



Issue Date: 11 January 2017

BALCA Case No.: 2017-TLN-00012

ETA Case No.: H-400-16299-122056

In the Matter of:

AC SWEEPERS,

Employer,

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary non-agricultural employment provisions of the Immigration and Nationality Act (“INA,” or “the Act”), 8 U.S.C. § 1101(a)(15)(H)(ii), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States “if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). For the reasons set forth below, the Certifying Officer’s (“CO”) denial of temporary labor certification is affirmed.

STATEMENT OF THE CASE

H-2B Application

On October 25, 2016, AC Sweepers, (“Employer”) filed an H-2B Application for Temporary Employment Certification (“ETA Form 9142B”) for the job titled “Bus and Truck Mechanics and Diesel Engine Specialists,” Standard Occupational Classification (“SOC”) code/occupation title 49-3031. AF 58.² Employer requested seven sweeper mechanics from January 15, 2017 through October 31, 2017. *Id.* Employer listed the nature of the temporary need as a “seasonal need.” *Id.* Employer did not provide an explanation for its seasonal need.

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 2015 IFR applies if an employer filed its temporary labor certification application after April 29, 2015 and requested a start date after October 1, 2015. In the present case, Employer filed its temporary labor certification application after April 29, 2015, requesting a start date of need after October 1, 2015. Thus, the 2015 IFR applies.

² For purposes of this opinion, “AF” denotes “Appeal File.”

Notice of Deficiency

On November 1, 2016, the CO issued a Notice of Deficiency (“NOD”), notifying Employer that its application failed to meet the acceptance criteria in light of four deficiencies. AF 49-53. Employer cured three of the four deficiencies, leaving one deficiency at issue on appeal. The uncured deficiency was Employer’s failure to establish that the job opportunity is temporary in nature pursuant to 20 CFR 655.6(a) and (b). AF 52.

The CO noted that Employer filed an application the previous year requesting different dates of need. However, Employer did not include an adequate explanation to justify the change in the dates of need from the employer’s prior certification. *Id.* Employer previously requested seven sweeper mechanics from April 22, 2016 through October 31, 2016. *Id.* The CO wrote that it is unclear why Employer’s dates of need have significantly changed from its previous certification. *Id.* Accordingly, the CO requested:

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;
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.

The CO also requested the following documents:

1. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received; or
2. Other evidence and documentation that similarly serves to justify the chosen standard of temporary need.

AF 52-53.

Employers’ Response to Notice of Deficiency

On November 9, 2016, Employer responded to the CO’s request. AF 39. Employer wrote that in 2014, it was engaged by the City of Atlanta to perform runway and airport sweeping services on behalf of Hartsfield Atlanta Airport. AF 40. Although the Hartsfield Atlanta Airport is a 12-month contract renewable annually, Employer wrote that

the use and need of the Airport under the contract sees its peak period between March and November each year. By requesting workers to begin in mid-January, AC Sweepers is able to bring workers to the United States and familiarize them

with their policies and procedures of the company and the particulars of the contract prior to the construction period commencing in early March.

Id.

In 2015, Employer requested seven Sweeper Mechanics from April 22, 2016 to October 31, 2016. *Id.* Employer was falling behind on its contract mid-season and needed assistance/workers. *Id.* Employer sought mechanics for the remainder of the season and Employer was not apprised of the H-2B program until later in the hiring season. Employer explained that

Even though AC Sweepers peak season was due to begin in March 2016 and the company had begun the H-2B process in earnest in early January, the gathering of information and documentation required to begin the process and the time required to obtain a determination for the ETA 9141, the company was simply unable to meet the government's required deadlines and could not file the ETA 9142 until January 2016. Under the existing processing times, the H-2B Temporary Labor Certification was not certified until April 2016.

Id.

Employer wrote that, based on its peakload need, the workers must begin in January and end in October in order to secure the necessary workers in time to fulfill its obligations under the contract. AF 41. Along with its explanation letter, Employer attached a signed contract between Hi-Lite Airfield Services LLC and AC Sweepers. AF 44-48. The contract was dated August 3, 2016 and signed by both parties. AF 48.

Final Determination

On December 1, 2016, the CO issued a Non-Acceptance Denial ("Denial"). AF 24. The CO found that Employer failed to show that its job opportunity is temporary in nature. AF 29. The Denial stated that Employer's discussion does not provide sufficient support that peakload period exists because Employer provided no explanation as to what causes its peakload need during the dates requested. *Id.*

Employer attested that its submitted agreement with Hi-Lite Airfield Services, LLC, creates an annual recurring peakload need for workers during the period of March through October. However, the agreement submitted is a Mentor Protégé Agreement and is not the actual work contract with the City of Atlanta. *Id.* The CO found that it is unclear how the submitted agreement with Hi-Lite Airfield Services Inc. supports Employer's claim of a peakload need; it does not contain any dates of service and is not a contract with the City of Atlanta, which is the party that contracted Employer to do the work. *Id.* The Denial also noted Employer did not submit any monthly payroll reports for a minimum of one previous calendar year or any other documentation justifying the chosen standard of peakload temporary need. *Id.*

Appeal

On December 9, 2016, Employer submitted a request for review before the Board of Alien Labor Certification Appeals (“BALCA”).³ AF 1-23. Employer wrote that it submitted identical documentation for this application as it did for its 2015 Application and “[t]he need for these temporary workers, which was granted by the DOL in 2015, has not changed.” AF 2. Employer elaborated that the only change in the 2016 Application was the requested start date. Employer listed two reasons for this change:

1. The “arbitrary” dates imposed by the DOL’s two-cap system blocked Employer from obtaining H-2B visas for the seven sweeper mechanics as the USCIS (United States Citizenship and Immigration Services) had reached the H-2B cap of 33,000 at the time the DOL certified the company’s Application for Temporary Labor Certification; and
2. Having the workers enter in April provides the workers no orientation, no assimilation, and no ability to introduction [sic] to the company, program, or contract; rather, these workers would need to enter the U.S. and begin working under the contract on day 1. This lack of orientation and training would be detrimental to the company and would not allow them to adequately service the existing contract in a manner that was satisfactory to the recipient.

AF 2.

Employer argued in the alternative that it has demonstrated a continued temporary need between April 1 and October 31 and as such, should be granted a partial temporary labor certification for this previously authorized period. *Id.* Employer also listed the information that it provided in response to the NOD.⁴ AF 3. Employer wrote that since 2014, it had to engage third-party contractors for sweeper and truck maintenance services during the busiest season under the Hartsfield Atlanta Airport contract because the existing workforce was insufficient to fulfill the demands of this contract. *Id.* Employer wrote that the earlier start date will allow AC Sweepers the opportunity to send its temporary workers to a specialized sweeper manufacture training academy in the first week of February. AF 4.

Employer also explained why there is a peak load need from March through November each year. Employer wrote that practically all construction maintenance can be performed in temperatures at or above 40 degrees Fahrenheit. *Id.* Based on the normal weather patterns in Georgia, the construction maintenance season generally starts in March. *Id.*

The CO’s Brief

The Associate Solicitor for Employment and Training Legal Services (“Solicitor”) filed a brief on January 4, 2017. The Solicitor argued that Employer failed to establish that its need for

³ 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). The undersigned has been so designated as a single member of BALCA to decide this case.

⁴ As discussed below, contrary to Employer’s assertion, some of the information that Employer wrote in its appeal letter was not included in its response to the NOD.

seven sweeper mechanics is temporary. The Solicitor argued that Employer failed to meet its burden of proof by not submitting documentation to demonstrate it has a temporary need for the dates of need requested. Solicitor's Brief at 5. The Solicitor also argued that Employer did not explain why it has a seasonal or peakload need. Employer failed to demonstrate a seasonal need by not providing any explanation as to why its services or labor are tied to a season of the year. *Id.* at 8. Employer failed to establish a peakload need because it did not allege or establish that it regularly employs permanent workers and did not allege that the temporary additions to staff would not become a part of its regular operations. *Id.* at 9.

Finally, the Solicitor argued that Employer's arguments are not supported by the record and are not persuasive. *Id.* The Solicitor wrote that Employer's additional arguments included in the Appeal letter are not part of the record and cannot be considered because the record does not support these arguments. *Id.* The Solicitor also noted that Employer cannot rely on its prior certification to obtain certification for the current application. *Id.* at 9-10.

SCOPE OF REVIEW

BALCA has a limited standard of review in H-2B cases. Specifically, BALCA may only consider the appeal file, the parties' legal briefs, and the employer's request for review, which may only contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.61(a)(5). After considering the evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO's denial of temporary labor certification, or
- (2) Direct the CO to grant temporary labor certification, or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.61(e)(1)-(3).

DISCUSSION

The issue on appeal is whether Employer established a temporary need for workers. 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 DHS. *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). That period of time is usually limited to less than one year but may last up to three years in cases of a one-time event. *Id.* 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-44, slip op. at 5 (May 8, 2009).

In its H-2B Application for Temporary Employment Certification, Employer listed the nature of the temporary need as a "seasonal need." AF 58. However, in its response to the CO's

NOD, Employer described its need as a “peakload” need. AF 40-41. Accordingly, this decision will address Employer’s application under both standards.

In order to establish a seasonal need, an 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. 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.

8 C.F.R. § 214.2(i)(F)(2)(ii)(B)(2).

Therefore, in order to demonstrate a seasonal need, Employer must establish when the season occurs and how its need for labor during that time of year differs from other times of the year. *See Santa Cruz Trucking Conglomerate, LLC*, 2017-TLN-00005(Nov. 16, 2016); *see also International Destiny Logistics, LLC*, 2016-TLN-00072 (Oct. 21, 2016).

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 failed to provide any evidence to substantiate a seasonal need or a peak load need for seven sweeper mechanics. As summarized above, the CO certified Employer’s previous application for temporary workers the previous year. Since the previous application, Employer increased its date of need by approximately three months (i.e., Employer changed from a start date of April 22 to a start date of January 15). Accordingly, Employer contends it has a seasonal or peakload need of approximately nine and a half months (i.e., from January 15 to October 31).

In the NOD, the CO requested an explanation as to why the requested dates of need have significantly changed from the prior application. In its response, Employer explained that it had to change its date of need for two reasons: 1) to obtain DOL certification before USCIS reached its annual H-2B visa cap and 2) to provide training and orientation to its workers.⁵ Although the

⁵ Congress has set a numerical limit on the total number of H-2B workers who may be issued a visa during a fiscal year. Currently, the H-2B cap is at 66,000 per fiscal year, with 33,000 for workers who begin employment in the first half of the fiscal year (October 1- March 31) and 33,000 for workers who begin employment in the second

H-2B visa cap limits employers' ability to obtain the workers they need in time, an employer cannot use the H-2B visa cap as an argument to extend its temporary need. *See Marco, LLC, d/b/a Evergreen Lawn Care & Rainmaker Irrigation*, 2009-TLN-00043, slip op. at 4 (Apr. 9, 2009)(holding that because of the visa cap, "the CO must be vigilant against employers who might claim to need workers earlier than they actually do.").

Although Employer's first argument is unpersuasive, Employer did provide a reasonable explanation as to why the requested dates of need have significantly changed. In its NOD Response, Employer explained that it needs to provide orientation and training to the workers and to let the workers become familiar with the contract. Thus, Employer has sufficiently explained why its requested dates of need have changed since the previous application.⁶ However, Employer's explanation for changing its dates of need is not sufficient to establish a seasonal or peakload need.

In the NOD, the CO also requested an explanation as to how Employer's request meets one of the regulatory standards of temporary need. Employer did not explain why it has a temporary peakload or seasonal need from March through October nor did Employer provide any documentation establishing that it has a peakload or seasonal need during these months. As noted above, in order to establish a seasonal need, Employer must establish that the service or labor is traditionally tied to a season of the year by an event or pattern that is of a recurring nature. In its appeal letter, Employer wrote that the construction maintenance season is tied to the weather conditions and that construction is usually done at above 40 degrees Fahrenheit. AF 4. However, contrary to Employer's assertion, Employer did not provide this information in its response to the NOD. *See AF 38-48*. As Employer first presented this argument on appeal and did not provide any evidence of this statement in its original response, this argument cannot be considered on appeal. *See 20 C.F.R. § 655.61(a)(5); Starlife Food, LLC*, 2014-TLN-00031 (Jun. 20, 2014).

Employer likewise did not establish that it has a peakload need. To establish a peakload need, Employer had to provide evidence that it regularly employs permanent workers to perform the services or labor, that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand, and that the temporary additions will not become part of the regular operation. Employer suggested that it regularly employs permanent staff to perform the labor, stating that it has an annual contract with the Hartsfield Atlanta Airport. Employer also argued that it needs to supplement its permanent staff with temporary workers due to a short-term demand. However, Employer did not state that the temporary additions will not become part of the regular operation. Employer also did not explain why it has to supplement its permanent staff on a temporary basis.

half of the fiscal year (April 1- September 30). *See U.S. Citizenship and Immigration Services, Cap Count for H-2B Nonimmigrants*, <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-h-2b-nonimmigrants> (last visited Jan. 9, 2017).

⁶ The Solicitor argued that Employer did not explain what type of training it will provide and why it specifically requires six weeks to train these workers. Solicitor's Brief at 7-8. Because Employer failed to cure the deficiency by failing to establish temporary need, this Decision does not address whether Employer would have been required to provide detailed information on its intended training.

In addition to Employer's failure to explain its temporary need, Employer did not submit evidence that substantiates its seasonal or peakload need. In support of its application, Employer submitted its "Mentor-Protégé Agreement" with Hi-Lite Airfield Services LLC dated August 3, 2016. AF 44-48. The agreement states that Hi-Lite manufactures, markets, and sells various products, including cleaning products. AF 44. Hi-Lite group is known for runway and pavement markings and runway rubber removal. *Id.* Employer did not explain how this agreement supports its need for the dates requested. Specifically, Employer did not explain how this agreement relates to its annual contract with the Hartsfield Atlanta Airport. The agreement also does not establish that Employer has a temporary need from March through October.

Employer did not provide any other documentation to substantiate its temporary need. The CO requested Employer to provide "summarized monthly payroll reports for a minimum of one previous calendar year" or other evidence that justifies Employer's chosen standard of need. Employer did not provide such payroll reports or any documentation establishing that it has a temporary peakload or seasonal need from March through October. *See D & R Supply*, 2013-TLN-00029 (affirming the CO's determination where the employer failed to provide any evidence establishing its temporary need).

Employer also argued that its application should be certified because its previous application was certified on the same basis. However, prior certification does not guarantee future certification. *See Dialogue Direct*, 2011-TLN-00039 (Sept. 26, 2011). The previous application is not part of the record. In this case, the CO identified a deficiency that Employer failed to address. Employer needed to cure this deficiency for certification and failed to do so. Thus, partial certification based on the previous application's certification is not appropriate.

Employer has failed to demonstrate that it has a seasonal need for seven sweeper mechanics from January 15, 2017 through October 31, 2017. Employer's evidence fails to substantiate its need as temporary in nature. Thus, the CO properly found that Employer failed to establish a temporary need.

ORDER

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

For the Board:

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey