



Issue Date: 19 October 2017

BALCA Case No.: 2017-TLN-00071
ETA Case No.: H-400-17193-453923

In the Matter of:

DELTA CENTRIFUGAL CORP.,
Employer.

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: Kevin Robert Lashus, *Esq.*
Austin, TX
For the Employer

Jeffrey L. Nesvet, *Esq.*
Mikole Allekotte, *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 Delta Centrifugal Corp.’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 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

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.

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).

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 Temple, Texas, is a commercial construction company.³ On January 31, 2017, 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) payroll reports 2014-2017; (4) shipment and backlog chart 2014-2017; (5) copy of prior full certification H-40015189-982562; (6) Statement of need; (7) DHS Form G-28; (8) copy of job order; (9) foreign recruiter attestation; (10) *Prevailing Wage Determination* P-400-17138-627765; and (11) the job order.⁴ Employer requested certification for six machinists⁵ from October 1, 2017 until July 31, 2018, based on an alleged peakload need during that period.⁶

On July 19, 2017, the CO issued a Notice of Deficiency (“NOD”), which outlined three deficiencies in Employer’s Application.⁷ Specifically, the CO determined that Employer failed to: (1) establish that its job opportunity is temporary in nature; (2) provide the same job order assurances and contents to U.S. applicants as to foreign applicants; and (3) submit an acceptable job order.⁸ Deficiency (1) is the sole issues on appeal.⁹ Regarding this deficiency, the CO stated that Employer did not sufficiently demonstrate the requested standard of temporary need as it “has not explained what events cause the peakload need and the specific period of time in which the employer will not need the services or labor.”¹⁰ The CO had requested that Employer submit supporting evidence documenting that it has a temporary need for labor and requested the following clarification:

1. A description of the employer's 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 employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need; and
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.¹¹

³ AF 68. In this Decision and Order, “AF” refers to the Appeal File.

⁴ *Id.* at 67-106.

⁵ SOC (O*Net/OES) occupation title “Machinists” and occupation code 51-4041. AF 67.

⁶ AF 67.

⁷ *Id.* at 59-66.

⁸ *Id.* at 59-66.

⁹ *Id.* at 10-16.

¹⁰ AF 12-13.

¹¹ *Id.* at 63.

The CO also stated that in order to establish that it has a peakload need, Employer must submit monthly invoices from “clearly showing that work will be performed for each month during the requested period of need on the ETA Form 9142, Section B., Items 5. and 6[,]” signed customer service contracts from the previous two years, and an explanation of how the submitted evidence of temporary need, including payroll reports, peakload need chart, and table, showed Employer’s peakload need.¹²

Thereafter, on August 1, 2017, Employer filed a response to the CO’s NOD both uploaded to iCERT and via email.¹³ Regarding the first deficiency, Employer stated that “the number of orders made to Delta Centrifugal increases in the middle part of the year, resulting in an increasing backlog of orders, which the company has not been able to sufficiently alleviate through additional local hires” and that the increase in orders has historically been related to the storm and hurricane activity in the Gulf of Mexico.¹⁴ It pointed out that the 2017 hurricane season, June 1-November 30, was predicted to be above normal and concluded that it would have an increase in production due to damage to oil production, starting in October. Employer also stated that it had a backlog which was reduced in the years that temporary laborers were employed and a reduced number of late shipments in those years.¹⁵

On September 12, 2017, the CO issued a Non-Acceptance Denial.¹⁶ Although Employer cured two of the three deficiencies outlined in the NOD, the CO concluded that Employer failed to submit evidence establishing that it has a temporary need for workers.¹⁷ On September 27, 2017, Employer requested administrative review of the CO’s Non-Acceptance Denial, as permitted by 20 C.F.R. § 655.61.¹⁸

On October 2, 2017, 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 October 6, 2017, BALCA received the Appeal File from the CO. The Solicitor declined to file a brief on October 12, 2017, and Employer filed a brief on October 16, 2017.

¹² *Id.* at 64.

¹³ AF 26-58.

¹⁴ *Id.* at 29-30.

¹⁵ *Id.* at 30-33.

¹⁶ *Id.* at 10-16.

¹⁷ *Id.* at 12-13.

¹⁸ AF 1-3. 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

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.¹⁹ 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.²⁰

Employer bears the burden of proving that it is entitled to temporary labor certification.²¹ 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.²²

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.²³ Employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary."²⁴ 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.

¹⁹ 20 C.F.R. § 655.61.

²⁰ 20 C.F.R. § 655.61(e).

²¹ 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).

²² 20 C.F.R. § 655.1(a).

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

²⁴ 20 C.F.R. § 655.6(a).

In this case, Employer alleges it has a peakload need for six machinists.²⁵ 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 the Employer has failed to establish that it has a temporary need for H-2B workers from October 1, 2017 to July 31, 2018. Although the Employer has demonstrated that it has regularly employed temporary workers in the past, for the reasons stated below, I find it has not shown that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand.

Employer has argued in its brief that it was not required to submit detailed supporting documentation to support its seasonal workforce needs based on the September 1, 2016 ETA announcement on the change in process on the submission of applications for temporary labor certification.²⁶ However, this argument ignores the fact that the same announcement specifically states that other documentation or evidence demonstrating temporary need “must be retained by the employer and provided to the Chicago NPC in the event a Notice of Deficiency (NOD) is issued by the CO.”²⁷ As the CO issued a notice of deficiency, Employer was obligated to provide the requested information.

Employer has argued that it has shown that it has an increase in sales and an increased backlog following the hurricane season’s destruction in the oil industry:

[G]iven the fall and winter expected demand for oil, and our customers' backlog of deliveries only further heightened by the (actual and anticipated) destruction to many Gulf of Mexico oil and gas operations by the powerful storms of the projected 2017 hurricane season, this situation along with the corresponding demand for Delta Centrifugal parts by the oil and gas industry to facilitate building and maintenance efforts, continues to affect our business to this day[.]²⁸

However, such a correlation was not actually documented by the evidence. Employer has not documented the presence of hurricanes or a correlation to increased sales following them. Nor has it documented a consistent increase in hours worked during the months it has requested temporary workers compared to the months it has not included in its request. Although some of

²⁵ AF 67.

²⁶ *Emp. Bf.* at 2-3.

²⁷ Employment and Training Administration, Dep’t of Labor H-2B TEMPORARY NONIMMIGRANT VISA PROGRAM: Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers: Submission of Documentation Demonstrating “Temporary Need” (September 1, 2016) https://www.foreignlaborcert.doleta.gov/pdf/FINAL_Announcement_H-2B_Submission_of_Documentation_Temporary_Need_082016.pdf.

²⁸ AF 29-30.

the months requested had greater numbers of hours worked than August or September, some of the months requested showed fewer hours worked by both permanent and temporary employees than were worked during the two months which were not requested.²⁹ Although there has been a spike in sales between October and December in several of the years documented, there have also been spikes in sales at various times throughout the year, including the months that were excluded from the request for temporary workers, and in 2016, there was actually a drop in sales during the months of October through December as compared to the previous two months, which were not included in the application.³⁰ I have charted the documented hours worked and the documented orders below.³¹

2014 Hours Worked

Month	Hourly Hours worked by Permanent Employees	Hours Worked by Temporary Employees
January	32,314	
February	29,569	
March	29,505	
April	29,909	
May	37,234	1,154
June	29,707	2,132
July	36,608	2,265
August	28,459	323
September	28,529	
October	34,386	2,215
November	27,816	2,087
December	29,593	2,364

2015 Hours Worked

Month	Hourly Hours worked by Permanent Employees	Hours Worked by Temporary Employees
January	31,632	2,132
February	25,974	2,192
March	26,894	2,688
April	31,915	2,594
May	24,157	1,768
June	24,541	1,843
July	26,384	2,045
August	20,098	157
September	20,610	
October	26,136	
November	20,358	
December	24,187	

²⁹ AF 40-41.

³⁰ *Id.* at 36, 52.

³¹ *Id.* at 36.40-4, 52, 56-57.

2016 Hours Worked

Month	Hourly Hours worked by Permanent Employees	Hours Worked by Temporary Employees
January	17,728	
February	19,996	
March	22,693	
April	17,142	
May	16,617	
June	20,361	
July	16,414	
August	16,374	
September	21,386	
October	18,201	
November	20,705	
December	24,079	

2017 Hours Worked

Month	Hourly Hours worked by Permanent Employees	Hours Worked by Temporary Employees
January	18,843	
February	20,397	
March	26,476	
April	21,569	
May	23,654	
June	29,090	
July		
August		
September		
October		
November		
December		

April 2015-April 2017 Orders

Month	Incomin g
Ian-	\$ 3,781,210
Feb-	\$ 3,195,057
Mar-	\$ 4,096,887
Apr-	\$ 2,449,760
May-	\$ 2,800,146
Jun-	\$ 3,203,991
Jul-	\$ 2,512,958
Aug-	\$ 3,102,402
Sep-	\$ 2,203,579
Oct-	\$ 3,268,688
Nov-	\$ 3,388,120
Dec-	\$ 2,618,257
Jan-15	\$ 2,429,162
Feb-	\$ 1,818,756
Mar-	\$ 3,894,946
Apr-	\$ 2,192,359
May-	\$ 1,807,802
Jun-	\$ 1,429,376
Jul-	\$ 1,751,607
Aug-	\$ 2,042,215
Sep-15	\$ 1,542,230
Oct-	\$ 1,242,637
Nov-	\$ 1,340,687
Dec-	\$ 1,135,735
Jan-16	\$ 2,094,979
Feb-	\$ 1,080,714
Mar-	\$ 1,184,163
Apr-	\$ 1,235,880
May-	\$ 1,367,449
Jun-16	\$ 1,136,399
Jul-	\$ 1,639,408
Aug-	\$ 2,450,731
Sep-16	\$ 2,524,402
Oct-	\$ 1,425,717
Nov-	\$ 1,595,039
Dec-16	\$ 1,558,732
Jan-17	\$ 1,839,158
Feb-	\$ 1,306,193
Mar-	\$ 1,959,523
Apr-	\$ 2,303,563
May-	\$ 1,136,816

I concur with the CO that the chart titled "Peakload Need Represented," which shows "Incoming Orders," "End of Month Backlog," "Shipments," and "Percent of Late Shipments" for the period of October 2015 through October 2016 does not legibly convey the data and Employer did not explain how this chart supports its temporary need. Likewise, I find that the charts titled

“Drop in End of Month Backlog with H-2B workers” and “Three years of spikes in late shipments without H-2B workers”³² do not legibly convey all of the relevant data and Employer does not sufficiently explain how the charts support its temporary need. Nor does it sufficiently explain how its chart titled “Shipments with the Help of H-2B workers” supports its claim of temporary need. Although this information, as presented may support a general need for additional labor, it does not establish that this need is temporary in nature.

Based on the evidence of record, I find that Employer has not carried its burden to show that the number of worker positions is justified and that the request represents a bona fide job opportunity. Therefore, I find that the CO properly concluded that Employer failed to establish a temporary need for six H-2B workers to fill the position of machinist.

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

³² AF 53, 55.