U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 14 June 2017

BALCA Case No.: 2017-TLN-00050
ETA Case No.: H-400-17039-172729

In the Matter of:

GARCIA FOREST SERVICE, LLC
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals ("BALCA") pursuant to Garcia Forest Service, LLC's ("Employer") request for review of the Certifying Officer's ("CO") Non Acceptance Denial in the above-captioned H-2B temporary labor certification matter.[1] The H-2B program permits employers to hire foreign workers to perform temporary non-agricultural work within the United States. *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). Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor ("Department" or "DOL"). 8 C.F.R. § 214.2(h)(6)(iii). Such applications are reviewed by a CO in the Office of Foreign Labor Certification of the Employment and Training Administration ("ETA").

STATEMENT OF THE CASE

On February 9, 2017, Employer filed an Application for Temporary Employment Certification ("Application"), requesting temporary labor certification for 60 workers. Appeal File ("AF") 328. Employer sought these workers from April 24, 2017 through October 31, 2017. *Id.* Employer attested that the workers were required due to seasonal need for the position of "Forestry Worker." *Id.* at 328, 330. The Forestry worker position was a full time position requiring 35 hours worked per week (seven hours per day). *Id.* at 330.

On March 28, 2017, the CO issued a Notice of Deficiency ("NOD") to Employer. AF 315. The CO identified multiple deficiencies in the application, including Employer's failure to establish the job opportunity as temporary in nature. *Id.* at 318-325. As to that specific deficiency, the CO requested that Employer provide explanations of: 1) the business and its

[1] On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule ("2015 IFR") to replace the regulations at 20 C.F.R. Part 655, Subpart A, established by the "2008 Rule" found at 73 Fed. Reg. 78,020 (Dec. 19, 2008). *See* 80 Fed. Reg. 24,042, 24,109 (Apr. 29, 2015). The process outlined in the 2015 IFR applies to applications filed after April 29, 2015 whose period of need begins after October 1, 2015. *See* 20 C.F.R. 655.4(e) (explaining transition procedures).

schedule of operations through the year; 2) why the nature of the job opportunity and the number of foreign workers requested reflected temporary need; 3) how the request meets one-time occurrence, seasonal, peak load, or intermittent need; and 4) why the requested dates of need had significantly changed since Employer's last application. *Id.* at 319. The CO specifically requested "[s]ummarized 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 . . . [or o]ther evidence and documentation that similarly serves to justify the chosen standard of temporary need for the occupational title." *Id.* at 320.

On March 28, 2017, Employer responded to the NOD. Included in this response was a "Payroll Summary" that spanned April to October 2016. AF 268-306. In response to this filing, on April 5, 2017, the CO issued a minor deficiency email explaining that some of Employer's responses were still insufficient. The CO also noted that Employer's summary did not provide the information requested in the NOD.

Employer responded to the minor deficiency email that same day. AF 215. Among the documents included by Employer in this response was "summarized monthly payroll information from 2016." *Id.* at 216. This payroll summary covered the period of April to October 2016, and it appears identical to the prior "Payroll Summary" provided in the March 28, 2017 response. *Id.* at 219-257. After sending in this information, Employer reached out to the CO multiple times to ask if there was anything else required of it. Employer did not receive a meaningful response until May 10, 2017, when the CO issued a Non Acceptance Denial of Employer's application. *Id.* at 197.

In the denial, the CO acknowledged that all deficiencies, beyond the issue of whether the job was temporary in nature, had been resolved. AF 199. The CO explained that Employer had failed to provide adequate monthly salary information, as requested by the CO in the NOD. *Id.* at 199-201. Moreover, the CO determined that the additional information provided by Employer did not explain the shift in its time of need. *Id.* at 200. Employer had needed workers from May through December during 2016. *Id.* at 199. Additionally, Employer's contracts provided with its application did not appear to support its need for laborers. *Id.* at 200-201.

On May 15, 2017, Employer sent a Response to Denial ("Response") seeking to appeal the CO's denial. In its Response, Employer admitted to errors regarding its contracts, and asked that "the contracts in Beltrami County and with Reiger Logging . . . be discarded." AF 4. Employer attested that the contracts were "not mentioned in either of the Notice of Deficiencies" and were "not brought to the employer's attention until the denial letter was issued." *Id.*

Further, the Employer explained that it "misunderstood" that the CO required payroll records for the entire year. AF 5. Employer stated that "it did not have permanent forestry workers as all [its] work [was] temporary." Employer then noted that "[t]he same payroll reports were submitted in [response to] both [NODs]." *Id.* Employer argued that "[i]f the first reports submitted were not sufficient it should have been noted in the second Minor [NOD] so changes

could have been made and the proper reports sent."[2] *Id.* Employer then provided payroll records from January to December 2016.

Finally, Employer noted that after responding to the minor deficiency email, the CO did not contact the Employer for more than 40 days. AF 5. Employer stated that had the denial letter been received earlier, Employer could have submitted another application addressing the deficiencies correctly.

I received Employer's request for administrative review on May 19, 2017. On May 23, 2017, I issued a Notice of Assignment and Expedited Briefing Schedule in this matter. I received the Appeal File on May 31, 2017, and the CO timely submitted its brief on June 9, 2017.

The CO argues that Employer's failure to submit the requested payroll summaries in response to the NODs was sufficient to justify denying the application. CO Brief ("CO Br.") at 3. Specifically, the CO noted that "[Employer] repeatedly submitted payroll records for only seven months that were not summarized, did not identify permanent versus temporary employees, did not identify monthly hours worked, and did not identify total monthly earnings." *Id.* Without this information, the CO explained that it was unable to determine whether Employer established temporary seasonal need. *Id.* at 3.

SCOPE OF REVIEW

BALCA's scope of review is limited in H-2B cases. 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 actually submitted before the CO. 20 C.F.R. § 655.61(a)(5). Upon 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).

DISCUSSION

Employers seeking certification under the H-2B program "must establish that [their] need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary." 20 C.F.R. § 655.6(a). Need is considered temporary if justified as "a one-time occurrence[,] a seasonal need[,] a peakload need[,] or an intermittent need." *Id.* § 655.6(b); *see also* 8 U.S.C. § 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6).

The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361. At filing, an employer need only submit a detailed statement of temporary need with their application. 20 C.F.R. § 655.21(a). However, should the CO request supporting evidence for an employer's application, the employer must "timely furnish the requested supplemental information or documentation." *Id.* § 655.21(b); *North Country Wreaths*, 2012-TLN-00043, slip. op at 6 (Aug. 9, 2012) ("the CO is not required

[2] The "second Minor [NOD]" appears to refer to the minor deficiency email.

to take [Employer] at its word.") Failure to furnish information may be grounds for denial of the application. *Id.*

Of the four kinds of temporary need, Employer asserts a seasonal need. AF 328; AF 267. To qualify for a seasonal need, an employer must establish "1) that the service or labor is traditionally tied to a season of the year by an event or pattern and is of recurring nature." 8 C.F.R. § 214.2(h)(6)(ii)(B)(2). An employer must specify any periods of time during each year in which it does not need the services or labor. *Id.* Moreover, "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 petitioner's permanent employees." *Id.*

In this case, the CO found that Employer had failed to provide sufficient information to prove temporary need, and in response the CO requested additional information, including specific, summarized monthly payroll reports for at least one prior year. AF 319-320. Despite multiple chances to respond to these requests, Employer only responded by giving overall payroll information for a six month period, without including monthly summaries. *See Id.* at 268-306, 267, 219-257. Upon review of this evidence, I find it is insufficient to establish a seasonal need.

The regulations plainly state that, to prove a seasonal need, an employer must specify any periods of time during the year in which it does not need additional services. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2). Employer's statement of need states that the seasonal need "[b]egin[s] in May with our crews & complet[es] at the *end* of November." AF 267 (emphasis added). Noting the change in dates of need, the CO requested additional information. *Id.* at 319. After the CO requested additional information, Employer responded by providing only a general summary of the work done by individuals from April to October, 2016. *See id.* at 268-306; 219-257.

Employer fails to provide sufficient information to verify its seasonal need. Employer's payroll summaries do not establish a seasonal need, because the records do not address the rest of the year. AF 268-306; 219-257. Employer's initial summary, which spans April 24 through October 31, 2016, and was included with the Application, similarly fails to show Employer's workforce in the alleged non-seasonal period. *See id.* at 342-363.

Employer states in its Response that "[Employer] misunderstood that [the CO] needed the payroll records for the entire year and just the dates of need requested from the previous year." AF at 5. Moreover, Employer explains that "it does not have any permanent forestry workers as all its work is temporary" and that "the payroll reports that were submitted show the total hours worked and total earnings received." *Id.* These excuses are insufficient to cure the problems with Employer's evidence.

First, the initial NOD went into great detail explaining that Employer had to submit "[s]ummarized *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 . . . the total number of workers or staff employed, total hours worked, and total earnings received." AF 320 (emphasis added). The CO's meaning is clear. Even if there were some confusion as to the CO's request, the CO clearly explained in the minor deficiency email that the payroll

information provided "did not provide summarized *monthly* payroll information," and that Employer "must submit . . . [s]ummarized *monthly* payroll information for 2016 in the manner specifically outlined in the employer's NOD." AF 258 (emphasis added). Despite these clear instructions, Employer still failed to provide the proper information.

Second, Employer's argument that it employs no workers during the alleged off-months cannot be raised. At no point did Employer raise this argument in its answers to the deficiency notices; thus the argument may not be raised for the first time here. *See* 20 C.F.R. § 655.61(a)(5). Further, I may not consider Employer's additional summarized payroll information, which was included for the first time in the Response and lists Employment summaries from May to December 2016, because it was not raised before the CO. 20 C.F.R. § 655.61(a)(5).

Employer's payroll summaries have additional issues beyond just their lack of information. Employer's initial payroll summary, which identified total hours worked per week, shows wild variation over time. *Compare* AF 340 (showing 327 hours worked by employees in a week) *with* AF 361 (showing 1900 hours worked by employees in a week). Employer's other payroll summaries show that many workers did not work for the entire six-month period; *e.g.* Trinidad Perez Perez worked for 487.75 hours from April to October, a total of only 69 7-hour days (or roughly 3.5 work months).[3] *Id.* at 255. Only 36 of the 76 workers identified worked more than 530 hours over the six month period. *See id.* at 219-257. This suggests that the entire six month period may not accurately reflect the period of seasonal need. Moreover, the summaries provided by Employer disagree with each other: *Compare id.* at 363 (listing net pay as $38,456.28) *with id.* at 257, 306 (listing net pay as $39,901.03). These issues further highlight the insufficiency of Employer's summaries.

CONCLUSION

Reviewing the information properly in the record, it is clear that Employer has failed to provide sufficient information to establish a seasonal need under 20 C.F.R. § 655.6(a) and (b). It is impossible for an adjudicator, whether I or the CO, properly to determine Employer's seasonal need without at least some information regarding the alleged off-season. This is particularly true when the Employer's application shows a change in the current season's dates compared to the prior year. *See, e.g.*, *Covenant Hospitality*, 2010-TLN-00066, slip op. at 4 (June 23, 2010). Accordingly, as Employer failed to submit adequate documentation to meets its burden, the CO's grounds for denial are valid.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED.**

I am requesting that this order be served by fax in addition to by regular mail.

[3] The average time worked by the 76 individuals identified in the payroll summaries is roughly 525 hours or 75 days each (roughly 3.75 work months).

SO ORDERED.

Digitally signed by PAUL R. ALMANZA
DN: CN=PAUL R. ALMANZA,
OU=ADMINISTRATIVE LAW JUDGE,
O=US DOL Office of Administrative Law
Judges, L=Washington, S=DC, C=US
Location: Washington DC

PAUL R. ALMANZA
Associate Chief Administrative Law Judge