

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 May 2016

BALCA Case No.: 2016-TLN-36
ETA Case No.: H-400-16020-219241

In the Matter of:

ERICKSON CONSTRUCTION dba ERICKSON FRAMING CA LLC,
Employer

Certifying Officer: Chicago National Processing Center

Appearances: Monica Rodriguez
Iris Juarez
Phoenix, Arizona
For the Employer

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Washington, D.C.
For the Certifying Officer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Erickson Construction DBA Erickson Framing CA LLC’s (“the Employer”) request for administrative review of the Certifying Officer’s (“CO”) denial of temporary labor certification under the H–2B program. For the following reasons, the Board affirms the CO’s denial of certification.

BACKGROUND

On January 20, 2016, Employer applied for temporary employment certification through the H-2B program to fill thirty positions for “Production Helpers” for the period of April 5, 2016 through October 25, 2016. (AF 82-108).¹ On March 3, 2016, pursuant to 20 C.F.R. § 655.17,

¹ In this decision, AF is an abbreviation for “Appeal File.”

Employer requested emergency treatment for its application due to the backlog of applications filed with the Chicago National Processing Center. (AF 80-81). On the same day, the CO approved Employer's request for emergency treatment of its H-2B application upon determining that there was "good and substantial cause to grant such request based on the unforeseen events wholly outside of the control of Employer . . . related to the application processing backlog at the Chicago NPC." (AF 77).

On March 14, 2016, the CO issued a Notice of Deficiency citing deficiencies regarding 20 C.F.R. §§ 655.6(a) and (b), as well as Sections 655.16 and 655.18.² (AF 68-76). Specifically, the CO notified Employer that its H-2B application was deficient pursuant to Sections 655.6(a) and (b) because Employer failed to establish its requested standard of need, as well as the period of intended employment.³ The CO determined that Employer requested thirty "Production Helpers" under a peakload need, but failed to provide supporting documentation to substantiate how Employer calculated its peakload temporary need. Further, Employer did not explain the nature of the temporary need based on its business operations.⁴ (AF 72-73). Additionally, the CO requested the Employer correct the deficiencies in its job order in accordance with 20 C.F.R. § 655.16, by identifying and providing contact information for the nearest SWA office (including a telephone number and/or email address for applicant referral) where applicants may apply for the job opportunity. Lastly, in accordance with 20 C.F.R. § 655.18 the CO noted that, while Employer provided a statement regarding inbound and outbound transportation, it did not comport with the United States Department of Labor's updated transportation and subsistence rates. As of February 26, 2016, employers had to provide daily subsistence rates at a cost of \$12.09 per day during travel to a maximum of \$51.00 per day with receipts. (AF 73-74).

On March 28, 2016, Employer responded to the CO's request for further information ("RFI") via email. Employer provided a letter of explanation, which included lists of contracted jobsites; a letter from KB Home dated March 28, 2016; and account distributions for 2015.⁵ (AF 26-67).

² On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. § 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015). These rules are effective and govern this case.

³ On its ETA Form 9142, Section B, Item 9, Employer stated "[t]he explanation why the nature of the job opportunity and number of foreign workers being requested for certification reflect a temporary need is because we work in a fast pace environment and the stick frame homes must be built on a short schedule during the yearly temporary schedule provided. . ." (AF 72, 88).

⁴ In the Notice of Deficiency, the CO requested Employer submit a description of its business history and activities, along with a corresponding schedule. The CO also requested Employer provide an explanation of why its business operations and need for requested H-2B workers actually reflected a temporary need and how its request met one of the regulatory standards of the H-2B regulations. Lastly, the CO instructed Employer to provide documentation, including but not limited to, signed work contracts and/or monthly invoices from previous years to show the work that would be performed, contracts with documentation showing the schedule of work for each month during the period of need and summarized monthly payroll records for a minimum of one previous calendar year that identified the number of full time permanent and temporary employees, the total number of workers employed, the total hours worked and earnings received, and any other evidence Employer had to justify the period of intended employment. (AF 73).

⁵ In its response to the CO's request for additional information, Employer responded via an email which was entitled "Response Part 2 of 2: NOD Erickson Construction-H-400-16020-219241." However, the CO noted that this email was the only correspondence it received from Employer relating to the Notice of Deficiency, thus indicating that the CO never received a "Part 1." (AF 26).

On April 15, 2016, the CO made its final determination regarding Employer's H-2B application. (AF 10-25). The CO found Employer failed to show: 1) that it had a peakload temporary need; and 2) that Employer's peakload temporary need was from April 5, 2016 through October 25, 2016. In particular, the CO stated that Employer, in order to establish a peakload need, must have shown that it regularly employed permanent workers to perform its services, but that it needed to supplement its permanent staff on a temporary basis due to seasonal or short-term demand. However, the CO found that Employer's submission of invoices of building components during 2015, a list of locations for contracted worksites, and its statement explaining its temporary need failed to establish its peakload temporary need request. On this basis, the 2015 invoices were for the months of January, February, March, and November, all of which were outside Employer's requested period of employment. On the other hand, the list of contracted worksites identified locations where work would be performed during the peakload dates of April 2016 through December 2016, but it did not indicate whether any work would be performed outside of this time period, nor were "contracts" provided to substantiate that the worksites were indeed contracted with Employer. Similarly, the line graphs submitted by Employer showing "actual unit counts" projected for 2016, provided no "discernable peak" despite there being a projection of increased unit counts. Moreover, the CO found that "issuance of building permits for future work" was not an example of actual work performed in previous years which would support Employer's peakload need. (AF 14-17). Thus, after examining the additional information provided by Employer in response to the Notice of Deficiency, the CO determined Employer failed to comply with 20 C.F.R. §§ 655.6(a) and (b) by establishing the job opportunity was temporary in nature. (AF 14).

On April 15, 2016, Employer submitted a request for administrative review to the Board of Alien Labor Certification Appeals ("BALCA") appealing the CO's Final Determination in the above-captioned H-2B matter. On April 22, 2016, BALCA docketed the appeal and issued a first Notice of Docketing. The CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services ("the Solicitor") in accordance with 20 C.F.R. § 655.33(b) on April 22, 2016. Because H-2B appeals are expedited, and in accordance with 20 C.F.R. § 655.33, the parties were given a brief due date of May 4, 2016. Thereafter, the CO timely submitted his brief, but no brief was proffered by Employer.

DISCUSSION

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 United States Department of Labor ("DOL" or the "Department"), Employment and Training Administration ("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 Chicago National Processing Center ("CNPC"). 20 C.F.R. § 655.20. After an employer's application has been accepted for processing, it is reviewed by a Certifying Officer ("CO"), who will 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).

BALCA's review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 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)."

To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). While an applicant need only submit a detailed statement of temporary need at the time of the application's filing, failure to provide substantiating evidence or documentation in response to the CO's RFI "**may be grounds for the denial of the application.**" § 655.21(b) (emphasis added). Notably, the burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

In the instant case, Employer attempted to establish a peakload need for the period of April 5, 2016 through October 25, 2016. To show a peakload need, 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 staff will not become part of the petitioner's regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). Furthermore, "the determination of temporary need rests on the **nature of the underlying need** for the duties of the position" and not "the nature of the job duties." 80 Fed. Reg. 24042, 24005.

In the Notice of Deficiency, the CO requested that Employer not only provide an explanation of why its business operations and need for requested H-2B workers actually reflected a temporary need, but also provide supportive documentation, such as signed work contracts and/or monthly invoices from previous years to show the work that would be performed, contracts with documentation showing the schedule of work for each month during the period of need, and summarized monthly payroll records for a minimum of one previous calendar year that identified the number of full time permanent and temporary employees, the total number of workers employed, the total hours worked and earnings received. (AF 73).

As discussed above, Employer provided an explanation of its operation and need, invoices reflecting costs of building components during 2015, and a list of locations for contracted worksites. Notwithstanding Employer's response, the CO ultimately concluded that Employer fell short of establishing its case for temporary need. Employer's 2015 invoices were provided for the months of January, February, March, and November, which were entirely

outside the period of temporary need, that being, April through October. Consequently, the CO could not determine according to the invoices if Employer indeed had a valid peakload need. In addition, while Employer provided a list of contracted jobsites for April 2016 through December 2016, Employer failed to provide any contracts specifying actual dates when work would commence and end. Nor did Employer furnish any information about the scope of work to be done in relation to the amount of time needed to perform the work or the number of workers required. Moreover, no comparative information was provided outside the requested period of need for 2016, and as a result, the CO could not contrast information from 2016, with previous years to determine that there was a peakload need in 2016. Finally, Employer did not submit any previous payroll documents to demonstrate its need for temporary workers during the requested time period in contrast to its regular permanent workforce. Thus, the CO could not determine that Employer's workload increased over what would be its normal operating conditions.

Given the foregoing discussion, I find and conclude the CO properly denied Employer's H-2B application. It is Employer's burden to demonstrate eligibility for the H-2B program, but Employer failed to provide documentation to demonstrate its temporary peakload need for thirty "Production Helpers" for the period of April 5, 2016 through October 25, 2016. Thus, the denial of Employer's H-2B certification must be **AFFIRMED**.

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

ORDERED this 6th day of May, 2016, at Covington, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge