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Issue Date: 30 June 2016

BALCA Case No.: 2016-TLN-00052
ETA Case No.: H-400-16075-008698

In the Matter of:

REFUSE MATERIALS, INC.,
Employer.

Certifying Officer: Chicago National Processing Center

Appearances:

Enrique Maciel-Matos, Esq., The Fowler Law Firm, PC, Austin, TX for the Employer

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DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for temporary alien labor certification under the H-2B non-immigrant program, which permits employers to hire foreign workers to perform temporary nonagricultural work within the U.S. on a one time occurrence, seasonal, peak load, or intermittent basis. 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A.

Prior to applying for a visa under the H-2B program, employers must file an *Application for Temporary Employment Certification* (ETA Form 9142) with the U.S. Department of Labor ("DOL" or "the Department"), Employment and Training Administration ("ETA"). 20 C.F.R. § 655.20. Employers' applications are reviewed by a Certifying Officer ("CO"), who makes a determination to either grant or deny the requested labor certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, an employer may seek administrative review before the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.33(a). The issue in this appeal is whether the Employer has adequately documented a temporary need based on peak load and whether it established a need for thirty-one marble and tile setter workers.

I. STATEMENT OF THE CASE

On March 15, 2016, Refuse Materials, Inc. (“Refuse Materials” or “Employer”) filed an Application for Temporary Employment Certification. Administrative File (“AF”) at 33. The application requested 30 Tile and Marble Setters based on a peak load need between May 30, 2016 and November 30, 2016. AF at 68. Refuse Materials is engaged in the flooring business and provides services such as flooring installation and remodeling, carpet removal, floor tile removal and installation, ceramic removal/installation and wood parquet removal. AF at 46, 48.

On May 3, 2016, the Certifying Officer (“CO”) e-mailed a Notice of Deficiency (“NOD”) to the Employer. AF at 59. The NOD identified one deficiency, citing the Employer for failure “to establish temporary need for the number of workers requested.” AF at 63. (citing 20 C.F.R. § 655.11(e)(3) and (4)). In particular, the NOD stated: “[t]he employer has not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities.” *Id.* The NOD requested the Employer to provide the following additional information:

The employer must include in the application attestations regarding temporary need in the appropriate sections. This must include a detailed statement of temporary need containing an explanation as to why this number of workers is being requested for this application.

AND

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 work contracts and/or monthly invoices from previous calendar years(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. 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
3. Other evidence and documentation that similarly serves to justify the number of workers being requested for certification.

AF at 63-64.

On May 10, 2016, Refuse Materials responded to the NOD. In its response, and in the Amended Statement of Temporary Need submitted along with the response, it provided information regarding its business noting it “has a turnover rate of 65% – meaning that out of those employees that the Company hired, the majority voluntarily quit within a couple weeks from their start date.” AF at 43, 48. The Employer went on to state the turnover rate is not a reflection of company culture and the company has maintained strong ties to the community. *Id.* The Employer attributes the high turnover rate to the “inability of the Company to find full-time employees who are willing to perform the duties of a Tile and Marble Setter.” AF at 44, 48. As to the company’s determination it needed 30 workers, Refuse Materials stated that “determination was reached due to the fact the Company no longer has accessibility to one contractor who used to support Refuse Materials, Inc. with three crews for a total of 30 individuals.” AF at 44, 48. The Employer stated further that it relied on that contractor to “service the needs of one particular client – Walmart – who provides the Company continuous work on a yearly basis.”¹ AF at 44.

With regard to the NOD’s requirement the Employer justify the chosen standard for temporary need, that is – peak load, the Employer stated its need is closely tied to the construction industry’s peak load needs, stating “during non-peak load months, its need for workers decreases due to the fact that construction slows down during winter months.” AF at 44.

Finally, Refuse Materials stated the need for 30 Tile and Marble Setter workers “has been cause by the following two factors: 1) the existence of pending contracts which need to be fulfilled; and 2) the high turnover rate associated with the position of Tile and Marble Setter. While the Company has been able to comply with its contractual obligations regardless of the high turn-over rate, the loss of readily available workers from its association with contractors has created a need for the Company to use the H-2B foreign workers program.” AF at 44.²

¹ In support of this statement, the Employer attached e-mail correspondence dated May 4 2016, between Mr. Todd Conway (contractor) to D.A. Pope, the owner of Refuse Materials, notifying Refuse Materials that due to health and other personal reasons, the contractor, would no longer be able to manage projects for Refuse Materials, and the contractor realized “the loss of the accountability for the 4-5 crews we ran for you each cycle” placed a burden on the company. AF at 53.

² Refuse Materials submitted five documents in support of its response to the NOD. EX 1 is an amended statement for temporary need which again pointed to the 65% turn-over rate of employees and attributed it to the “inability of the Company to find full-time employees who are willing to perform the duties of a Tile and Marble Setter.” AF at 48. EX 2 is an email correspondence from D.A. Pope of Refuse Materials, a portion of which is redacted. The non-redacted part of the email notes, “[t]here was a contractor that we used last year that had three crews (30 Guys) [and] [d]ue to terminal cancer the contractor is no longer available.” AF at 51. EX 3 is an email from Todd Conway, the contractor, to D.A. Pope detailed above. AF at 53. EX 4 is a payroll summary for Refuse Materials’ tile and marble setter employees in 2015. AF at 55. EX 5 is a description of the “Bronco Floor Stripper” a machine designed and used by Refuse Materials. AF at 57-58.

On May 31, 2016, the CO issued a Non-Acceptance Denial. AF at 30. In denying certification, the CO identified the deficiency as “failure to establish temporary need for the number of workers requested.” AF at 33. The denial noted, the “employer submitted additional information in support of its need for 30 workers. The employer stated that new construction is slowed down due to the ‘harsh’ Georgia winters. However, Georgia winters are characterized by mild temperatures and little snowfall around the state.” AF 34. The denial further commented that the services Refuse Materials offers “appear to be predominantly completed indoors where ‘harsh’ weather would not be a factor.” *Id.*

The denial stated the application was premised upon a peak load need and the peak load need was due to the turn-over in its permanent workforce. AF at 34. The CO stated the employer indicated “it works on a Walmart contract that operates continuously on a yearly basis” *Id.* The CO concluded turn-over in permanent employees “does not constitute a temporary need and the Walmart contract appears to support a permanent, year-round need.” *Id.*

The denial also noted that to establish peak load need, the employer must demonstrate that it regularly employs permanent workers at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis because of seasonal or short-term staffing demand. AF at 34. The employer must also establish the temporary additions to its staff will not become part of the employer’s regular staff. *Id.* The CO determined that “[t]he Walmart contract demonstrates work is available on a continuous basis and is not only for a short period of time causing a short-term demand.” *Id.* For the above reasons, the CO found the Employer’s statements established the “occupation is not seasonal in nature and it does not have a peak load need for temporary workers.” AF at 35.

On June 10, 2016, the Employed appealed the denial of certification. AF at 2.³ Refuse Materials filed its brief on June 21, 2016. The CO filed its brief on June 24, 2016.

II. LEGAL STANDARD

The standard of review in H-2B is limited. A reviewing judge may consider only “the Appeal File, the request for Review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The evidence is reviewed *de novo*, and a reviewing judge must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. 20 C.F.R. § 655.61(e). An employer seeking to hire employees under the H-2B program bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361.

III. DISCUSSION

1. The Employer Did Not Establish a Temporary Need for Workers

In order to establish eligibility for certification under the H-2B program, an employer

³ The Employer’s brief is the same as its June 10, 2016 request for review of the denial. *Compare* Emp. Br. and AF 2-26; *see also* Ltr from Employer’s counsel dated June 20, 2016 transmitting brief.

must establish that its need for nonagricultural workers qualifies as temporary under one of the four temporary need standards, that is, it is “a one-time occurrence, a seasonal need, a peak load need or an intermittent need.” 8 C.F.R. § 214.2(h)(6)(ii)(B) *see also Tampa Ship*, 2009 TLN 44, slip op. at 5 (May 8, 2009). The employer must show “the need for the employee will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B).

To successfully establish a peak load need, an employer “must establish that it regularly employs permanent workers at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis because of seasonal or short-term staffing 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). Additionally, in reviewing an employer’s application, one of the factors the CO considers in making a determination of temporary need is that “[t]he number of worker positions and period of need are justified.” 20 C.F.R. § 655.11(d)(3).

In this case, the CO listed several reasons for concluding the Employer failed to establish the job opportunity is temporary. The Employer maintains on appeal that the CO’s final denial unfairly raised issues not identified in the NOD. Emp. Br. at 2, 4. Neither the CO’s NOD, nor the Employer’s response were models of clarity. While I agree with Employer, the NOD addressed primarily the need to provide additional evidence to support the request for 30 workers, the NOD also indicated, more broadly, that the Employer “must submit supporting evidence and documentation that justifies the chosen standard of temporary need.” AF at 63. If the NOD gives sufficient notice of the proposed basis for denial, despite the COs failure to articulately state the defect(s), the NOD places the Employer on notice of the basis for denial. *Corning Silk Screen Print, Inc.*, 2002 INA 00307, slip op. at 4 (Mar. 15, 2004) citing *Liason Center of General Chamber of Commerce of the Republic of China*, 1990 INA 00140 (Apr. 29, 1991). If the Employer addresses the issue in response, it indicates the NOD provided the Employer with adequate notice of the deficiency. *Corning Silk*, 2002 INA 00307, slip op. at 4. Here, the Employer’s response, and the Amended Statement of Temporary Need submitted with its response, addressed the basis of its temporary need. AF 43-49. Thus, I find Employer was provided adequate notice that the CO’s NOD was requesting additional information to support both the Employer’s assertion of temporary need based on peak load need and its request for 30 workers.⁴

In attempting to satisfy its burden of establishing the job opportunity is temporary, the Employer states its need for the temporary workers based upon peak load need, is the result of

⁴ The Employer contends that its Statement of Temporary Need attached to its response to the NOD, if read “in the totality of the circumstances” established its temporary need and was tied to the Company’s work “which is tied to the construction industry”. Emp. Br at 2-3. A review of the Employer’s Statement of Temporary Need in its original application does not clearly link its work with the work of the construction industry. AF at 77. The Amended Statement of Temporary Need in response to the NOD, explicitly states the Employer’s “peakload need is highly correlated to the construction industry’s peakload needs” but does not explain how. AF at 48. The Employer’s bald statement that its peak load need is connected to the construction industry peak load need alone is not enough to support its burden of establishing a peak load need. The Employer’s response could have provided contracts it has in connection with construction industry work, or evidence as to the construction industry’s peak load need, but it did not.

the loss of the three crews normally provided by its contractor which performed work under the Employer's contract with Walmart. But the Employer stated the Walmart contract provides it with "continuous work on a yearly basis." AF 9. The CO reasonably construed this statement to mean the Walmart work was not temporary but rather year round work. Placing workers on a Walmart project that provides "continuous work" does not support a peak load need for workers. The Employer could have provided the CO with the Walmart contract to establish the work was not year round but it elected not to do so. Any confusion as to whether the Walmart contract or projects are continuous year round lies with the Employer. In addition, the 2015 payroll records submitted by the Employer appear to indicate the Walmart work was performed by permanent workers. AF at 55.

Employer's brief also challenges the COs determination the Walmart work is continuous year round work, by pointing to an e-mail from Mr. Conway, the contractor for Refuse Materials, in which he states "I realize the loss of accountability for 4 to 5 crews we ran for you each *cycle* probably puts a burden on you" and "I am very sorry to inform you that we will no longer be able to manage *projects* for you." Emp. Br. at 2. Employer's emphasis on the words "project" and "cycle" in the two e-mails to support its assertion the Walmart work is cyclical in nature and not year round is not persuasive. Emp Br. 2-3. Again, any confusion as to whether the Walmart work Employer performs is continuous year round work or is confined to the dates for which Employer seeks certification, could have been clarified had Employer submitted its contract with Walmart. Employer did not provide the contract and any uncertainty on this point is borne by Employer, and does not assist Employer in meeting its burden of establishing a temporary need.

The Employer's assertion that the CO improperly considered its turnover rate in evaluating whether it established a temporary need for workers is also unpersuasive. The Employer stated it has a 65% turnover rate in workers. The Employer's response to the NOD states its need for 30 workers is the result of pending contracts which need to be fulfilled and the high turn-over rate associated with the Tile and Marble Setter position. AF at 44. While the Employer asserts its statements regarding the high turnover rate for its employees was intended to support its request for 30 workers, it was not improper for the CO to consider that fact in determining whether the Employer established a peak load need. The high turnover rate militates against establishing a temporary need as turnover is an ongoing issue and the Employer stated it has previously been "able to comply with its contractual obligations regardless of the high turn-over rate." AF at 13.

For the reasons outlined above, I find the Employer failed to meet its burden of establishing a need for temporary workers based upon a peak load need.

2. Employer Failed to Establish Need for the Number of Workers Requested

An Employer seeking H-2B labor certification must establish the number of H-2B temporary workers needed and must attest that the number of positions for which certification is sought is accurate. 20 C.F.R. § 655.22(n). The Employer has the burden of establishing that "[t]he number of worker positions and period of need are justified" and that the position requested represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3)-(4); *Sur-Loc Flooring Systems LLC*, 2015 TLN 00031, slip op. at 4-7 (Apr. 8, 2015); *BMC West Corp.*, 2016 TLN

00043, slip op. 10-11 (May 31, 2016).

I find Refuse Materials failed to carry its burden of establishing a need for 30 Tile and Marble Setters. The Employer stated its need for 30 workers was based upon its contract with Walmart and the fact that the Company “no longer has accessibility to one contractor and that contractor serviced the needs of one...client – Walmart.” AF at 44. However, the Employer did not provide the contract with Walmart even though the NOD requested “[s]igned work contracts...showing work will be performed for each month during the requested period of need.” AF at 44. There is no evidence as to the number of Walmart Stores the Employer services.

In support of its request for 30 Tile and Marble Setters, the Employer relies on an e-mail from Mr. Pope, its president.⁵ The e-mail is extensively redacted, but the un-redacted portion states the company used a contractor last year that “had three crews (30 Guys)” and due to illness “the contractor is no longer available and we have to do the stores that we [sic] was helping with.” AF 51. Employer’s reliance upon Mr. Pope’s e-mail to support the request for 30 workers fails on multiple counts. First, as noted, the e-mail is redacted raising questions about its probative value. Second, Mr. Pope’s e-mail indicates the contractor used last year had three crews (30 Guys), but due to illness cannot supply the workers this year. AF 51. However, the contractor’s e-mail to Mr. Pope informing Refuse Materials that the contractor would no longer supply workers, states it will not be able to provide the “4-5 crews” it normally provided. AF 53. See *Erickson Constr.*, 2016 TLN 00050, slip op. at 7 (June 20, 2016) (affirming denial of certification for failure to establish need for number of workers requested where no indication of the number of requested teams or crews employed in prior year or the work completed by each crew); *BMC West Corp.*, 2016 TLN 00043, slip op at 11 (affirming denial where employer stated need for 17 crews but did not establish the number of crews it had or how many workers form a crew). Because Mr. Pope’s e-mail supporting the Employer’s request for three crews (30) workers is inconsistent with the contractor’s email stating it had supplied 4-5 crews to the Employer in past years, and there is no indication of the work completed by crews in prior years, I find the Employer fails to support its request for 30 workers.

Additionally, I note both Mr. Pope’s e-mail and the contractor’s e-mail are dated May 4, 2016, several weeks after the Employer’s application was filed. The Employer did not explain how the fact it learned of the need for additional workers May 4, but its application requesting 30 workers was filed in March, demonstrated the positions were bona fide job opportunities.⁶ The Employer is required to show “there are not enough available domestic workers...at the time the employer files its application for certification.” *Running Sports, Inc.*, 2016 TLN 00049, slip op at 5 (June 20, 2016). The evidence Employer presented here did not do so.

⁵ Mr. Pope’s email is addressed to counsel, Enrique Marciel, and the subject line is Notice of Deficiency. AF at 51.

⁶ While it is conceivable, Mr. Pope received notification from the contractor prior to filing the company’s application; the Employer did not submit any evidence to establish this fact.

After review of the record in this matter, I find the Employer has not met its burden of establishing it has a peak load need for thirty Marble and Tile Setter workers.

IV. ORDER

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

SO ORDERED.

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts