



Issue Date: 19 September 2017

BALCA Case No.: 2017-TLN-00059

ETA Case No.: H-400-17121-687811

In the Matter of:

JETCRAFTERS AVIATION, LLC,

Employer

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, an employer may request administrative review by the Board of Alien Labor Certification Appeals ("the Board" or "BALCA"). 20 C.F.R. § 655.61(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. § 655.61(a)(5).

STATEMENT OF THE CASE

On June 30, 2017, Jetcrafters Aviation LLC ("Employer") submitted an application for temporary labor certification to the Department of Labor's Employment and Training Administration ("ETA"). AF 151-156.² Employer requested certification for ten Aircraft Painters, with Standard Occupational Classification ("SOC") title "Painters, Transportation

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.

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

Equipment,” from May 31, 2017 to December 31, 2017 on a peakload basis. AF 151. Under Section B. 9, “Statement of Temporary Need,” Employer wrote “see attachment for statements of temporary need.” *Id.* However, no attachment was included.

On July 11, 2017, the CO issued a Notice of Deficiency (“NOD”), notifying Employer that its application failed to meet the criteria for acceptance due to five deficiencies.³ AF 139-145. The CO found, *inter alia*, that Employer failed to establish that the job opportunity is temporary pursuant to 20 C.F.R. §655.6(a)-(b). AF 139. The CO noted that Employer previously submitted two applications for the same position and worksite location. *Id.* Specifically, the application with ETA case number H-400-16320-432494 requested dates of need from January 29, 2017 to May 31, 2017. *Id.* The application with ETA case number H-400-16352-948198 requested dates of need from April 16, 2017 to May 31, 2017. *Id.* The CO found that based on Employer’s previously certified application and current application, Employer has an eleven-month permanent need for the requested workers.⁴ *Id.*

Furthermore, the CO found that Employer has not explained or demonstrated what causes the peakload need. *Id.* The CO directed Employer to submit an updated temporary need statement and supporting evidence and documentation that justifies the chosen standard of temporary need. AF 140. The temporary need statement had to include:

- i. A description of the employer’s business history and activities and schedule of operations through the year;
- ii. An explanation regarding why the nature of the employer’s job opportunity and number of foreign workers being requested for certification reflect a temporary need; and
- iii. An explanation as to the event or activity in the employer’s business that causes a peak from May 31, 2017 to December 31, 2017 and why the employer’s previous certification under a peakload need requested dates of January 29, 2017 to May 31, 2017.

Id. The supporting documentation had to include monthly payroll reports for at least one calendar year which identifies the permanent and temporary employees for the requested occupation. *Id.*

On July 24, 2017, Employer submitted its response to the NOD. AF 67. Employer’s response included a Statement of Need, Quarterly Federal Tax Returns (“Form 941) for all four quarters in 2015, copy of the job order, and summarized monthly payroll records for 2015 and 2016. AF 66-100. The summarized monthly payroll reports show the number of permanent staff, temporary staff, and total wages paid for each month. AF 99; AF 100. Employer granted the CO permission to make corrections to its application to cure some of the deficiencies. AF

³ Employer cured one of the five deficiencies, leaving four deficiencies on appeal. As Employer failed to cure the first deficiency, failure to establish peakload need, this Decision does not address the other deficiencies on appeal.

⁴ The first application’s dates of need were from January 29, 2017 to May 31, 2017 and the current dates of need are from May 31, 2017 to December 31, 2017.

68. Of relevance here, Employer requested that its start date of need be changed from May 31, 2017 to September 16, 2017.⁵ AF 74.

In its Statement of Need, Employer explained it experiences a decrease in demand during the summer months because “most airplane owners travel the most during the summer season.” AF 84. Employer further explained that “[g]iven our current sales we project business to begin its peak load from October all the way through May.” *Id.* Employer acknowledged that the temporary workers “must return to their country of origin after their visa expiration or on October 31, 2018.” *Id.*

On August 1, 2017, the CO issued a Non-Acceptance Denial (“Denial”). AF 50. The CO concluded that Employer failed to establish a peak load need under 20 C.F.R. §655.6(a)-(b), citing several reasons. AF 54. First, the CO found that Employer’s Statement of Need conflicts with Employer’s dates of need. *Id.* In its Statement of Need, Employer wrote that “we accept the fact that the foreign temporary workers must return to their country of origin after their visa expiration or on October 31, 2018.” *Id.* The CO noted that this statement is inconsistent with Employer’s December 31, 2018 end date.⁶ *Id.* Second, the CO noted that Employer referenced its current sales in support of its determination that the peak load begins in October and ends in May. *Id.* The CO noted that these dates are also inconsistent with Employer’s dates of need and that Employer did not provide documentation of its current sales.

Third, the CO reviewed Employer’s 2015 and 2016 monthly payroll reports and Employer’s Form 941 and found that these reports do not demonstrate a peak period consistent with Employer’s dates of need. *Id.* The CO noted that the monthly payroll reports did not include the hours worked and did not identify the workers’ occupation, as the NOD requested. The CO found that the payroll reports include Employer’s entire workforce, based on a comparison with the data on Form 941. Furthermore, the CO found that the 2015 payroll report is inconsistent with Employer’s Form 941 regarding the number of workers employed. *Id.*

Finally, the CO found that Employer’s 2016 payroll report does not show a sustained peak in total wages paid. AF 55. The CO acknowledged that Employer changed its start date of need from May 31, 2017 to September 16, 2017. *Id.* However, the CO found that this changed date of need does not cure the deficiency. The CO cited to Employer’s prior application for this position in which Employer listed the dates of need from April 16, 2017 to May 31, 2017. *Id.* The CO found that based on Employer’s prior applications, Employer has a year-round need for the position. *Id.*

On August 18, 2017 Employer requested administrative review of the denial of certification. AF 1. In its request for administrative review, Employer explained that “the letter statement of need of Jetcrafters Aviation contains typo errors that are being used as inaccuracies, we can fix those errors. We are in the best dispositions to modify everything that is not correct.”

⁵ The end date of December 31, 2017 remained the same.

⁶ The CO’s reference to December 31, 2018 is incorrect as Employer’s end date is December 31, 2017. See AF 68; AF 74. Nevertheless, the CO is correct in finding that Employer’s statement that the temporary workers must return on October 31, 2018 is inconsistent with Employer’s dates of need.

The parties had seven business days from their receipt of the appeal file to file briefs. BALCA received the appeal file on August 30, 2017.

The Associate Solicitor for Employment and Training Legal Services (“Solicitor”) filed a brief on September 11, 2017. Employer untimely filed its brief on September 13, 2017.

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-00044, slip op. at 5 (May 8, 2009). Here, Employer requests temporary workers 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).

Employer has not established that it has a temporary peakload need for ten aircraft painters. Employer’s Statement of Need does not adequately explain why it experiences a peak load need from September 16, 2017 through December 31, 2017. Employer’s Statement of Need contains several inconsistencies. Employer wrote that its current sales reflect a peak load need from October through May. Employer also explained that it experiences a decrease in demand during the summer months. Employer did not specify which months it experiences a decrease and did not explain why it did not include other non-summer months in its dates of need. Most importantly, Employer’s evidence does not substantiate its dates of need. The 2015 and 2016 monthly payroll records do not match Employer’s need. *See D and R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (Affirming CO’s denial where the submitted evidence did not match the employer’s requested dates of need.)

Employer’s summarized monthly payroll records do not identify the workers’ occupations. Thus, the payroll reports do not demonstrate whether Employer has a peakload need for Aircraft Painters. Furthermore, neither the staff data nor the total wages paid reflects a peakload need from September through December. In 2015, Employer had the highest number of temporary staff in April and May. In 2016, Employer had the highest number of temporary staff in January through March. None of these months are within Employer’s peakload period of September through December.

Employer's provided evidence does not support its peakload need of September 16 through December 31. Employer did not present any other evidence to support its temporary need. Consequently, Employer has not met its burden of establishing that it has a peakload need for temporary workers between September 16, 2017 and December 31, 2017.

ORDER

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

SO ORDERED.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey