



Issue Date: 27 October 2016

BALCA Case No.: 2017-TLN-00004
ETA Case Nos.: H-400-16209-873515

In the Matter of:

E.H. CONSTRUCTION,

Employer.

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: Carol Ann Schick
Farmers Aid America
For the Employer

Jeffrey Nesvet, Esq.
Cynthia Liao, Esq.
Office of the Solicitor of Labor
Division of Employment and Training Legal Services
For the Certifying Officer

Before: DANA ROSEN
Administrative Law Judge

DECISION AND ORDER - AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to E.H. Construction’s, (“Employer”) request for review of the Certifying Office’s Final Determination in the above-captioned H-2B temporary labor certification matter.¹ The H-2B program permits

¹ On April 29, 2015, the U.S. Department of Labor and the U.S. 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 and 29 C.F.R. Part 503). Pursuant to this rule, the U.S. Department of Labor will process an Application for Temporary Employment Certification filed on or after April 29, 2015, with a start date of need after October 1, 2015, in accordance with all application filing

employers to hire foreign workers to perform temporary, non-agricultural work within the United States on a one-time, seasonal, peakload, or intermittent basis, as defined by U.S. Department of Homeland Security regulations. 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). Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor. 8 C.F.R. §214.2(h)(6)(iii). A Certifying Officer (“CO”) 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

On July 27, 2016, Employer submitted its Application for Temporary Employment Certification (ETA Form 9142B). Employer requested to hire 15 “Framing Carpenters” for the period of October 25, 2016, to July 25, 2017. (AF 43-79). The “Nature of Temporary Need” was intermittent or other temporary need. (AF 43). Employer filed its application as an “Individual Employer.” (AF 44). Employer provided the following job duties for the aliens it was seeking to hire: “construct walls, subfloor, install roofing etc. Erect wood structures, including homes and buildings.” (AF 45). The intended work was to be performed in Nelson County, Kentucky. (AF 46).

On August 4, 2016, the CO issued a Notice of Deficiency (NOD), which contained six deficiencies. (AF 34-42). For Deficiency #1, the CO stated that Employer failed to comply with 20 C.F.R. § 655.6(a) and (b) because Employer failed “to establish the job opportunity as temporary in nature.” (AF 38). For Deficiency #2, the CO cited 20 C.F.R. § 655.11(e)(3) and (4) and stated Employer failed “to establish temporary need for the number of workers requested.” (AF 39). For Deficiency #3, the CO stated Employer failed “to satisfy the obligations of H-2B employers” by not including “qualifications for its job opportunity that are normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.” (AF 40). The CO cited 20 C.F.R. § 655.20(e). For Deficiency #4, the CO stated Employer failed to disclose its “foreign worker recruitment” pursuant to 20 C.F.R. § 655.9(b). (AF 41). For Deficiency #5, the CO stated Employer failed “to submit a complete and accurate ETA Form 9142” pursuant to 20 C.F.R. § 655.15(a). (AF 41). Specifically, “Employer did not submit the correct version of ETA Form 9142B, Appendix B.” (AF 41). For Deficiency #6, the CO stated Employer failed “to submit a complete and accurate ETA Form 9142” pursuant to 20 C.F.R. § 655.15(a). (AF 42). Specifically, Section F.c of the ETA Form 9142 “indicates a worksite that it [sic] inconsistent with the worksite listed in Section E.c. of ETA Form 9141, Prevailing Wage Determination.” (AF 42).

On August 31, 2016, Employer responded to the NOD. (AF 17-33). In response to Deficiency #1, Employer stated it has had:

requirements under the IFR. Id. at 24,110. The Employer filed two Applications for Temporary Employment Certification on January 8, 2016, with a start date of need after October 1, 2015. Therefore, the IFR applies to this case. All citations to 20 C.F.R. Part 655 refer to the IFR.

some workers that come and go with the work load the employer has at this time he will need an additional 15 workers through this time frame due to the fact that E H Construction has contracts that are behind schedule of termination and is subject to fines and penalties for not finishing the new houses.

To clarify the employer needs the workers on an intermittent need. The causes; of this is that the American workers do not want to do this job anymore as in the years past there was more willing workers in this profession.

Other cause; is that the employer took on more work this year thinking he would be able to complete the framing work with American workers.

The employer has numerous ads in the local newspaper Kentucky Standard and LGP T.V. and has not resulted in any willing workers to apply for the job. Find attached the statement from the KY Standard of the dates and the amount of ads the employer has ran trying to locate willing U.S workers.

The request; for the 15 foreign being requested at this time is to finish the construction of the contracts that are behind in the allotted time frame and is temporary full time position. [sic] (AF 30).

In response to Deficiency #2, the Employer stated it, “made an estimate of the time it will take to complete the project. The construction site is large and with the amount of new houses to complete also this is the least that the employer will need.” (AF 31). The Employer also attached payroll records. (AF 31).

In response to Deficiency #3, the Employer stated, “this is a typographical error in the part that reads the workers must live in Mackinac Island. The Employer will assist the workers in locating housing for those that are not able to return to their homes daily. And the Employer is not requiring the workers to live in any specific place.” (AF 31).

In response to Deficiency #4, the Employer attached the recruiter agent agreement and stated “there are no other recruiters to list due to the fact there is only 1 recruiter.” (AF 31).

In response to Deficiency #5, Employer submitted the corrected ETA Form 9142B, Appendix B, dated August 31, 2016. (AF 27-29).

In response to Deficiency #6, Employer submitted a corrected ETA Form 9142B dated August 31, 2016, correcting the worksite to coincide with the worksite on ETA Form 9141. (AF 26).

On September 23, 2016, the CO issued the Non-Acceptance Denial Letter. (AF 2-9). The CO noted that Employer's response was due on August 18, 2016, but was received at the Chicago NPC on August 31, 2016. (AF 6). The CO determined that the Chicago NPC could not issue an acceptance because deficiencies in the application still remained. (AF 6). For Deficiency #1, the CO determined that Employer failed to establish the job opportunity was temporary in nature pursuant to 20 C.F.R. § 655.6(a) and (b). (AF 6-8). Specifically, the CO stated that "[i]n order to establish an intermittent need, Employer must establish it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods." (AF 6). The CO further determined "Employer has not explained its need or what causes this need." (AF 7). The CO determined Employer's response to the NOD was insufficient to correct the deficiency.

The employer does not meet this standard because it employs full-time Framing Carpenters on a permanent basis. Also in response to the NOD, the Employer submitted its payroll; however, the payroll does not make clear permanent and temp workers. The occupation of the listed workers is not specified. Therefore, the submitted payroll could not be used to support the employer's temporary need. (AF 7-8).

The CO also took noted that the Employer's newspaper advertisement requested "minimum two years experience" but its application required only three months. (AF 8).

For Deficiency #2, the CO cited 20 C.F.R. § 655.11(e)(3) and (4) and determined Employer failed "to establish temporary need for the number of workers requested." (AF 8). Specifically, the CO determined "Employer has not sufficiently demonstrated that the number of workers requested on the application was true and accurate and represented bona fide job opportunities." (AF 8). The CO determined Employer's response to the NOD was insufficient to correct the deficiency because, "No contracts or formulas were presented that support this statement or the employer's requested need for 15 Framing Carpenters...The payroll indicated that the employer employed at most nine workers." (AF 9). The CO concluded in accordance with 20 C.F.R. § 655.51, Subpart A., "the Employer's application is denied." (AF 9).

Certifying Officer's Brief

On August 21, 2016, the undersigned received the Solicitor's Brief on behalf of the Certifying Officer requesting that the Board of Alien Labor Certification Appeals (BALCA) affirm the Certifying Officer's determination to deny the application of Employer.

a. Part 1

The Solicitor, on behalf of the Certifying Officer at the Chicago National Processing Center ("CNPC"), argued that the "CO correctly determined E.H. Construction failed to demonstrate a temporary need" under the Act and regulations. (CO br. 5-7).

The Solicitor argued that in order to establish that a need is temporary in nature, Employer must “establish that the need for the employee will end in the near definable future” and that it will last for a period not to exceed one year. (CO br. 5-6). The Solicitor further argued that “Employer must show its need for labor or services is a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.” (CO br. 6). To demonstrate an intermittent need, Employer must “establish that although ‘it has not employed permanent or full-time workers to perform the services or labor,’ it ‘occasionally or intermittently needs temporary workers to perform services or labor for short periods.’” (CO br. 6). 8 C.F.R. § 214.2(h)(6)(ii)(B)(4).

The Solicitor argued that rather than showing it does not employ permanent or full-time carpenters, Employer showed “it does employ permanent and full-time carpenters.” (CO br. 6). Specifically, the Solicitor argued Employer responded to the NOD by submitting a “payroll summary document showing it employed 4 to 9 employees - presumably carpenters - between October 2015 and June 2016.” (CO br. 6). The Solicitor stated that the same employees are generally listed month after month on the payroll summary lists and “the CO reasonably inferred that Employer employed carpenters on a permanent basis.” (CO br. 6). The Solicitor argued that since many of the employees listed worked over 100 hours per month and in some cases over 140 hours per month, it was reasonable to conclude that at least some of the four to nine employees worked full-time at least some of the time. (CO br. 6-7). As such, the Solicitor argued it was reasonable for the CO to conclude Employer employs permanent or full-time carpenters and thus did not meet its burden of showing intermittent need. (CO br. 7).

The Solicitor also argued that Employer failed to adequately explain “how its need was temporary.” (CO br. 7). The Solicitor noted that Employer “stated in its application and NOD response that it needs H-2B carpenters because it took on more contracts than it could handle, had gotten behind on its contracts, and has recently had a hard time finding qualified American workers.” (CO br. 7). The Solicitor urged the court to affirm the CO who noted that while this may explain Employer’s need for carpenters generally, it did not establish its need for carpenters temporarily. (CO br. 7). Specifically, the Solicitor argued Employer did not establish its need for carpenters would “end in the near definable future,” as required by the H-2B program. (CO br. 7).

b. Part 2

The Solicitor, on behalf of the CO, also argued the CO correctly determined that Employer failed to substantiate why it required 15 carpenters. (CO br. 8).

The Solicitor stated that in Employer’s NOD response, Employer stated it “needed more workers because it was behind schedule on its contracts due to employee absenteeism and the difficulty of finding U.S. workers...It claimed it had ‘made an estimate of the time it will take to complete the project,’ that ‘the construction site is large and with the amount of new houses to complete...[15] is the least that the employer will need.’” (CO br. 8). The Solicitor argued that Employer did not provide any specific information on “the expected volume of work” because “it did not attach the contracts or state the number of contracts.” (CO br. 8). The Solicitor also argued Employer did not “provide any information about the size of the projects or the

construction schedules. It was impossible for the CO to verify the volume of potential work, to determine when the work had to be performed, and to evaluate whether 15 carpenters were needed to handle that volume in that time period.” (CO br. 8).

The Solicitor further argued that Employer’s payroll summary showed that it “employed at most 9 employees between October 2015 and June 2016, with only 4 to 5 employees in more recent months.” (CO br. 8). Therefore, the Solicitor argued Employer’s “request for 15 more workers appears very out of proportion to the company’s recent labor needs, as adding 15 carpenters would triple the size of the company.” (CO br. 8). The Solicitor argued that without more specific information on how much Employer’s workload was expected to increase during the stated period of need, the CO was reasonable in concluding “Employer failed to sufficiently demonstrate that the number of workers requested was true and accurate and represents bona fide job opportunities.” (CO br. 8-9). The Solicitor relied on Tarlias Corp., 2015-TLN-00016, at *5 (March 5, 2015) (where an employer regularly employed only 3 workers, requiring more documentation to support the employer’s assertion that, based on its experience, it needed 125 temporary workers); North Country Wreaths, 2012-TLN-00043, at *6 (Aug. 9, 2012) (“[I]t is the Employer’s burden to prove that the requested positions represent bona fide job opportunities, and the CO is not required to take the Employer at its word.”).

DISCUSSION

A. Standard Of Review

The Board of Alien Labor Certification Appeals (BALCA) has adopted the position that review of the U.S. Department of Labor’s determination of H-2B applications is governed by the “arbitrary and capricious” standard. Brooks Ledge, Inc., 2016-TLN-00033, *5 (May 10, 2016); see also J and V Farms, LLC, 2016-TLC-00022 (Mar. 4, 2016). Upon appeal to BALCA, only that documentation upon which the CO’s final determination was made (the Appeal File), the request for BALCA review (which may not contain evidence that was not submitted to the CO for consideration in the underlying determination) and submitted legal briefs, may be considered. 20 CFR §655.61(e); see also Bassett Construction, Inc., 2016-TLN-00023, *4 (April 1, 2016).

As noted above, BALCA has adopted the position that review of U.S. Department of Labor’s determination of H-2B applications is governed by the “arbitrary and capricious” standard. Brook Ledge, Inc., 2016-TLN-00033, at 5 (BALCA May 10, 2016). Under this standard of review, courts “retain a role, and an important one, in ensuring that agencies have engaged in reasoned decision making.” Judulang v. Holder, 132 S. Ct. 476, 483-84 (2011). Thus, courts must satisfy themselves that the agency has examined “the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted). In reviewing the agency’s explanation, courts must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Id. (citations and internal quotation marks omitted). If the agency has

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise,

then it is arbitrary and capricious. Id. An agency's decision is also arbitrary and capricious when it fails to "cogently explain why it has exercised its discretion in a given manner." Id. at 48. Inquiry into these factual issues "is to be searching and careful" Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

Based on the facts, statute, regulations, case law, and certifying officer's brief, the undersigned finds that the CO did not act in an arbitrary or capricious manner in denying Employer's Application for Temporary Employment Certification (ETA Form 9142B) for the following reasons.

B. The Certifying Officer Was Not Arbitrary or Capricious in Determining Employer Failed to Establish the Job Opportunity Was Temporary in Nature

Based on the evidence and the Appeal File, the undersigned finds that Employer failed to demonstrate the job opportunity was temporary in nature under the H-2B regulations. The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the employer. Eagle Industrial Professional Servs., 2009-TLN-00073, at *5 (July 29, 2009) (citing 8 U.S.C. § 1361); Bassett Constr., 2016-TLN-00023, at *7 (Apr. 1, 2016) (citing 8 C.F.R. § 214.2(h)96(ii)(B)(1)). A temporary need can be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 20 C.F.R. § 655.6(b). In order to demonstrate an intermittent need, an employer must show "it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods." 8. C.F.R. 214.2(h)(6)(ii)(B)(4).

Here, Employer seeks certification to hire 15 framing carpenters based on intermittent need. (AF 43). In the NOD, the CO requested Employer provide a description of the business history and activities and schedule of operations through the year, an explanation as to why the need was temporary, and monthly payroll reports for at least one prior calendar year identifying full-time permanent and temporary employment of framing carpenters, the total number of workers or staff employed, total hours worked, and total earnings received. (AF 38-39). In its response, Employer reiterated its temporary, intermittent need for 15 framing carpenters. (AF 30). Yet, its payroll records for October 2015 to June 2016, show that Employer employed four to nine individuals during this period, several of whom worked full-time during this period. (AF 25). As the CO requested payroll records for Employer's framing carpenters, and Employer did not specify differently, it was reasonable for the CO to conclude that the records submitted were Employer's payroll records for just its framing carpenters. As such, Employer has shown it has employed framing carpenters on a permanent and full-time basis, thus failing to show it has an intermittent need.

In great depth, the CO in the initial Notice of Deficiency and the Final Determination, reviewed the documents submitted, discussed the documents, the elements, and the statute. The Final Determination was well-reasoned and well-supported by the evidence in the record. Based on the evidence in the record and the statute, the undersigned finds that Employer has not shown that the job opportunity was temporary in nature and the CO did not act in an arbitrary or capricious manner in denying Employer's Application.

C. The Certifying Officer Was Not Arbitrary or Capricious in Determining Employer Failed to Establish a Temporary Need for the Number of Workers Requested

Based on the evidence in the record, the undersigned finds that Employer failed to establish a temporary need for the number of workers requested. The CO must determine whether the employer has established that the number of worker positions and period of need being requested for certification is justified and represent bona fide job opportunities. 20 C.F.R. 655.11(e)(3) and (4).

Here, the CO determined Employer had not provided sufficient documentation that the number of workers it requested represented a true and accurate need nor did it provide documentation as to how it determined the number of workers needed. (AF 39). In the NOD, the CO requested Employer provide monthly payroll records for framing carpenters and other evidence to justify the number of workers requested. (AF 39-40). In response, Employer stated, "The Employer has made an estimate of the time it will take to complete the project. The construction site is large and with the amount of new houses to complete also this is the least that the employer will need." (AF 31). Employer also stated, "[w]e have based the needs for the number of applicants applied for on our average flow of potential work. Our present requested number of fifteen workers would suffice as far as our fall and winter demands." (AF 33). Employer failed to provide any specific information on the number of contracts it had to complete, when the contracts needed to be completed, or the size of the construction sites. As such, the CO was unable to verify Employer's need for 15 framing carpenters. The CO had no specific information on the amount of work to be performed for the time period requested by Employer.

Employer also submitted payroll records from October 2015 to June 2016. (AF 25). These records showed that from October 2015 to January 2016, Employer had nine workers on its payroll. (AF 25). From February 2016 to June 2016, Employer had four to five workers on its payroll. (AF 25). Adding 15 additional workers to Employer's payroll would more than double the size of the company at its peak. As Employer has provided only a general attestation that its workload has increased due to more contracts and large construction sites, there is no way to verify whether Employer's need requires a doubling of its workforce. The CO is not required to take the employer at its word that requested positions represent bona fide job opportunities. North Country Wreaths, 2012-TLN-00043, at *6 (Aug. 9, 2012).

In great depth, the CO in the initial Notice of Deficiency and the Final Determination, reviewed the documents submitted, discussed the documents, the elements, and the statute. The Final Determination was well-reasoned and well-supported by the evidence in the record. Based on the evidence in the record and the statute, employer did not establish a temporary need for the

number of workers requested. Therefore, the CO's determination denying Employer's Application was not arbitrary and capricious.

CONCLUSION

The undersigned finds that the Certifying Officer did not act in an arbitrary and capricious manner in denying Employer's Application for Temporary Employment Certification (ETA Form 9142B). The undersigned finds that Employer did not provide sufficient documentation to demonstrate the job opportunity was temporary in nature and that it had a temporary need for the number of workers requested pursuant to 20 C.F.R. § 655. Accordingly, the Certifying Officer's denial of Employer's Application for Temporary Employment Certification is affirmed.

ORDER

It is hereby ORDERED that the Certifying Officer's Denial of Employer's Application for Temporary Employment Certification is **AFFIRMED**.

For the Board:

DANA ROSEN
Administrative Law Judge

DR/LMB/mjw
Newport News, VA