U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 19 January 2017

BALCA Case No.: 2017-TLN-00016
ETA Case No.: H-400-16302-336330

In the Matter of:

MUNOZ ENTERPRISES, LLC,
Employer

Certifying Officer: Chicago National Processing Center

Appearances: Luis Munoz
President, Munoz Enterprises, LLC
Simpsonville, South Carolina
For the Employer

Leticia Sierra, Attorney
Division of Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the H-2B temporary agricultural labor provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1), and the implementing regulations at 20 C.F.R. Part 655, Subpart A. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. *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).

This proceeding is before the Board of Alien Labor Certification Appeals ("BALCA") pursuant to Munoz Enterprises, LLC's ("the Employer") request for administrative review of the Certifying Officer's ("CO") denial of the temporary labor certification under the H–2B program. For the following reasons, the Board affirms the CO's denial of certification.

BACKGROUND

On October 28, 2016, the Employer applied for temporary labor certification through the H-2B program to fill positions for "Helpers-Painters, Paperhangers, Plasterers, and Stucco Masons" for the period of January 14, 2017 through July 7, 2017. (AF 55).[1] The Employer stated it needed additional painters because it had recently entered into a new contract of "significant magnitude" in Greenville, South Carolina. (AF 69). The Employer asserted this project would overlap with other projects causing Employer to be short-staffed, specifically for the Greenville project. *Id.* The Employer included excerpts, three (3) out of eighty (80) pages, of the service contract entered into with Creative Builders, Inc. for the Greenville, South Carolina project, which did not contain a start and end date for the completion of the job. (AF 64-67). The Employer did not indicate on its application how it concluded it would need twenty-five (25) foreign workers. In addition, the Employer did not include an explanation about its business cycles or month-to-month workload, how the workload differed from other times during the year, and did not provide payroll documentation to establish a baseline for staffing levels. (AF 55-76).

On November 8, 2016, the CO issued a Notice of Deficiency citing four deficiencies regarding 20 C.F.R. §§ 655.6(a)-(b), as well as 655.9(a)-(b), 655.15(a), and 655.18(a)(1).[2] (AF 44-50). Specifically, the CO notified the Employer that its H-2B application was deficient pursuant to 20 C.F.R. § 655.6(a)-(b) because Employer failed to provide adequate documentation as to how it determined the requested period of need. (AF 47). The CO noted the Employer requested twenty-five (25) "painter-helpers" under a peakload need, but did not justify the need for temporary workers for the dates requested on its application. *Id.* The CO also indicated the Employer failed to explain the change in dates of need since it filed its previous 2016 application stating it needed temporary workers from March 28, 2016 through October 7, 2016. *Id.* Further, the CO noted the Employer stated in its *Statement of Need* that the construction projects would be completed in Spartanburg and Greenville, South Carolina. *Id.* However, the Employer failed to provide the contract related to the Greenville, South Carolina project. *Id.* Consequently, in the Notice of Deficiency the CO requested Employer provide the following documentation:

> The employer must submit supporting evidence and documentation that justifies the date of need requested. The employer's response must include, but is not limited to, the following:
>
> - Schedules of anticipated projects during the requested period of need by location;
>
> - Copies of fully executed contracts for the work to be performed during the request dates of need in the area of intended employment;

[1] In this decision, AF is an abbreviation for "Appeal File."

[2] On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. § 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015). These rules are effective and govern this case.

- Summarized monthly payroll reports for a minimum of two previous calendar years 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. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; or

- Other evidence and documentation that similarly serves to justify the chosen standard of temporary need.

AND

The employer must include a revised, detailed statement of temporary need that includes, but is not limited to the following:

- An explanation of the work performed in Greenville, SC, and how this work differs from the employer's normal, year-round operations;

- A description of the business history and activities (i.e., primary products or services) and schedule of operations through the year;

- An explanation regarding why the nature of the job opportunity and number of foreign workers being requested for certification reflect a temporary need;

- 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

- An explanation of why the employer's period of intended employment has changed significantly from its previous certification, H-400-15356-096418.

(AF 44-48).

On November 17, 2016, the Employer responded to the CO's Notice of Deficiency ("NOD") to include a revised *Statement of Need* dated November 17, 2016, and a letter dated November 15, 2016. (AF 36-42). The Employer explained, "it is standard practice in the construction business to receive and bid on [a] project many months, of [sic] in some cases, over a year in advance . . . . In that our services are not needed until three quarters of the way though [sic] the process it is very common that a start date not be specified in the contract." (AF 37). The Employer further explained that the dates of need changed from its previous 2016 certification application because it could not predict when and/or where its next project might be, or if it would be successful in obtaining the contract. *Id.* In addition, the Employer noted that the Spartanburg and Greenville metropolitan areas had seen an "explosion" in construction of multi-family dwellings and that staff was in short supply. *Id.* In the revised *Statement of Need*, the Employer noted it had existing commitments that would overlap with the commencement of its

project—The Assembly Apartments—with Creative Builders, Inc. (AF 39). The Employer also addressed the three other deficiencies identified by the CO.[3] (AF 38).

After examining the additional information provided by the Employer in response to the NOD, the CO determined on December 13, 2016, that the Employer failed to comply with 20 C.F.R. § 655.6(a)-(b) by establishing the job opportunity was temporary in nature. (AF 23-28). The CO found the Employer failed to provide adequate documentation to support its dates of need. (AF 26). The CO further noted the contract submitted by the Employer did not provide the dates the work would be performed.[4] (AF 27, 65-67). Consequently, the CO concluded the contract did not support the "peakload" dates of need for temporary workers. *Id.* The CO further concluded that the Employer did not submit documentation to establish that it had a temporary need due to conflicting projects regarding the contract to commence on January 16, 2017. (AF 28). The CO stated the Employer also never clarified why the dates of need changed from its previous 2016 certification application, H-400-15356-096418, which requested "26 Painter-Helpers from March 28, 2016 through October 7, 2016." (AF 27).

On December 14, 2016, the Employer submitted a request for administrative review to BALCA appealing the CO's Final Determination in the above-captioned H-2B matter. (AF 1). The Employer argued that when it submitted its original filing it notified the CO that it had just received the start date, January 16, 2017, for its newest project, The Assembly Apartments. (AF 4). The Employer explained that in the construction industry start dates are communicated verbally between the on-site superintendent(s) or project manager, and therefore, newly acquired contracts would not have a start date. (AF 5). As a result, the Employer's Greenville, South Carolina project conflicted with projects already underway. *Id.* On this basis, the Employer explained the need for temporary workers was properly characterized as a "peakload" need because it had received a one-time opportunity to work on a large-scale project, that being, The Assembly Apartments which required additional workers. *Id.* The Employer also argued the CO was inconsistent in her adjudication of H-2B applications (noting Employer's two out of five previous applications for temporary labor had been approved), and that the CO failed to provide the final determination within ten (10) days from receipt of the Employer's NOD response.[5] (AF 2-3).

On December 23, 2016, BALCA docketed the appeal and issued a Notice of Docketing. The CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services ("the Solicitor") in accordance with 20 C.F.R. § 655.33(b) on December 30, 2016. The parties were given a brief due date of January 11,

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[3] In brief, the CO stated the Employer's response to the NOD satisfied three of the four deficiencies identified in the NOD. Therefore, the CO denied the Employer's application on the basis of one deficiency, namely, the Employer's failure "to demonstrate that the job opportunity was temporary." (CO Brf. 3).

[4] With regard to the Employer's contract, the CO stated the Employer provided only three pages of the eighty-page contract which did not contain the start or end dates of performance. (CO Brf. 3; AF 65-67).

[5] In particular, the Employer averred it received the CO's final determination letter twenty-eight (28) days after it received notice from the Department of Labor that its response to the Notice of Deficiency were received by the Department. The Employer asserted that, pursuant to the Department of Labor's regulations, the CO had ten (10) days from the date it received the Employer's response to issue the final determination letter. (AF 3).

2017, in accordance with 20 C.F.R. § 655.33. The CO timely submitted her brief, but no brief was proffered by the Employer.[6]

In brief, the CO argued denial of the Employer's temporary labor certification is correct because the Employer provided minimal documentation to establish its "peakload" need. (CO Brf. 7-8). Moreover, the CO asserted the Employer's response to the NOD failed to include any of the documentation requested by the CO, which is ground for an automatic denial. (CO Brf. 8, 9-11). In particular, in its response to the NOD, the Employer failed to provide any details about its "operation," it did not amend its *Statement of Need* to include a description of its business history and activities, it did not offer specific details about its current workforce, nor did the Employer provide payroll reports to document staffing patterns/levels. (CO Brf. 5). Thus, the CO contends the final determination, that the Employer failed to demonstrate a temporary, peakload need for H-2B workers, was not arbitrary, capricious, or otherwise not in accordance with law, and as such, is proper.

DISCUSSION

The H-2B program permits employers to hire foreign workers on a temporary basis to "perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States]." 8 U.S.C. § 1101(a)(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). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* ("ETA Form 9142") with ETA's Chicago National Processing Center ("CNPC"). 20 C.F.R. § 655.20. After an employer's application has been accepted for processing, it is reviewed by a Certifying Officer ("CO"), who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

BALCA's review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012), "[t]he scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e)." BALCA may overturn a CO's decision if it finds the decision is arbitrary or capricious. *See Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016); *J and V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016).

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. §

[6] Citations to the CO's brief in the present matter is as follows: "CO Brf. ____."

214.2(h)(6); 20 C.F.R. § 655.6(b). 20 C.F.R. § 655.31(b)(4) provides in pertinent part, "if the employer does not comply with the requirements of this section by either submitting a modified application within 10 business days or requesting administrative review before an ALJ under § 655.61, the CO will deny the *Application for Temporary Employment Certification.* The Notice will inform the employer that the denial of the *Application for Temporary Employment Certification* is final, and cannot be appealed." The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

In the instant case, Employer attempted to establish a "peakload" need for the period of January 14, 2017 through July 7, 2017. However, to show a peakload need, the 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. Nevertheless, the CO determined the Employer failed to establish a need for temporary workers because, aside from the Employer's professed statement of need, it provided no documentation to demonstrate the temporary nature of the job or the dates of "peakload" need.

In *Saigon Restaurant*, 2016-TLN-00053 (July 8, 2016), the CO requested the employer submit a description of its business history, activities, and schedule of operations during the year, along with various other documentation, but the employer failed to provide the requested documentation. As a result, the CO denied the employer's temporary labor certification application. *Id.* On appeal, BALCA upheld the CO's decision because a failure to provide all required documentation would result in a denial of the application in accordance with 20 C.F.R. § 655.32(a). Consequently, BALCA held that the employer failed to comply with the CO's directive, therefore the CO's basis for denial was correct. *Id.*; *see, e.g., Erickson Construction d/b/a Erickson Framing CA LLC*, 2016-TLN-00036, slip op. at 5 (May 6, 2016) (finding the employer failed to provide any contracts specifying the start and end dates for the project, amongst other documentation, BALCA upheld the CO's denial of the temporary labor employment application).

Here, the CO requested the Employer provide specific documentation as outlined in the NOD. (AF 44-50). Nonetheless, the Employer failed to provide adequate documentation to support its need for temporary workers (i.e., schedules or contracts that conflicted with the Creative Building, Inc. contract). The Employer argued start and end dates for a construction project are uncertain; therefore, it could not provide accurate dates of need. (AF 5, 39). However, the CO stated in the NOD that "other evidence and documentation that similarly serves to justify the chosen standard of temporary need" was permissible, but Employer failed to provide any alternative documentation as well. (AF 48). Accordingly, like *Saigon Restaurant*, I find the CO properly denied the Employer's application for temporary labor certification for failing to provide adequate documentation that was clearly delineated in the NOD.

In addition, on several occasions, the Employer asserted it had a "peakload" need which required temporary workers, but failed to provide documentation to support such a need. For example, the Employer averred there was currently an "explosion" of new home construction in Spartanburg and Greenville metropolitan areas. (AF 37, 39). However, the Employer did not provide documentation (i.e., a complete copy of the work-contract, payroll reports, or schedules of anticipated contracts) to demonstrate how the general industry-wide explosion created a specific peakload need for twenty-five (25) "painter-helpers." Further, the Employer stated it could not provide the CO with the information requested in the NOD because "construction projects vary as to when they occur and . . . are almost all of a different magnitude." (AF 2). BALCA has held that "a bare assertion without supporting evidence is insufficient to carry the employer's burden." *BMC West Corporation*, 2016-TLN-00039/40, slip op. at 5 (May 18, 2016) (citing *AB Controls & Technology, Inc.*, 2013-TLN-00022 (Jan. 17, 2013). Therefore, pursuant to *BMC*, I find the Employer's bare assertions without supporting evidence are insufficient to carry its burden.

Likewise, in *Erickson Construction d/b/a Erickson Framing AZ LLC*, 2016-TLN-00060 (Aug. 19, 2016), the CO issued a NOD indicating the employer failed "to establish the job was temporary" and requested documentation to support the employer's assertion that it had a peakload need. *Id.* at 2. In response, the employer cited to U.S. Census data that revealed an increase in building permits during the employer's period of need. *Id.* at 3. However, the CO denied the employer's application for temporary labor certification because the U.S. Census data (which demonstrated an industry-wide building permits increase) "fell short of specifically demonstrating [the] employer's [peakload] need for temporary workers." *Id.* at 4-5. On appeal, BALCA affirmed the CO's denial noting that, although the U.S. Census data did show an increase in construction work during the claimed period of need, it did not demonstrate the employer's specific need for temporary workers. *Id.* at 5.

Just as in *Erickson*, here, I find the Employer's explanation about an industry-wide increase (i.e., an explosion) in construction work in the Greenville, South Carolina area is an unreasonable explanation for its "peakload" need. Arguably, a general increase in construction work (in Greenville, South Carolina) will not necessarily result in a "peakload" need for the Employer, rather it depends on the amount of work the Employer is contractually obligated to perform, when such work must be performed, whether the Employer's contractual obligations overlap, and how many permanent workers are employed by the Employer. However, the Employer did not provide adequate documentation to prove the "explosion" in new home construction in the Greenville area resulted in its purported "peakload" need. Accordingly, I find the Employer's general assertion of an increase in new home construction in Greenville, South Carolina is insufficient to establish its "peakload" need for temporary workers.

Additionally, the Employer asserts the CO inconsistently adjudicated Employer's H-2B applications, noting that two of the Employer's five applications for temporary nonagricultural work were approved on prior occasions with "basically the same information." (AF 2). Indeed, the CO acknowledged the Employer's 2016 H-2B application was approved for a similar number of "painter-helpers." Nonetheless, the CO contends that, unlike the 2016 application, the information the employer provided in this case is "negligible" and falls short of what the regulations require for certification. (CO Brf. 12). I agree. While the CO may have found the

Employer's prior applications for temporary workers to be sufficiently documented, here I find the CO properly denied certification because the Employer's application is clearly deficient in regard to adequate documentation. Therefore, contrary to the Employer's assertion, I do not find the CO has adjudicated the Employer's H-2B applications in an inconsistent manner that would warrant a finding that the CO acted arbitrarily in the present matter.

Finally, the Employer contends the CO was required to make the final determination within ten (10) days after receiving the Employer's NOD response. (AF 3). However, the CO avers that the Department of Labor's H-2B regulation does not impose a deadline when the CO is reviewing an employer's modified (post-NOD) response, as is the case here. (CO Brf. 13); *see* 20 C.F.R. § 655.31, § 655.32, § 655.50, § 655.53 (none of which impose a deadline). Accordingly, I do not find the CO acted arbitrarily, capriciously, or contrary to the law when the CO provided the final determination 17 business days after receiving the Employer's NOD response.

Based on the foregoing discussion, I find and conclude the CO properly denied the Employer's H-2B application. It is the Employer's burden to demonstrate eligibility for the H-2B program, but the Employer failed to provide documentation to demonstrate its temporary peakload need for twenty-five (25) painter-helpers for the period of January 14, 2017 through July 7, 2017. Thus, the denial of Employer's H-2B certification must be **AFFIRMED**.

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

ORDERED this 19th day of January, 2017, at Covington, Louisiana.

Digitally signed by LEE J. ROMERO JR
DN: CN=LEE J. ROMERO JR,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=Covington, S=LA, C=US
Location: Covington LA

LEE J. ROMERO, JR.
Administrative Law Judge