied did not overcome the deficiency, and therefore the Employer’s application was denied.

Administrative Review

On April 8, 2016 Employer’s representative sent an email to the Associate Chief Administrative Law Judge requesting administrative review of the CO’s final determination denying its application under the H-2B program.

The Administrative File was received by the undersigned on April 18, 2016. On that date an Order was issued notifying the parties that they could file written briefs with the undersigned by April 27, 2016. Both parties filed timely briefs on April 27, 2016.

The Employer argues in its brief that its response to the CO's Notice of Deficiency, which included 60 pages of listed invoices from 2014 and 2015, as well as statements from the Nevada Subcontractors Association and the Southern Nevada Home Builders Association, supports a peakload need in the Nevada building industry between April and December. Employer asserts that this information proved its seasonal peakload need for the workers it requested in its H-2B application. Employer argues that the CO apparently did not have adequate time to analyze the evidence including the 60 pages of untotaled and unsummarized invoices which it submitted. In its brief the Employer also provided summaries allegedly reflecting monthly totals for the submitted invoices. Employer argues that the 2014 and 2015 summaries show that January, February and March "tend to be slower months for our stucco and plastering division," and therefore support the requested temporary need in April through December of 2016. Employer asserts that the CO incorrectly concluded that it had failed to establish its temporary peakload need for workers.

Attorney Robert P. Hines of the U.S. Department of Labor Associate Solicitor's Office for Employment and Training Legal Services ("Solicitor") also filed a brief in this matter. The Solicitor argues that Employer did not meet its burden of proof to establish its eligibility for employing foreign workers under the H-2B program, and in particular, did not establish that its need for non-agricultural services or labor is temporary in nature. The Solicitor asserts that the Employer failed to provide the information requested by the CO in its Notice of Deficiency including "contracts or invoices showing work to be performed during the requested period, prior year employment records demonstrating the number of permanent and temporary employees who worked during the requested months in prior years, or any other evidence to justify the peakload need." (Solicitor's brief at 4). The Solicitor further states that although the Employer submitted general statements describing the new home cycle "that slows down in late December through mid-January and picks up in April through mid-December," Employer failed to provide documentation to show that the Employer's business follows the described pattern. The Solicitor further points out that the invoice evidence submitted to the CO included no totals or summaries and that the CO's analysis which determined that the invoices showed that the Employer provided services at "substantially the same rate on a year-round basis" (AF 34 at 15) was supported by the record since the records did not show a marked reduction in January through March. The Solicitor argues that since the Employer provided no analysis of the invoice data which showed BMC's high seasons and slow months, the CO reasonably concluded that the invoices showed significant year-round sales by the Employer.

SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer's request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

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

20 C.F.R. § 655.61(e).

ISSUE

In this case the Certifying Officer denied the Employer's application requesting H-2B temporary alien labor certification for 40 workers ("helpers of plasterers") for Employer's "Failure to establish the job opportunity as temporary in nature" as stated in the March 14, 2016 Notice of Deficiency and the April 8, 2016 Non Acceptance Denial Letter. Accordingly the issue to be decided in this Administrative Review of the CO's denial is whether the Employer had established that the stated job opportunity is "temporary" according to the Employer's stated standard of a "peakload" need, based on the information submitted to the CO.

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H2-B program the Employer is required to establish that its need for the requested workers is "temporary." The applicable regulation at 20 C.F.R. §655.6(a) states as follows:

An employer seeking certification under this subpart must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.

The regulations further state:

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.

20 C.F.R. §655.6.

The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program.³ *See, e.g. Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

Employer's H-2B Application (ETA Form 9142B) at Item#8 indicates that the nature of temporary need in this case is "peakload." AF 261.

³ In reaching a determination of whether Employer has met its burden of "establishing" the temporary nature of the employment opportunity, it is worth noting that Black's Law Dictionary defines "establish" as pertains to this situation as follows: "to prove; to convince." See Black's Law Dictionary, 7th edition, 1999. Thus this definition suggests the element of "convincing," as well as proving the petitioner's position to the Certifying officer.

The DHS regulations referenced in 20 C.F.R. §655.6 provide that to establish a peakload need, the employer “must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.” 8 C.F.R. §214.2(h)(6)(ii)(B)(3). *See Kiewit Offshore Services*, 2012-TLN-33 (ALJ May 14, 2012).

In the present case the CO requested certain specific information in his March 14, 2016 Notice of Deficiency to address the deficiencies in the Employer’s application and in particular, in its failure to establish its peakload need. Among the information requested by the CO was documentation of specific contracts and monthly invoices for work to be performed in the requested period of need, as well as summarized monthly payroll reports for a minimum of one previous calendar year separately establishing permanent and temporary employment in the requested occupation. (emphasis added).

In response, the Employer submitted general information regarding the construction industry in Nevada as it pertains to its construction cycle that slows down in late December through mid-January and picks up in April through mid-December. Employer also submitted 60 pages of unsummarized invoices with no analysis as to how the invoices pertain to its alleged peakload need. Further, although the CO had requested payroll records, specifically summarized for permanent and temporary workers, the Employer submitted no payroll records, whatsoever.

The Employer argues in its brief that the CO’s denial should not be affirmed “because his decision is based on a limited time frame to analyze the evidence. We understand the CO is under a lot of pressure and it would have helped immensely to provide a summary of the evidence.” Employer also suggests that the CO “failed to see the summarized amounts,” implying alternatively, that summaries had been submitted, although a review of the file confirms that this was not the case.

A review of the Administrative file and Employer’s response to the Notice of Deficiency does not support the Employer’s argument. No monthly summaries of the 2014 and 2015 invoices were supplied to the CO, nor were any invoices pertinent to the April – December 2016 period provided, as requested by the CO. In addition, Employer failed to provide any payroll records, summarized separately for permanent and temporary workers, as requested by the CO.

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.

Although the invoice summaries submitted with the Employer’s brief suggest some support for the Employer’s argument that it experienced a slow down during January through March in 2014 – 2015 (See attached graph), the significance of this information has not clearly been established, nor was this information submitted to the CO, and therefore may not be considered in this administrative review of the CO’s denial. *See* 20 C.F.R. §655.61(a)(5). Accordingly, since the Employer did not meet its burden of establishing its peakload need for

temporary workers, on the basis of information submitted to the CO, the CO's denial of the Employer's temporary labor certification application is affirmed.

CONCLUSION

Employer has not met its burden of establishing that it has a "peakload need" for temporary workers between April 5, 2016 and December 15, 2016. Accordingly, the CO's decision to deny Employer's application for temporary foreign workers is affirmed.

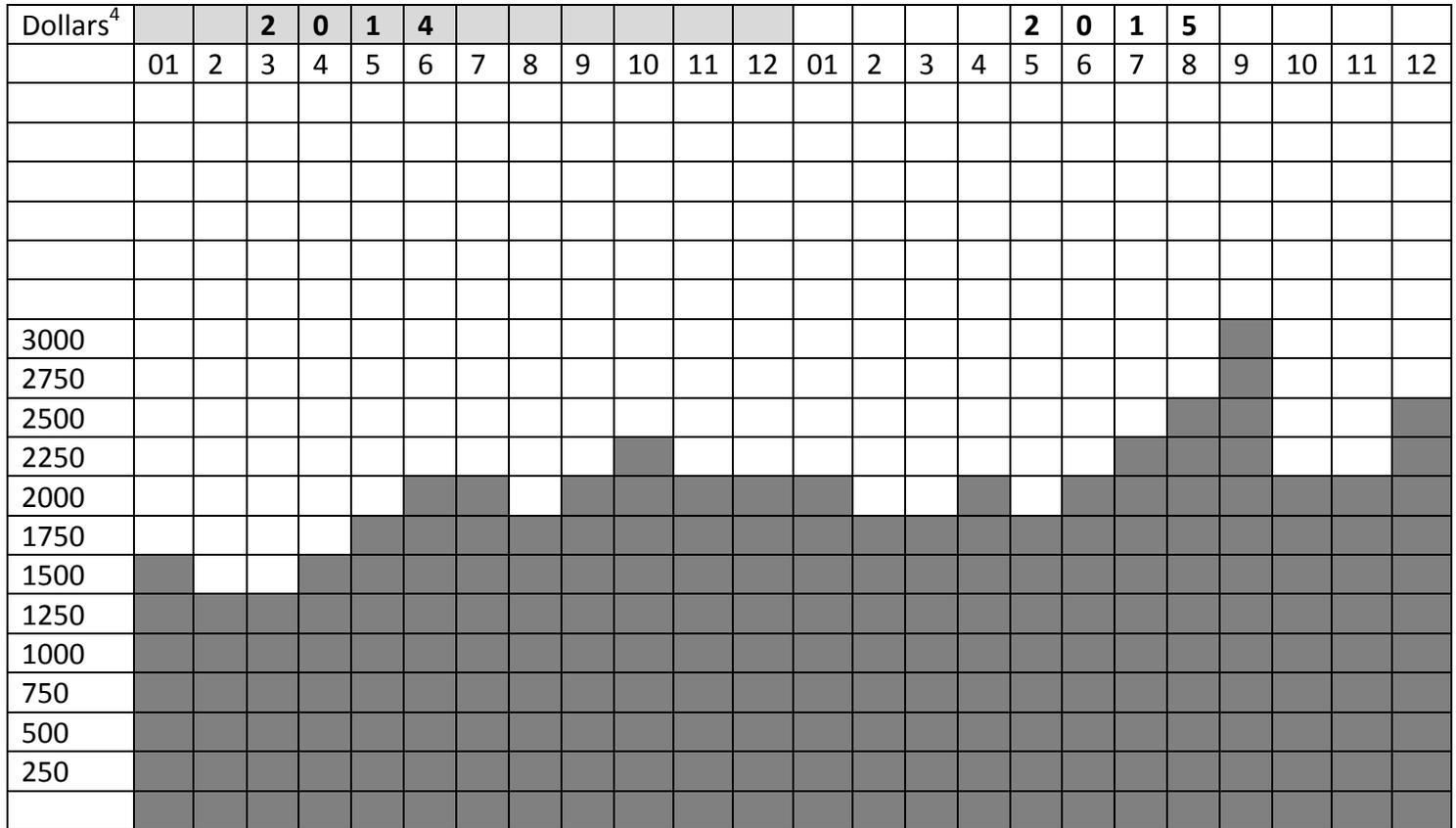
ORDER

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

For the Board of Alien Labor Certification Appeals:

RICHARD A. MORGAN
Administrative Law Judge

**Graph of BMC West Corp. Summarized Data Submitted Post CO Denial
(Dollars per month in Years 2014-2015)**



⁴ In thousands (rounded), calculated based on monthly invoice summaries for years 2014-2015 (submitted with Employer's brief).