

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 October 2016

OALJ Case No.: 2016-TLN-00074

ETA Case No.: H-400-16204-921703

In the Matter of:

THE GARAGE TAVERN LLC,
Employer

Certifying Officer: Chicago National Processing Center

Appearances: Aaron D. Bernard
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For the Employer

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U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Stephen R. Henley
Chief Administrative Law Judge

DECISION AND ORDER AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This matter is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Employer’s request for review of the Certifying Officer’s denial in the above-captioned H-2B temporary labor certification matter. The H-2B program permits employers to hire foreign workers to perform temporary non-agricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis.¹ Employers who seek to hire foreign workers under this program must apply for and receive a labor certification from the U.S.

¹ 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 definition of temporary need is now governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113) § 113 (Dec. 18, 2015).

Department of Labor.² Applications are reviewed by a Certifying Officer (CO) of the Office of Foreign Labor Certification of the Employment and Training Administration (ETA). If the CO denies certification the employer may seek administrative review before BALCA.³

STATEMENT OF THE CASE

On July 22, 2016, The Garage Tavern LLC (the “Employer”) submitted an application for temporary labor certification to ETA. (AF 98-168.) The Employer requested certification for two restaurant cooks as seasonal employees for the period from October 5, 2016 to January 1, 2017. (AF 98.) In its application, the Employer provided the following explanation regarding its temporary need for these workers:

The Garage Tavern correlates its seasonal need to a few different activities in Iowa during the warm months of the year that lead to an increase in business. As the weather warms up, more people eat out at restaurants. There is more construction work, more agricultural work, and more travel through Iowa during the warm weather months. In the cold winter months, business usually slows because there is less outdoor work and less people travel on Iowa’s icy interstates during the winter.

(AF 106.) The Employer also attached a printout of a business entity summary from Iowa.gov, a Certificate of Organization of The Garage Tavern, LLC, a business card, a printout from the website www.garagetavern.com, flyers regarding various events at the The Garage Tavern, (AF 119-27, Exhibit A); newspaper advertisements for The Garage Tavern, (AF 128-31, Exhibit B); a menu, (AF 132-34, Exhibit C); a graph showing gross sales during the months of 2016, a chart showing sales by item from January 11 through June 30, 2016, payroll transactions from January 11 through July 2, 2016, (AF 135-44, Exhibit D); a printout of a website giving the location of Sanderfoot Wind projects, the number of associated turbines, the foundation type, and photos of construction workers, (AF 145-50, Exhibit E); an article from Trumbull-Nelson, General Contractor and Construction Manager entitled “The Challenges and Cost Impacts of Winter Construction,” (AF 151-52, Exhibit F); a printout of a satellite image from Google Maps, (AF 153, Exhibit G); a printout of the weather in Coulter, Iowa, January through April 2015, (AF 154-61, Exhibit H); a printout from Kimt.com entitled “Low Gas Prices for Summer Travel” and an article from radioiowa.com entitled “Record numbers expected to travel this holiday season,” (AF 162-64, Exhibit I); and a chart of the number of employees by month in 2016, as well as monthly payroll for 2016, (AF 165-66, Exhibit J).

On August 1, 2016, the CO issued a Notice of Deficiency (NOD) noting the following deficiencies: (i) failure to submit an acceptable job order; (ii) failure to justify the dates of need requested; (iii) disclosure of foreign worker recruitment; and (iv) failure to submit a complete and accurate ETA Form 9142. (AF 89-97.) The CO requested the following additional information regarding the Employer’s failure to justify the dates of need requested:

² 8 C.F.R. § 214.2(h)(6)(iii).

³ 20 C.F.R. § 655.61(a).

. . . a revised, detailed statement of temporary need 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 of why the employer indicates that its season begins in late March but has requested a start date of need of June 29, 2015; and
3. An explanation of how the employer determined its requested dates of need.

...

AND

The employer must submit supporting evidence and documentation that justifies the dates of need requested. The employer's response must include, but is not limited to, the following:

1. Summarized monthly payroll reports for a minimum of one previous calendar year that identifies, 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, coupled with IRS Form 941, Employer's Quarterly Tax Return covering all quarters for the past year. 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; and/or
2. Other evidence and documentation that similarly serves to justify the number of workers being requested for certification.

(AF 95-96.)

The Employer responded to the NOD on August 12, 2016⁴ and attached a cover letter, (AF 33-37); an Iowa Workforce Development Job Order, (AF 38-39); an amended ETA Form 9142, including an updated Statement of Temporary Need, (AF 40-47); a document on Cold Weather Concreting, (AF 48-70, Exhibit AA); a paragraph about excavating hard and frozen ground, (AF 71, Exhibit BB); a brochure on "falls" from the Massachusetts Department of Public Health, (AF 72-73, Exhibit CC); summarized payroll reports and quarterly taxes for 2016, (AF 74-80, Exhibit DD); and a copy of *Midwest Poured Foundations, Inc.*, 2013-TLN-00053 (ALJ June 18, 2013), (AF 81-88, Exhibit EE).

On September 20, 2016, the CO sent the Employer a Final Determination denying certification. (AF 21-32.) The CO found that the Employer failed to "establish the basis for [its] asserted temporary need and the response failed to include evidence to document the business cycles of the nearby construction, agricultural, and other hospitality business in the area on which it was basing its own temporary need." The CO noted that the Employer's documentation

⁴ The response, including attachments, can be found at AF 33-88.

indicated “that more hours were worked in January, a date outside the dates of need, than several months during the . . . requested dates of need.” (AF 26.)

On September 29, 2016, BALCA received a *Notice of Appeal and Request for De Novo Hearing* from the Employer requesting administrative review of the Certifying Officer’s Final Determination, as permitted by 20 C.F.R. § 655.41.⁵ On October 6, 2016, I issued a *Notice of Docketing and Order Establishing Briefing Schedule* notifying the parties that the matter had been docketed by BALCA. The Employer filed its brief (“Employer Brief”) on October 13, 2016. The CO filed its brief (“CO Brief”) on October 18, 2016. For the reasons set forth below, I affirm the denial of the temporary labor certification.

DISCUSSION AND APPLICABLE LAW

BALCA’s standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued a Final Determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA must: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) 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. BALCA must affirm a CO’s determination denying an application unless it was arbitrary or capricious. *Brook Ledge, Inc.*, 2016-TLN-00033, at 5 (May 10, 2016); *see also J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016).

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 Request for Information “may be grounds for the denial of the application.” 20 C.F.R. § 655.21(b). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 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). 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

⁵ Under 20 C.F.R. § 655.61(a), within ten business days of the CO’s adverse determination, an employer may request that BALCA review the CO’s denial. Within seven business days of an employer’s appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO’s decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven business days of the CO’s brief or ten business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

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 the instant case, the Employer attempted to establish a seasonal need. To establish a seasonal need, the Employer must:

establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change.

8 C.F.R. § 214.2(h)(6)(ii)(B).

The CO asserts that the record supports its determination that the Employer has not established the basis for its dates of temporary need. (CO Brief at 5.) I agree. The documentation provided by the Employer fails to establish a seasonal need for workers during the requested period of October 5, 2016 through January 1, 2017. The Employer explains that it is a newly-established business, and that it anticipates a yearly increase in business from April through December. The Employer further explains that it had not become aware that it could utilize the H-2B program in time to submit a labor certification application for April through September. (AF 45.) The Employer acknowledges that the documentation it submitted to the CO shows that there is one month outside of what it considers to be its regular season where more hours were worked than some months during the regular season. The Employer explains that “there was an accounting error where incorrect hours for one individual were entered in the Appellant’s account records in the month in question,” and that the error should have been clear because it was inconsistent with the gross sales data that was submitted. (Employer Brief at 9.) However, I cannot consider that information since it was not previously submitted to the CO. *See* 20 C.F.R. § 655.61. Additionally, the CO cannot be expected to pick up on inconsistencies in submitted documentation or to construe inconsistencies in the light most favorable to the Employer. As stated above, the burden rests with the Employer to establish its need.

The Employer speculates that it will have an increased need that will coincide with warmer weather due to an increase in agricultural and construction workers (including cement workers), as well as increased travel on Iowa interstate highways. (AF 106.) However, the submitted documents do not establish a need based upon the Employer’s own business needs. Nor do the Employer’s submissions establish the business cycles of nearby businesses. The Employer’s documentation suggests that in general, concrete companies may lay less busy during colder periods of time; agriculture may be affected by the cold; and gasoline prices may be cheaper in Iowa during summer months. The Employer cites only one business, Sanderfoot Wind, whose seasonal business operations could affect the Employer’s volume of customers. *See* AF 145-50, Exhibit E. However, Employer fails to document Sanderfoot Wind’s business cycle, or the business cycle of other nearby businesses.

The Employer has not established that its regular season runs from April through December, and that business decreases in January, February, and March. Wage information submitted by the Employer is contrary to the asserted months of need. The data on employees, hours, and wages by month from January through June 2016, (AF 79), indicates that the highest wages were paid in April (\$4,309.26), followed by March (\$3,064.07), June (\$2,442.81), January and February (each \$2,183.39), and May (\$2,099.76). The most hours worked were in April (489.08 hours), followed by January (369.71 hours), March (343.92 hours), June (294.75 hours), May (258.42 hours), and February (226.33 hours). Although the Employer correctly asserts that, as a new business, it is not required to have a full year of payroll data to establish its business cycle,⁶ (Employer Brief at 8, 9), the Employer must establish its need in an alternate way. In this case, the Employer has failed to establish its need in an alternate way, and the limited wage information that the Employer submitted is inconsistent with the asserted peak business months.

ORDER

Accordingly, I find that the CO's determination was not arbitrary or capricious and hereby AFFIRM the denial of the temporary labor certification in this matter.

For the Board:

STEPHEN R. HENLEY
Chief Administrative Law Judge

⁶ See *Midwest Poured Foundations, Inc.*, No. 2013-TLN-00053 (ALJ June 18, 2013).