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Issue Date: 13 April 2017

BALCA NO.: 2017-TLN-00031

ETA CASE NO.: H-400-17006-118083

In the Matter of:

PRADO AND SONS POOL
PLASTERING, INC.,

Employer.

DECISION AND ORDER
AFFIRMING DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals ("BALCA") on the Employer's request for review of the Certifying Officer's denial in this H-2B temporary labor certification matter.

Procedure for Temporary Labor Certification

Under the H-2B program, employers may hire foreign workers to perform temporary nonagricultural work within the United States, under certain circumstances, "if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor." 8 C.F.R. §214.2, subsection (h)(1)(ii)(D). Employers wishing to hire foreign workers under this program must apply for a "labor certification" from the U.S. Department of Labor ("DOL"). 8 C.F.R. §214.2, subsection (h)(6)(iii). A Certifying Officer ("CO") of the Office of Foreign Labor Certification ("OFLC") of the Employment and Training Administration ("ETA") reviews the employer's application under 20 C.F.R. §655.50.

The CO (acting for the Secretary of Labor, 20 C.F.R. §655.2, subsection (a)) can issue the labor certification only after determining (1) that there are not sufficient U.S. workers who are qualified and available to perform the work in question and (2) that employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. §655.1, subsection (a). The burden of proof is on the employer to show it is entitled to the labor certification. 8 U.S.C. §1361.

If the CO denies certification, the employer may seek administrative review before BALCA under 20 C.F.R. §655.61 (*see* 20 C.F.R. §655.53). When the employer requests administrative review, the CO, within seven business days, submits the Appeal File to BALCA, to the employer, and to the Associate Solicitor for Employment and Training Legal Services. 20 C.F.R. §655.61, subsection (b). Counsel for the CO may submit a brief in support of the CO's decision within seven business days of receipt of the Appeal File. 20 C.F.R. §655.61, subsection (c). BALCA then considers only the Appeal File, the request for review, and any legal briefs submitted, and must either affirm the CO's determination; reverse or modify the CO's determination, or remand to the CO for further action. 20 C.F.R. §655.51, subsection (e).

By another curious quirk of this procedure, by designation of the Chief ALJ, I am BALCA for purposes of this appeal. 20 C.F.R. §655.61, subsection (d).

Statement of the Case

The Application

On January 6, 2017, the Employer, Prado and Sons Pool Plastering, Inc., applied for a Temporary Labor Certification (AF, pp. 57-83).[1] Its application included a two-page Statement of Need (AF, pp. 72-73), in which it averred

> We are having a very difficult time finding workers to accommodate the increase *[sic]* demand for our plastering services, due to the labor shortage construction is experiencing in our area. We are requesting this temporary workforce so we can supplement our permanent workforce during this short-term demand, from April, 2017 through December 15, 2017 (AF, p. 72).

Employer also referred to a Census Bureau survey of building permits issued in this Phoenix-Scottsdale-Mesa area in 2014, 2015, and 2016. The survey results, represented on the Statement of Need in the form of a graph,[2] shows generally an increase in the issuance of building permits throughout each year, from a low in January to a high in November, followed by a sharp drop to January of 2015 and January of 2016,[3] after which the numbers began to rise again. Employer conclud-

[1] References to "AF" are to the Appeal File.

[2] The graph does not provide exact figures for permits issued. For every two months – January, March, May, July, September, and November – it shows a dot located on a graduated scale beginning at zero and increasing to a maximum of 50,000 in increments of 5000 permits. Lines connect the dots.

[3] The survey apparently ended in September of 2016, but Employer anticipated another drop in January, 2017.

ed the demand for building permits "begins to peak every year in February," and, "[a]s we are a sector of the new home construction industry, this is the event that causes our peakload" (AF p. 73). Later, the Employer added "We regularly employ workers to perform the services and labor at the place of employment and we need to supplement our permanent staff at the place of employment due to our peakload (short-term need) as per 8 § CFR 214.2(h)(6)(ii)(b)(3) *[sic]*" (*Id.*).

The Notice of Deficiency

On February 15, 2017, the Certifying Officer issued a Notice of Deficiency (AF pp. 52-56). As relevant here, the CO stated

> 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 DHS regulations.
>
> The employer did not submit sufficient information in its *Application for Temporary Employment Certification* to establish its requested period of intended employment.
>
> The employer did not include adequate documentation to justify the change in dates of need from the employer's prior certification, H-400-16110-781757, which requested five Helpers of Plasterers from July 3, 2016 through December 15, 2016. The current application requests five Helpers of Plasterers from April 1, 2017 through December 15 2017. The employer submitted a summary for new privately owned housings units in Phoenix Arizona. Although the summary does indicate an increase in housing units within the period requested *[sic]*. The employer did not explain how the increase correlates with its need for workers during the period requested.
>
> Additionally, the employer's statement discusses the reason for its requested temporary need is due to labor shortages. A labor shortage, no matter how severe, does not demonstrate a temporary need based on the requested peakload standard.
>
> It is unclear why the employers' dates of need have significantly changed from its previous certification (AF p. 55).

The CO went on to request a more detailed statement of temporary need addressing specifically-enumerated issues, including, *inter alia*, "[a]n explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need;"

and "[a]n explanation as to why the requested dates of need have significantly changed from the employer's prior application" (AF pp. 55-56).

Response to Notice of Deficiency

On March 3, 2017, the Employer e-mailed its Response to the Notice of Deficiency to the CO (AF pp. 37-51). Employer reported the difference in dates of need between its current application and its previous application was the result of the previous application having been filed late: "Our statement of need for our prior petition, H-400-16110-781757, stated 'Our need is recurrent each year and we know we are filing late per regulation to file 75 days before the start date of need. I must remark that in this petition our date of need, and only for this petition, is from July 3 to December 15'" (AF, p. 49).

With respect to justifying its need for foreign workers as temporary, Employer included another version of its Census Bureau building-permit chart, this one including a dot for November, 2016 (AF p. 48). This chart, Employer argued, showed a yearly cycle in the local construction industry, "a peakload in which late-December and January are the slowest with the least amount of work or activity. The work and activity begins to peak in February, then reaches its high point during the summer months" (*Id.*) Employer also repeated its argument from the Application that its need for workers was temporary because of "peakload (short-term need) as per 8 § CFR 214.2(h)(6)(ii)(B)(3)" (AF pp. 48-49). Additionally, Employer provided payroll information, a revenue report, and a history of its business (AF pp. 44-45, 51, 48).

The Denial

On March 15, 2017, the CO denied the application (AF pp. 23-36), on the grounds Employer had filed the Response a day late (AF p. 26) and also because "[t]he employer did not submit sufficient information in its *Application for Temporary Employment Certification* to establish its requested period of intended employment" (*Id.*) After quoting extensively from the Notice of Deficiency, faithfully reproducing the original's idiosyncrasies of style and punctuation, the CO specifically discussed the shortcomings of the Response:

> In response to the NOD, the employer submitted a letter of explanation, 2016 and 2015 payroll summaries, and a 2015-2016 chart summary of its income.
>
> In its explanation letter, the employer described its history and business activities and included a chart for building permits in Phoenix-Mesa-Scottsdale for 2014 through 2016. The letter explained that, "the construction industry has a yearly cycle, which has occurred year after year. The cycle is a peakload in which late-December and January are the slowest with the

> least amount of work or activity." However, the employer's own payroll reports show the employer's least hours worked were in February and October in 2016 and in September and October in 2015.
>
> The employer further explained that, "the pool plastering and remodeling in Phoenix and its surrounding cities are ranked among the top 10 medium-to-large cities with the highest percentage of backyard pools. Consequently, the demand for our services is very high in the Phoenix Metropolitan area." This statement points to an increase in potential business for this employer as does the employer's submitted Consolidated Income Statement; however, it does not support a temporary need for workers.
>
> The employer also discussed that their need is temporary based on its regularly employing workers to perform the labor and that they have a need to supplement their permanent staff during their period of need. However, the employer did not actually explain the *reason* why it has a need for these workers during their requested dates of need.
>
> The employer's explanation letter went on to explain two factors in understanding its submitted payroll. The first factor was, "that the construction industry has about twice the turnover rate that the national average and increasing as the economy gets better." However, an employer's turnover rate does not support a temporary need and instead points to an overall industry challenge in recruiting and retaining workers. Furthermore, the employer's payroll was analyzed using hours worked to determine if the employer has a peak in business as opposed to a number of workers.
>
> The employer's second factor in understanding its payroll is that homes being constructed do not pay the same. However, again, the employers' payroll was analyzed using hours worked to determine if the employer has a peak in business as opposed to total wages paid (AF pp. 27-28).

After reviewing Employer's payroll information, the CO concluded

> In 2016, the employer shows a peak in working hours during July and December with all other months showing hours similar to the stated nonpeak industry month of January. It is important to again note that the employer stated that December

> is an industry nonpeak month; however, in December 2016, the employers' workers worked its second highest hours for 2016.
>
> The employer's 2015 payroll reflects a slight increase in hours in May and a peak in hours in July compared to its stated industry nonpeak in December and January. All other months of the year show hours worked below those worked in January.
>
> The employer's explanation and submitted documents to support its temporary need did not sufficiently overcome its temporary need deficiency. Therefore, the employer did not overcome the deficiency (AF p. 29).

The Appeal

On March 22, 2017, the Employer requested administrative review (AF pp. 1-2).

Discussion

On March 31, 2017, the court notified the parties it had received the Appeal File and invited both parties to file briefs. Both have done so. The court has read and considered the arguments of the parties.[4] The court finds Employer substantially complied with 20 C.F.R. §655.31, subsection (b)(2), and, since there is no showing of prejudice to anyone, excuses the late filing of the Response to the Notice of Deficiency. The filing, as the parties agree, was late by a single day.

As the CO observes, on this appeal, I must consider the relevant factors and determine whether the CO made a "clear error of judgment," but I may not substitute my own judgment for the CO's. I must uphold the CO's determination "so long as the agency's construction of the statute is permissible and its 'path may be reasonably discerned.'" Certifying Officer's Brief, p. 2, fn. 2. Here, the issue separating the parties is whether the Employer has made a sufficient showing of temporary need. The applicable regulation is 8 C.F.R. §214.2, subsection (h)(6)(ii)(B):

> Nature of petitioner's need. 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. . . . The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

[4] The Employer submitted various additional documents with its two-page April 11, 2017, brief. Except to the extent those documents may otherwise appear in the Appeal File, the court may not, and does not, consider them. 20 C.F.R. §655.51, subsection (e).

. . .

(2) Seasonal need. The petitioner 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 or is considered a vacation period for the petitioner's permanent employees.

(3) Peakload need. The petitioner 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.

. . .

In the Notice of Deficiency, the CO expresses two concerns with the application: first, that the Employer seems to have enlarged its period of temporary need in comparison to an earlier application; and, second, that the Employer refers to a labor shortage, a justification the CO considers inadequate to show temporary need. Of the two, the first concern is stated more emphatically, mentioned twice, and discussed at greater length. Indeed, neither the CO nor the Employer ever mentions the purported labor shortage ever again. Under the applicable regulation, a Notice of Deficiency must "[s]tate the reason(s) why the Application for Temporary Employment Certification . . . fails to meet the criteria for acceptance and state the modification needed for the CO to issue a Notice of Acceptance." 20 C.F.R. §655.31, subsection (b)(1). In response, the Employer explains it filed its previous application after the temporary need that year had already begun, and could not apply for retroactive approval. Employer pointed out that it had in fact identified that very issue in its earlier application and had suggested it might apply for a different period of temporary need in the future. Denying the certification, the CO does not even mention this explanation (AF pp. 20-22), much less question its truthfulness. It is a clear error of judgment to reject this explanation without articulating a single reason why. But that clear error alone does not warrant reversal of the CO's determination.[5] The CO's analysis of the payroll records which Employer submitted in re-

[5] Nevertheless, it may help explain the Employer's evident frustration with the process. If the CO granted the earlier application, and the only question the CO raises about the current application is the difference in the period of temporary need, and the earlier application itself answers that question, but the CO nonetheless asks the Employer to explain it again, and the Employer does so, and the explanations match, and the CO has no reason to disbelieve the explanation, it may seem coun-

sponse to the Notice of Deficiency, including hours worked, raises a legitimate question as to when the "peakload" occurs. As Employer sees it, the "peakload" begins at the beginning of February and runs through November, ten of the twelve months of the year. The CO, on the other hand, concluded the payroll records show peak work hours in July and December in 2016, and May and July in 2015. In concluding that the payroll records did not support the Employer's assertion of a temporary "peakload" period from February through November, the CO's construction of the statute and applicable regulations was permissible, and the CO's path to the ultimate determination may be reasonably discerned.

Finally, one might fault the CO for failing specifically to consider the petition under the regulatory standard of seasonal need, rather than exclusively under the peakload-need standard, to show temporary need. To be sure, after the Notice of Deficiency, both the CO and the Employer seemed to assume the peakload-need standard was controlling in this case. Still, the Employer might have raised, and the CO might have considered, whether the Employer had demonstrated "temporary need" under the seasonal-need standard as well. But inasmuch as the CO rationally concluded, based on Employer's records, that ten months in 2016 showed working hours "similar to the stated nonpeak industry month of January," and ten months in 2015 "show hours worked below those worked in January," the court concludes further consideration of the seasonal-need standard would be moot.

ORDER

The Certifying Officer's denial of the Temporary Labor Certification in this case is affirmed.

SO ORDERED.

Digitally signed by John C. Larsen
DN: CN=John C. Larsen,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

CHRISTOPHER LARSEN
Administrative Law Judge

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terintuitive to suggest the CO could deny the current application anyway. But 1) the granting of an earlier petition creates no presumption in favor of granting a later one, and 2) a CO is not bound by his or her own previous determinations, and considers each new petition *de novo*.