



Issue Date: 18 April 2017

BALCA Case No.: 2017-TLN-00030
ETA Case No.: H-400-17006-371933

In the Matter of:

VERDUGO AND SON POOL REPAIR, LLC,
Employer.

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: Armando Garcia, *Esq.*
Lefelco
Las Vegas, Nevada
For the Employer

Vincent C. Costantino, *Esq.*
Jeffrey L. Nesvet, *Esq.*
Office of the Solicitor
Division of Employment and Training Legal Services
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Steven D. Bell
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Verdugo and Son Pool Repair, 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 on a one-time, seasonal, peakload, or

¹ On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24042 (Apr. 29, 2015) (to be codified at 20 C.F.R. Part 655). The IFR applies to this case. All citations to 20 C.F.R. Part 655 refer to the IFR.

intermittent basis.² 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”). 8 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA. 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

Employer, located in Phoenix, Arizona, is a swimming pool repairer and remodeling service.³ On December 30, 2016, Employer filed with the CO the following documents: (1) ETA Form 9142B, *Application for Temporary Employment Certification* (“Application”); (2) Appendix B to ETA Form 9142B; (3) an H2B Work Visa Client Service Agreement, dated December 30, 2016; (4) a Statement of Need; (5) a copy of job order number 2514044; (6) a Foreign Recruitment Agreement and Referred Foreign Worker Agreement, and (7) ETA Form 9141, *Application for Prevailing Wage Determination*.⁴ Employer requested certification for ten construction laborers⁵ from April 1, 2017 until November 15, 2017, based on an alleged peakload need during that period.⁶

On February 14, 2017, the CO issued a Notice of Deficiency (“NOD”), which outlined two deficiencies in Employer’s Application.⁷ Specifically, the CO determined that Employer failed to: (1) establish that its job opportunity is temporary in nature; and (2) submit an acceptable job order.⁸ Regarding the first deficiency, which is the sole issue on appeal, the CO stated that Employer did not submit sufficient information to establish its requested period of intended employment, or include adequate attestations or explain why its dates of temporary need changed from its prior applications, where Employer sought certification for ten Production Helpers.⁹ The CO requested that Employer submit supporting evidence documenting that it has a temporary need for labor and requested the following clarification:¹⁰

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

² 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 definition of temporary need is now governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113) § 113 (Dec. 18, 2015).

³ AF 72. In this Decision and Order, “AF” refers to the Appeal File.

⁴ *Id.* at 51-82.

⁵ SOC (O*Net/OES) occupation title “Construction Laborers” and occupation code 47-2061. AF 58.

⁶ AF 58.

⁷ *Id.* at 44-50.

⁸ *Id.*

⁹ *Id.* at 47.

¹⁰ *Id.* at 47-8.

3. An 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
4. An explanation as to why the requested dates of need have significantly changed from the employer's prior application.¹¹

The CO also stated that in order to establish that it has a peakload need, Employer must submit signed monthly payroll reports listing the number of full-time permanent and temporary workers Employer has historically employed each month as construction laborers, including total hours worked and earnings received.¹² Alternatively, the CO stated that Employer could submit any other evidence that "similarly serves to justify the chosen standard of temporary need."¹³

Thereafter, on February 28, 2017, Employer filed a response to the CO's NOD.¹⁴ The response stated that the Phoenix area ranks highly in the sale of swimming pools, and it contained a chart depicting the number of permits for backyard pools issued in the Phoenix-Mesa-Scottsdale area between 2014 and 2016.¹⁵ Employer stated that it has a peakload need for construction laborers because of the following:

[O]ur need for these workers and our need for the duties these workers will perform is temporary, therefore they will not become part of our regular operation. 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). Furthermore, our need for the duties to be performed by the temporary additions to staff is temporary, specifically will end on November 15. When our peakload ends, we are knowledgeable of the fact that all temporary guest workers must return to their country of origin at the end of their visa permitted season.¹⁶

In response to the question of why the dates of temporary need had changed from its prior application, Employer stated that it was trying to grow the business, there was more demand, and "it is my [Alberto Verdugo's] experience that a peakload need is subject to change."¹⁷ Employer also cited an article which referenced a lack of skilled labor in the Phoenix area and a small labor pool.¹⁸ Employer then discussed the second deficiency, which is not at issue on appeal.¹⁹

¹¹ AF 47-8

¹² *Id.*

¹³ *Id.* at 48.

¹⁴ *Id.* at 31-6.

¹⁵ AF 32.

¹⁶ *Id.* at 33.

¹⁷ *Id.*

¹⁸ *Id.* at 34.

¹⁹ *CO's Bf.* at 1 "The NOD identified a second deficiency... which has since been cured."

On March 17, 2017, the CO issued a Non-Acceptance Denial.²⁰ Although Employer cured one of the two deficiencies outlined in the NOD, the CO concluded that Employer failed to submit evidence establishing that it has a temporary need for workers.²¹ On March 21, 2017, Employer requested administrative review of the CO's Non-Acceptance Denial, as permitted by 20 C.F.R. § 655.61.²²

On March 23, 2016, I issued a Notice of Docketing and Order Setting Briefing Schedule, permitting Employer and counsel for the Certifying Officer ("Solicitor") to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). On March 31, 2017, BALCA received the Appeal File from the CO. The Solicitor filed a brief on April 10, 2017 and Employer filed a brief on April 11, 2016.

DISCUSSION AND APPLICABLE LAW

BALCA's standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and Employer's request for administrative review, which may only contain legal arguments and evidence that Employer actually submitted to the CO before the date the CO issued a final determination.²³ After 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.²⁴

Employer bears the burden of proving that it is entitled to temporary labor certification.²⁵ The CO may only grant Employer's Application to admit H-2B workers for temporary nonagricultural employment if Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.²⁶

²⁰ AF 16-22.

²¹ *Id.* at 20-2.

²² AF 1. Pursuant to 20 C.F.R. § 655.61(a), within ten (10) business days of the CO's adverse determination, an employer may request that BALCA review the CO's denial. Within seven (7) business days of receipt of an employer's appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO's decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO's brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery

²³ 20 C.F.R. § 655.61.

²⁴ 20 C.F.R. § 655.61(e).

²⁵ 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed, Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009).

²⁶ 20 C.F.R. § 655.1(a).

Failure to Establish a Peakload Need for Workers

The sole issue on appeal is whether Employer has established a temporary need for workers. To obtain certification under the H-2B program, Employer 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.²⁷ Employer “must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.”²⁸ Pursuant to § 113 of the Department of Labor Appropriations Act, 2016, “for the purpose of regulating admission of temporary workers under the H-2B program, the definition of temporary need shall be that provided in 8 CFR 214.2(h)(6)(ii)(B).” Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113), § 113 (Dec. 18, 2015). Accordingly, 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

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. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. 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.

In this case, Employer alleges it has a peakload need for ten construction laborers.²⁹ In order to establish such 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 to staff will not become a part of the petitioner’s regular operation.” 8 C.F.R. 214.2(h)(6)(ii)(B)(3).

After reviewing the record and the parties’ legal arguments, I concur with the CO that Employer has failed to establish that it has a temporary need for H-2B workers from April 1, 2017 through November 15, 2017. I accept Employer’s claim that the Phoenix area issued more permits to build swimming pools during the period between April 1, 2016 and November 15, 2016. However, for the reasons stated below, I find Employer has not shown that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand as it has not shown that this increased demand applies to its own business.

In the NOD, the CO required Employer to provide documentation of its temporary need for additional laborers in the form of payroll records or other specific evidence documenting the peakload need. Employer did provide a brief history of its business and gave a brief narrative description of why it believed that it met the definition of peakload need. However, Employer failed to specifically demonstrate why its need for the requested additional workers was

²⁷ 20 C.F.R. § 655.6(b); 20 C.F.R. §655.11(a)(3).

²⁸ 20 C.F.R. § 655.6(a).

²⁹ AF 58.

temporary, or why the dates when those additional workers would be needed had changed since Employer's previous application. The general statements from Employer that peakload needs in general are subject to change,³⁰ and that the "need for the duties to be performed by the temporary additions to staff is temporary....When our peakload ends, we are knowledgeable of the fact that all temporary guest workers must return to their country of origin[,]"³¹ fail to adequately demonstrate that there is a peakload need for the 10 additional laborers requested by Employer.

Evidence of the seasonal variation in the issuance of swimming pool construction permits in the metropolitan Phoenix area is insufficient to show that Employer specifically has had an increase in worker need during the period of alleged construction peak or that it has had a corresponding decrease in work during the months outside of the period of alleged peak need. In its brief, Employer conclusorily states that it had difficulty finding enough workers during its alleged period of peakload need, but Employer failed to provide the CO with any of the requested supporting documentation which might actually demonstrate the existence of this temporary need.³² For example, it has presented no evidence of an increased number of contracts, increased overtime for its employees, or other evidence such as contracts declined for lack of labor. Nor has it presented payroll records or other evidence demonstrating that it historically supplements its permanent workforce during the period of alleged temporary need. In its brief, Employer emphasizes the fact that a peakload need can occur at different times of the year and can vary in length.³³ While this may be true, this argument fails justify or explain why the Employer has a peakload need for construction laborers from April 1, 2017 until November 15, 2017.

Based on the evidence of record, I find that Employer has not carried its burden to show that it regularly employs permanent workers to work as construction laborers and that it needs to supplement its permanent staff on a temporary basis due to a peakload demand. Therefore, I find that the CO properly concluded that Employer failed to establish a temporary need for H-2B workers.

³⁰ *Id.* at 33

³¹ AF 33.

³² *Emp. Bf.* at 1-2.

³³ *Id.* at 2.

ORDER

In light of the foregoing, it is **ORDERED** that the Certifying Officer's decision denying certification be, and hereby is, **AFFIRMED**.

For the Board:

Steven D. Bell
Administrative Law Judge