

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 November 2015

BALCA Case No.: 2016-TLN-00002
ETA Case No.: H-400-15201-183471

In the Matter of:

GUZZINO LEASING & RENTALS, INC.
Employer

Certifying Officer: Charlene G. Giles
Chicago National Processing Center

Appearances: Lisa M. Galvan, Esq.
Hammond Law Group, LLC.
For the Employer

Before: **ADELE HIGGINS ODEGARD**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("CO") denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B guest worker program permits employers to hire foreign workers to perform temporary non-agricultural work within the United States on a onetime occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. 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).¹ Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request administrative review by the Board of Alien Labor Certification Appeals ("the Board" or "BALCA"). 20 C.F.R. § 655.33(a). The administrative review is limited to the appeal file, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence as was actually submitted to the CO in support of the application. § 655.33(a), (e).

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 Employer filed its application for temporary labor certification after April 29, 2015, requesting a start date of need after October 1, 2015. Thus, the 2015 IFR applies.

STATEMENT OF THE CASE

On July 27, 2015, Guzzino Leasing & Rentals, Inc., (“Employer”), submitted an application for temporary labor certification to the Department of Labor’s Employment and Training Administration (“ETA”). AF 85-94.² The Employer requested certification for one “Welder” to be employed from October 15, 2015 to June 30, 2016 on a peakload basis. AF 85. The Employer explained that the need for an additional welder arose “due to several new contracts and increased business.” Id.

On August 6, 2015, the CO issued a Notice of Deficiency (“NOD”), notifying the Employer that its application failed to meet the criteria for acceptance in light of five deficiencies. AF 75-84.³ The deficiency on appeal is the Employer’s failure to establish that the job opportunity is temporary pursuant to 20 C.F.R. §655.6(a)-(b). The CO found that Section B, Item 9 of the application was not sufficient because the Statement of Temporary Need did not adequately establish a peakload need. Thus, the CO requested that the Employer amend its ETA Form 9142, Section B, Item 9 to include: 1) a description of the Employer’s business history; 2) an explanation regarding why the Employer’s job opportunity reflects a temporary need; and 3) an explanation regarding how the request meets the regulatory standards of a peakload need. AF 80. The CO also found that the Employer did not provide any documentation to support its statement. Accordingly, the CO asked the Employer to submit the following documentation:

1. Signed work contracts and/or monthly invoices from previous calendar year(s) clearly 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;
2. Annualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of service and clearly 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 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; or
4. Other evidence and documentation that similarly serves to justify the chosen standard of temporary need.

² Citations to the Administrative File will be abbreviated “AF” followed by the page number.

³ The Employer cured four of the five deficiencies, leaving only one deficiency at issue on appeal. See AF 37-65.

Id. On August 20, 2015, the Employer submitted a partial response to the NOD and supplemented its response on August 27, 2015.⁴ AF 37-65. The Employer’s response included an amendment to its ETA Form 9142, Section B, Item 9. AF 37. In its new Statement of Temporary Need, the Employer described its business, stated that it employs ten permanent welders, and explained that there has been a peakload need “due to press of business and a temporary increase in work orders.” Id. The Employer went on to state that “all of our work comes from phone calls and referrals and we do not have any agreements or work contracts. We have work orders and invoice[s] and we invoice when the job begins or is completed depending on the situation.” AF 38. In support of its Statement of Temporary Need, the Employer submitted “Welders Monthly Payroll Records.” AF 51- 65. In its supplemental response of August 27, 2015, the Employer attached the Employer’s record of sales from April 2013 through 2015. AF 23-28.

On October 19, 2015, the CO issued a Non-Acceptance Denial (“Denial”). AF 15-22. The CO concluded that the Employer’s response to the NOD was insufficient, citing three reasons. First, the Employer provided contradictory statements by initially stating that demand increased “due to several new contracts” and then stating that it “does not have any agreements or work contracts.” AF 21. Second, rather than providing summarized monthly payroll reports which identify both full-time permanent and temporary workers for each month, the Employer provided payroll documents for individual employees. Id. The CO found that these payroll documents did not indicate whether the employees worked in the position of “Welder.” Id. Third, the Employer submitted a sales statement in which it is unclear whether the last sales period ended in March 2015 or August 2015, the date of the sales statement. Id. The CO wrote that because the end date of the sales period is unclear, the sales statement does not support the Employer’s “stated increase in sales.” AF 22. The CO concluded that “the employer’s stated increase in business for the dates of need requested do not constitute a need for temporary labor.” Id.

On October 29, 2015, the Employer requested administrative review of the denial of certification. AF 1-14. The Employer argued that it provided sufficient documentation to establish that its need is temporary and is a peakload need due to a short-term demand for its services. AF 4. The Employer also explained that its statements were not contradictory because a phone call or an email constitutes a “contract” for the Employer but these were not the types of contracts that the NOD requested. AF 5.

⁴ The Employer, through counsel, requested additional time to gather and submit supplemental documentation. Employer’s counsel explained that the Employer was unable to gather necessary documentation before the deadline due to a death in the family. AF 37. By email dated August 25, 2015, the Chicago National Processing Center granted the Employer’s request for an extension of time and asked the Employer to submit additional documentation by August 27, 2015. AF 29.

DISCUSSION

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. 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). The DHS regulations provide that 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.” 8 C.F.R. § 214.2(h)(6)(ii)(B). The employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); see also Tampa Ship, 2009-TLN-44, slip op. at 5 (May 8, 2009). A bare assertion without supporting evidence is insufficient to carry the employer’s burden of proof. AB Controls & Technology, Inc., 2013-TLN-00022 (Jan. 17, 2013). 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).

Here, the Employer requests a temporary worker for a “peakload” need. To establish a peakload need, an 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).

I find that the Employer provided insufficient information to establish that it regularly employs permanent workers to perform the services or labor requested in its ETA application. In its original response to the NOD, the Employer asserted that it “regularly employ[s] 10 permanent welders to perform these welding duties.” AF 37. To support its statement, the Employer provided monthly payroll records for ten employees. AF 51-65. As the CO correctly points out, these documents do not show the employees’ title or whether their job is permanent or temporary. There is no evidence that these employees work as “welders” or that they work “at the place of employment” where the Employer is requesting temporary labor.⁵ While the employees have been on payroll from October 2013 through March 2014, I find this evidence insufficient to establish their status as permanent employees. Consequently, I find that the Employer failed to establish that it regularly employs permanent workers to perform the services or labor requested at the place of employment pursuant to 8 C.F.R. §214.2(h)(6)(ii)(B)(3).

The Employer also failed to establish that it has a peakload need for a temporary employee. To support its statement that the Employer has experienced a “temporary increase in work orders,” the Employer provided a document, dated August 27, 2015, showing the company’s list of sales from April 2013 through the year 2015. AF 28. The CO correctly noted

⁵ The payroll records show that the employees receive substantially different salaries.

that the last sales period does not show the month that the sales period ended. AF 21. Based on this document, the Employer's sales periods are divided into two parts; from April through September and October through March. Thus, one can reasonably presume that the last sales period spanned from October 2014 through March 2015. The last sales period showed \$5.7 million in sales, substantially higher than the sales in October 2013 through March 2014, which showed a little over \$5 million. If the last sales period in fact ended in March 2015, then this document supports the Employer's statement that it has had a recent increase in work orders. However, based on the evidence before me, I agree with the CO that this document does not establish a recent increase in demand because the last sales period is unclear. There is no discernable reason why the Employer would have left out the end month in the last sales period. If the last sales period extended through July 2015, then it is not apparent that the document establishes an increase in business.

Even presuming that the document shows an increased business need for an employee, it does not establish that the need is temporary. The Employer did not articulate when the temporary increase in work orders—and consequently the Employer's need—will end. The Employer made a bare assertion that the temporary welder “will not become part of our regular operations.” AF 37. However, the Employer did not explain why its job opportunity reflects a temporary need or provide any documentation to show that the need has an end date. Furthermore, the document does not establish why the Employer needs a temporary worker for the dates requested (October 2015 through July 2016). Thus, I find that the Employer failed to “establish that the need for the employee will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B).

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

SO ORDERED.

For the Board:

ADELE HIGGINS ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey