

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 04 April 2017

Case No.: 2017-TLN-00026
ETA Case No. H-400-16347-204194

In the Matter of:

CAROLINA CONTRACTING & MANAGEMENT, LLC.

Employer

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: Samuel Eli Garcia
Pro Se
Carolina Contracting & Management, LLC.
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For the Employer

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For the Certifying Officer

Before: **TRACY A. DALY**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

1. Nature of Appeal. This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h) and 20 C.F.R. Part 655 Subpart A. It involves Employer's Employment and Training Administration (ETA) Form 9142B application for temporary labor certification for 45 temporary nonagricultural

workers and an administrative review of the application's denial.¹

2. Findings of Fact.

a. On December 14, 2016, Carolina Contracting & Management, LLC's (Employer) filed ETA Form 9142B application for temporary labor certification with the Certifying Officer (CO) at the Chicago National Processing Center (CNPC) for 45 temporary "Forest and Conservation Workers" to perform work from January 23, 2017 through September 20, 2017 based on Employer's claimed seasonal need for temporary workers. (AF 77-105)²

b. On December 22, 2016, the CO issued a Notice of Deficiency (NOD). The CO explained the application contained the following deficiencies based on Employer's failure to: 1) satisfy application filing requirements, as required by 20 C.F.R. § 655.15(b), 655.17; 2) justify the dates of need requested, as required by 20 C.F.R. § 655.6(a)-(b); 3) submit an acceptable job offer, as required by 20 C.F.R. §§ 655.16, 655.18; 4) submit job order assurances and contents, as required by 20 C.F.R. § 655.18(a)(1); 5) disclose foreign worker recruitment, as required by 20 C.F.R. § 655.9(a)-(b); 6) submit adequate Farm Labor Contractor (FLC) documentation concerning the workers' transportation to worksites, as provided in TEGL 27-06, Attachment A, Section II; 7) submit adequate Farm Labor Contractor (FLC) documentation concerning the address where work is to be performed, the number of crews and workers, the wages for each location, and the start and end dates of work for each worksite, as provided in TEGL 27-06, Attachment A, Section II; and 8) submit a complete and accurate ETA Form 9142.³ (AF 65-76)

c. Concerning the justification of dates of need requested, Employer's Statement of Temporary Need provided that it "specializes in forestry work, ranging from site preparation, brush cutting, planting tree seedlings, and spraying herbicide." Employer declared its contracts range from May to September. Employer explained its "season begins in May when the winter conditions have subsided and the growth of new vegetation and seedlings begins again." (AF 88)

d. In the NOD, the CO explained that Employer did not submit sufficient information to support the dates of need requested. Specifically, the CO stated "the employer has requested a seasonal need for H-2B workers from January 23, 2017 to September 20, 2017, but has not provided any information or supporting documentation as to how it determined its start date of need. The employer has not justified that it has a need for temporary workers for the dates requested." In addition, the CO required Employer to submit a revised, detailed statement of temporary need containing the following:

1. A description of the business history and activities (i.e. primary

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 established by the "2008 Rule" found at 73 Fed. Reg. 78020. *See* 80 Fed. Reg. 24042, 24109 (2015 IFR). The procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR, and apply to this appeal.

² References to the Appeal File are by the abbreviation AF and page numbers.

³ Because the undersigned concluded that the CO properly found Employer failed to justify the dates of need requested as required by 20 C.F.R. §655.6(a)-(b), the merits of other reasons for the CO's denial are not addressed in this decision.

- products or services) and schedule of operations through the year;
- 2. An explanation regarding why the nature of the job opportunity and number of foreign workers being requested for certification reflect a temporary need;
- 3. An explanation of why the employer indicates that its season begins in May, but has requested a start date of January 23, 2017; and
- 4. An explanation of how the employer determined its requested dates of need.

The CO also required Employer to submit the following supporting evidence and documentation:

- 1. 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; and
- 2. A summary of all projects that have contributed to the employer's need for temporary workers at its worksite location(s) during its requested dates of need. The list should include the anticipated start and end dates of each project and worksite addresses; or
- 3. Other evidence and documentation that similarly serves to justify the number of workers being requested for certification.

(AF 69-70)

e. As stated in the December 22, 2016 NOD, in accordance with 20 C.F.R. § 655.31(b)(2), the CO permitted Employer to submit a modified application "within 10 business days from the date [Employer] receive[s] this Notice of Deficiency letter."⁴ In the alternative, and in accordance with 20 C.F.R. § 655.61, the CO permitted Employer to request administrative review of the application's denial before the Office of Administrative Law Judges (OALJ) within 10 business days from the date the Notice of Deficiency was issued. (AF 65-67)

f. In a letter dated January 23, 2017, and received by the CNPC on January 26, 2017, Employer submitted its response to the NOD. Employer requested the CO to amend the requested needed start date from January 23, 2017 to April 20, 2017. Employer did not provide a specific reason for making this amended request. Employer then stated its contracts range from April to September of each year. In attempting to justify the dates of need requested, Employer stated: "In the years 2015 and 2016 we acquired several contracts for tree planting and pre-commercial thinning. However, because we could not find enough US citizens to work to

⁴ However, the timing requirements in this subsection states the Notice of Deficiency will "[o]ffer the employer an opportunity to submit a modified Application for Temporary Employment Certification or job order *within 10 business days from the date of the Notice of Deficiency.*" 20 C.F.R. § 655.31(b)(2) (emphasis added).

complete the contract requirements we were forced to subcontract the work to various subcontractors. For this reason, we do not have payroll reports to support our required number of foreign workers.” The only attachment to Employer’s amended application included a job posting for the identified positions on the “NCWorks Online” website. (AF 49-64)

g. On February 27, 2017, the CO issued a “Non-Acceptance Denial H-2B Temporary Non-Agricultural Program” of Employer’ application. The CO explained the NOD was issued on December 22, 2016, and Employer did not file a response no later than January 9, 2017. As a result, the CO considered Employer’s response untimely. However, the CO also denied Employer’s application for the following deficiencies based on Employer’s failure to: 1) justify the dates of need requested, as required by 20 C.F.R. § 655.6(a)-(b); 2) submit an acceptable job offer, as required by 20 C.F.R. §§ 655.16, 655.18; 3) submit job order assurances and contents, as required by 20 C.F.R. § 655.18(a)(1); 4) submit adequate documentation as a Farm Labor Contractor (FLC), as provided in TEGL 27-06, Attachment A, Section II; and 5) submit adequate documentation as a as a Farm Labor Contractor (FLC), as provided in TEGL 27-06, Attachment A, Section II.

h. Regarding Employer’s failure to justify the dates of need requested, the CO found that Employer’s response to the NOD “did not adequately support its temporary need based on a seasonal standard of need, nor its date of need requested.” The CO further stated that Employer indicated that its increased workload required it to subcontract work to various subcontractors. Although Employer stated it did not have any payroll records due to work being performed by subcontractors, Employer “did not provide any evidence to show that it subcontracted its work. In addition, the employer did not provide a detailed response as to why its start date of need requested changed from January 23, 2017 to April 20, 2017.” The CO concluded that based on the lack of explanation and lack of documentation submitted, Employer did not establish a peakload standard of need, nor did it present sufficient evidence to support the requested dates of need. (AF 33-34)

i. On March 2, 2017, Employer requested administrative review of the CO’s denial of certification pursuant to 20 C.F.R. § 655.61 and submitted a reply brief in response to the CO’s denial. In this filing, Employer acknowledged that its response to the NOD was not timely received by the CO. (AF 1-2)

j. On March 7, 2017, the Board of Alien Labor Certification Appeals (BALCA) docketed this appeal. On March 14, 2017, the undersigned issued a Notice of Case Assignment and Order Establishing Brief Filing Deadlines. The CO transmitted the Appeal File to BALCA on March 15, 2017.

k. Consistent with 20 C.F.R. § 655.61(c), on March 27, 2017, the CO submitted a brief urging BALCA to affirm the CO’s decision denying Employer’s ETA Form 9142B application.

3. Applicable Law and Analysis.

a. *H-2B Program.* The H–2B nonimmigrant visa program enables United States

nonagricultural employers to employ foreign workers on a temporary basis to perform nonagricultural labor or services if unemployed persons capable of performing such service or labor cannot be found in this country. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL. 20 C.F.R. § 655.20.

b. *Standard of Review.* BALCA’s standard of review in H-2B cases is limited. Specifically, 20 C.F.R. § 655.61 provides that 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 was actually submitted to the CO in support of the employer’s application. After considering the evidence of record, BALCA must: (1) affirm the CO’s decision to deny temporary labor certification; (2) direct the CO to grant certification; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e)(1)-(3).

c. *Burden of Proof.* The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361; *Eagle Indus. Prof’l Servs.*, 2009-TLN-00073 (July 28, 2009); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (employer bears burden of proof to establish its eligibility to employ foreign workers under the H-2B program). A bare assertion without supporting evidence is insufficient to carry the employer’s burden of proof. *AB Controls & Tech., Inc.*, 2013-TLN-00022 (Jan. 17, 2013).

d. *Time Period for Employer to Respond to Notice of Deficiency or Request Administrative Review.* A Notice of Deficiency will “offer the employer an opportunity to submit a modified Application for Temporary Employment Certification or job order within 10 business days from the date of the Notice of Deficiency.” 20 C.F.R. § 655.31. An employer also may request administrative review of the CO’s determination “within 10 business days from the date of determination.” 20 C.F.R. § 655.61. “If the employer does not comply with the requirements of this section by either submitting a modified application within 10 business days or requesting administrative review before an ALJ under § 655.61, the CO will deny the Application for Temporary Employment Certification.” 20 C.F.R. § 655.31(b)(4). Such a denial is final and cannot be appealed. *Id.*

In this case, the CO issued the NOD on December 22, 2016. Based on the filing deadlines set forth in the regulations, Employer’s modified application must have been filed with the CO no later than 10 business days from the date of the NOD, which was January 9, 2017. Employer submitted its amended application on January 23, 2017, which was after the applicable deadline had elapsed. Employer also did not timely file a request for administrative review within 10 business days from the date of the CO’s determination. In its subsequent request for administrative review, Employer concedes that it did not timely respond to the CO’s NOD and did not provide any justification for this failure. Accordingly, the undersigned concludes Employer did not timely file its response and amended application with the CO, and the CO properly denied Employer’s application.

However, the undersigned notes that contrary to the regulations, the NOD specifically stated that Employer “may submit a modified application within 10 business days from the date

you receive this Notice of Deficiency letter.” (AF 65) The record does not contain any documentation evidencing when Employer received the CO’s NOD. Nevertheless, Employer does not argue it timely responded to the CO’s NOD and there is no evidence in the record to find that the CO’s non-acceptance of Employer’s untimely response would result in manifest injustice. *See In Madeleine S. Bloom*, 88-INA-152, at 4, n.8 (Oct. 13, 1989) (emphasizing regulatory deadlines should only be tolled in those rare instances in which failure to do so would result in “manifest injustice”). However, even if the circumstances of this case warranted tolling of the regulatory time periods, the undersigned finds the CO properly rejected Employer’s application based on the failure to establish a need for temporary workers.

e. *Temporary Need for Workers.* An employer seeking certification must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 20 C.F.R. § 655.6(a). 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 Department of Homeland Security (DHS) regulations. 20 C.F.R. § 655.6(b). An employer’s need is temporary if the need is limited and will “end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). To demonstrate a temporary need based on a seasonal need, an 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 employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner’s permanent employees.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(2); 20 C.F.R. § 655.6(b).

Employer declared in its initial application it had a seasonal need for 45 workers ranging from January 23, 2017 to September 20, 2017. (AF 77, 88) The CO noted Employer’s statement of temporary need provided that its contracts to perform the described forestry work ranged from May to September of each year. The CO issued a NOD and requested Employer to submit additional documentation to substantiate the requested dates of need. (AF 67-70) In response to the NOD, Employer requested the CO to amend its application to reflect the requested dates of need from April 20, 2017 to September 20, 2017. Employer then stated its contracts range from April to September of each year. (AF 51-53) Employer did not attempt to explain the discrepancy or submit any additional documentation substantiating the amended dates. The only explanation Employer provided was “[o]ur original season begins in April when the winter conditions have subsided and the growth of new vegetation and seedlings begins again.” (AF 51)

The NOD also required Employer to submit summarized payroll reports for a minimum of one year detailing the number of full-time and temporary workers in the requested occupation, the total number of workers employed, total hours worked, and total earnings received. (AF 33, 70) In response, Employer asserted that it did not have payroll reports because it subcontracted most work to various subcontractors. (AF 51) Although Employer raises a valid point concerning its lack of summarized payroll reports, it does not excuse Employer’s failure to submit other evidence and documentation that would similarly serve to justify the number of workers requested for certification. For example, Employer did not submit any subcontractor agreements to support its assertion that it has an increased need for temporary foreign workers during the specifically requested periods of need. Employer’s failure to comply with the NOD was alone grounds for the CO’s denial of certification. *See* 20 C.F.R. § 655.32(a) (“The employer’s failure

to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification.”); *see also Tarilas Corp.*, 2015-TLN-00016 (Mar. 5, 2016) (upholding the CO’s denial of certification based on the employer’s failure to show temporary need and for failing to submit the requested additional information in response to the NOD).

The undersigned concludes that, based on the inconsistencies concerning Employer’s claimed temporary seasonal need in the application documents and failure to present adequate documentation and evidence in support of its application to the CO, Employer failed to carry its burden to establish a temporary seasonal need for H-2B workers.

4. Ruling. Employer failed to carry its burden to establish its eligibility for H-2B labor certification. The CO’s denial of Employer’s Application for Temporary Employment Certification is affirmed.

SO ORDERED.

TRACY A. DALY
Administrative Law Judge