



Issue Date: 05 June 2017

BALCA Case No.: 2017-TLN-00048

ETA Case No.: H-400-17006-209781

In the Matter of:

RUCOBA & MAYA CONSTRUCTION, LLC,
Employer

DECISION AND ORDER

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Rucoba & Maya Construction, LLC’s (Employer) request for administrative review of the Certifying Officer’s (CO) denial of temporary labor certification under the H-2B program. For the following reasons, the Board affirms the CO’s denial of certification.

BACKGROUND

Employer submitted its ETA Form 9142, H-2B Application for Temporary Employment Certification, on January 6, 2017, requesting certification for six construction laborers for the eight-month period of April 1 to November 30, 2017. In support of its application, Employer attested that it requires an increased workforce during spring and summer months, as the winter weather prohibits employee retention at high levels. AF 49-76.¹

On February 15, 2017, the CO issued the Notice of Deficiency, requesting that Employer supplement its statement of temporary need, provide a description of the business history, activities, and schedule throughout the year, and explain why the nature of the job opportunity and number of foreign workers reflect a temporary need. AF 44-48. Employer responded to the Notice of Deficiency on February 28, 2017, and provided a payroll summary and an amended statement of temporary need. Specifically, Employer stated:

Temperatures have to be just right for [concrete pouring] or the concrete will not set properly or will set slowly. The winter months of December, January and February bring on shorter daylight hours. There is less time in the day with optimal temperatures to perform the work. Thus, the employer reduces the amount of staff employed. As stated in the temporary need, the employer operates

¹ AF refers to the Administrative File.

year round. When the spring months bring longer daylight hours and better temperatures, more work is performed thus resulting in a need for more workers. AF 41-43.

On April 6, 2017, the CO denied Employer's application, finding that Employer's payroll actually demonstrated more working hours worked during the winter months than the spring and summer months, contrary to Employer's attestation that the spring and summer months are its peakload period. AF 27-40. Employer thereafter requested administrative review on April 19, 2017. AF 1-26.

This matter was assigned to me on April 24, 2017. I issued the Notice of Docketing on April 25, 2017, ordering briefs to be submitted by the seventh business day after receipt of the administrative file. The CO submitted his brief on May 11, 2017.² The decision that follows is based upon the entire record, the parties' briefs, and the applicable law.

DISCUSSION

To obtain certification under the H-2B program, 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). Notably, the burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361. BALCA reviews H-2B decisions under an arbitrary and capricious standard. *Brook Ledge, Inc.*, 2016-TLN-00033 (May 10, 2016).

To show a peakload need, 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 staff will not become part of the petitioner's regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). Furthermore, "the determination of temporary need rests on the nature of the underlying need for the duties of the position" and not "the nature of the job duties." 80 Fed. Reg. 24042, 24005. In order to establish a seasonal need, 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. In addition, Employer must specify the period 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. 8 C.F.R. § 214.2(i)(F)(2)(ii)(B)(2).

In this case, the payroll information submitted in response to the Notice of Deficiency fail to establish any peak period. Indeed, Employer's workforce worked more hours during some

² Employer had apparently not received the Notice of Docketing and requested additional time to file its brief. Accordingly, Employer was permitted an extension of time to submit its brief until Monday, May 22, 2017, and the CO was permitted an opportunity to file a reply brief. Despite being granted an extension of time, no brief was received on behalf of Employer as of the date of this Decision and Order.

winter months than the supposed peak spring and summer months. For example, January had more hours worked than April or July, December and February had more hours than August, and March had more hours than June or November. The Board has consistently affirmed denials of certification applications where an employer's own records belie its claimed peakload periods of need. *See, e.g., Erickson Construction*, 2016-TLN-0050 (Jun. 20, 2016); *GM Title, LLC*, 2017-TLN-00032 (Apr. 25, 2017); *Potomac Home Health Care*, 2015-TLN-00047 (May 21, 2015); *Stadium Club, LLC*, 2012-TLN-00002 (Nov. 21, 2011).

Therefore, after reviewing the record in this matter, I find that Employer has submitted insufficient information to establish need for peakload H-2B workers. Accordingly, I find that the CO's denial of certification was not arbitrary and capricious and should not be disturbed.

ORDER

In light of the foregoing, the Certifying Officer's Final Determination denying the Employer's ETA Form 9142, H-2B Application for Temporary Employment Certification is **AFFIRMED**.

SO ORDERED.

For the Board:

LARRY W. PRICE
Administrative Law Judge

Covington, LA