



Issue Date: 11 April 2017

BALCA CASE NO.: 2017-TLN-00027

ETA CASE NO.: H-400-17004-916612

In the Matter of:

THE ORIGINAL ROOFING COMPANY, LLC,
Employer.

DECISION AND ORDER AFFIRMING DENIAL

This matter arises under the labor certification process for temporary non-agricultural employment in the U.S. under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart A.

On March 14, 2017, The Original Roofing Company (“Employer”) filed a letter requesting administrative review pursuant to 20 C.F.R. § 655.61(a) challenging the Non-Acceptance Denial (“Denial”) issued by the Employment and Training Office, Chicago National Processing Center (“ETA”) on March 13, 2017. This Office received the Administrative File (“AF”) on March 22, 2017. The U.S. Department of Labor, Office of the Solicitor, on behalf of the ETA Certifying Officer (“CO”), and Employer filed simultaneous briefs on March 31, 2017 (“CO’s Brief” and “Employer’s Brief”).

This Decision and Order is based on the written record, which consists of the Appeals File, the request for review, and the briefs of the parties. 20 C.F.R. § 655.61(e). As explained below, this Decision and Order affirms the Denial and denies Employer’s request for relief.

Factual Findings

On a year-round basis, Employer performs new roof construction and roof repair. AF at 21. On January 4, 2017, Employer filed an H-2B Application for Temporary Employment Certification (“Application”) seeking certification to hire 30 “Helpers – Roofers” from April 1, 2017, through November 18, 2017. AF at 56-83. On February 9, 2017, the CO issued a Notice of Deficiency, indicating that Employer had failed to establish the job opportunity as temporary in nature in violation of 20 C.F.R. § 655.6(a) and (b). AF 51-55.

In the Notice of Deficiency, the CO stated that Employer did not include adequate attestations to justify the change in dates of need from its prior certification, which requested the “Helpers – Roofers” from February 18, 2017, through November 18, 2017. AF at 54. The CO noted that Employer indicated demand for services was increasing earlier in 2017, but that this did not support the listed change. *Id.* In addition, Employer did not explain how the attached permits chart relates to its work. *Id.* The Notice of Deficiency identified specific actions which Employer

was to take in order to remedy the deficiencies, including providing a description of Employer's business history and activities and a schedule of operations throughout the year; an explanation why the job reflected a temporary need; an explanation of how the request meets one of the standards of a one-time occurrence, seasonal, peak load, or intermittent need; and an explanation of why the requested dates of need significantly changed from the prior application. AF at 54. The Notice of Deficiency also specified that Employer should provide payroll records for at least three previous calendar years that identify, on a monthly basis for both full-time permanent and temporary employees in the requested occupation, the total number of workers employed, total hours worked, and total earnings received. AF at 55.

Employer responded to the Notice of Deficiency on February 24, 2017. AF at 20. Employer explained that its dates of need did not change, but that the change in start date from February 18, 2017, to April 1, 2017, was related to the closing of the H-2B cap on January 11, 2017, for the first half of the fiscal year. AF at 22. Employer stated that its peakload months remained the same, but because USCIS would reject new H-2B petitions that requested an employment start date before April 1, 2017, it changed the requested start date. *Id.* Employer also explained that the construction industry operates on a yearly cycle, with activity beginning to peak in February, reaching its high point in the summer, and its lowest in late December and January. AF at 21. As evidence of this cycle, Employer provided a chart showing the "permit start per month" in the Las Vegas, Nevada metropolitan area for 2014 through 2016. *Id.* Employer alleged these start dates "are a direct reflection of our peakload, for we are subcontracted by the builders who create this event." *Id.* Employer stated its peakload is established by the demand for its services, as demonstrated by a chart showing the amount of work scheduled for 2016 and projected for 2017 in square footage per month.¹ AF at 23. Employer submitted payroll summaries for 2014 through 2016, along with an explanation that due to high turnover rate and a fluctuating monthly "payout" of different projects, the payroll records would not truly identify a peakload because they only show the workers that were available at the time, not the amount of workers that were needed. *Id.* Employer stated it needed at least 170 to 180 workers "during [its] peakload" in 2016, but only averaged about 85 workers. *Id.* Employer also provided excerpts from and links to newspaper articles related to labor shortages of construction workers, as well as copies of its work contracts. AF at 25-50.

The CO issued the Denial letter on March 13, 2017, based on Employer's failure to establish the job opportunity as temporary in nature according to 20 C.F.R. § 655.6(a) and (b). AF at 8-12. The CO noted Employer's explanations of its turnover issues, variability of pay per project, and the projected square footage per month of scheduled projects in 2017 in contrast to 2016. AF at 11. However, the CO found that Employer did not explain how its anticipated work on projects with an overall increased square footage corresponds to an increased need for workers throughout the requested period. *Id.* Employer also did not demonstrate that increased square footage changes the scope of the projects performed, or how the practice of undertaking projects of varying scope relates to its peakload request. AF at 12. The CO also found that Employer's ability to take on additional projects appears based on the number of workers it employs rather than a peakload event, and that Employer appears capable of performing its work at any period of the year provided it has sufficient staff. *Id.* The CO noted that the contracts and payroll summaries Employer submitted do not suggest any peakload need. *Id.* Specifically, the payroll summaries indicated that peak periods were sporadic and "not of a scope comparable to the requested periods here." *Id.* In addition,

¹ Employer noted that "the best way to measure our work is in square footage." AF at 23.

Employer did not appear to have utilized the temporary workers it requested in its 2016 Application. AF at 12. The CO stated that the newspaper articles submitted by Employer suggested a permanent labor shortage and that no matter how severe, a labor shortage “is not inherently a temporary event.” *Id.*

Contentions of the Parties

In her limited brief on behalf of the CO, the Solicitor argues that Employer failed to meet its burden to demonstrate it was entitled to certification, and that the CO’s decision to deny certification was neither arbitrary nor capricious. CO’s Brief at 2. The Solicitor states that “[o]ther than a review of the administrative file to determine whether the CO’s decision was arbitrary or capricious, no other issues of fact or law are presented in this case,” and that therefore the CO’s Denial should be affirmed.² *Id.* at 3.

In its brief, Employer repeats many of the arguments it made in its response to the Notice of Deficiency, and provides the same documentation.³ Employer explains that because it was unable to find workers willing to work locally to meet its contract obligations in 2016, it lost over 4 million dollars, and that since January of 2017 it has adjusted its current bidding schedule “to reflect the workers [it] did not receive.” Employer’s Brief at 2. Employer claims its “trade is at the mercy of other trades” in the construction business and that the builders create the peakload. Employer’s Brief at 1.

Legal Standard and Analysis

The standard of review in H-2B is limited. When an employer requests a review by the Board of Alien Labor Certification Appeals (“the Board”) under § 655.61(a), the Board may consider only “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The evidence is reviewed de novo, and the Board must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. 20 C.F.R. § 655.61(e). While neither the Immigration and Nationality Act nor the regulations applicable to H-2B temporary labor certifications identify a specific standard of review, the Board “has fairly consistently applied an arbitrary and capricious standard” in reviewing the CO’s determinations. *The Yard Experts, Inc.*, 2017-TLNL-00024, slip op. at 6 (Mar. 14, 2017); *Brook Ledge Inc.*, 2016-TLNL-00033, slip op. at 5 (May 10, 2016). The decision must be affirmed if the CO considered the relevant factors and did not make a clear error of judgment. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (describing the requirements to satisfy the “arbitrary and capricious” standard of review).

The employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; *see also, Alter and Son Gen. Eng’g*,

² This appears to be standard language used by the Solicitor. *See The Yard Experts, Inc.*, 2017-TLNL-00024, slip op. at 6 (Mar. 14, 2017).

³ Employer repeats the explanation regarding the change in start date from February 18, 2017, to April 1, 2017, based on the closing of the H-2B cap on January 11, 2017. Employer’s Brief at 1. However, the CO did not list the change of dates as a reason for the Denial, only Employer’s failure to establish that the job opportunity was temporary in nature according to 20 C.F.R. § 655.6(a) and (b). AF at 10.

2013-TLN-3, slip op. at 4 (ALJ Nov. 9, 2012). Under 20 C.F.R. § 655.6(a) and (b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peakload, or intermittent need. An employer establishes a “peakload need” if it shows 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...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).

The CO found that Employer did not submit sufficient information to establish that the job opportunity is temporary in nature. AF at 10. After reviewing the record, I find that despite some unexplained statements by the CO, the denial of Employer’s Application was neither arbitrary nor capricious.

Employer indicated that compared with 2016, it would be working on projects with increased square footage in 2017.⁴ AF at 23. The CO’s statement that Employer “did not establish how this increase in square footage during the requested period corresponds to an increased need for workers” or changes the scope of the projects is perplexing. AF at 11. Common sense dictates that the larger the roof, the greater the scope of the project and the greater the need for workers to help build the roof. The CO’s comment may have been directed at Employer’s failure to explain in detail how an increase in square footage corresponds to an increase in need for a specific number of workers for its projects, but if so, this was not clear.⁵

In addition, the CO’s statements about Employer’s payroll summaries appear to be inaccurate. The CO commented that based on the prior payroll summaries, the peak periods “appear to have been July and August in 2014; April, July, and September in 2015; and May and August in 2016.” AF at 12. The CO does not explain how it determined the peak periods. However, based on number of hours worked by both temporary and permanent employees, a review of the payroll summaries suggests the peak periods were: May through October in 2014; April through December in 2015; and January through March, and May in 2016, although the numbers for 2016 are, as the CO stated, “sporadic.” AF at 25-27; *see Roadrunner Drywall Corp.*, 2017-TLN-00019, slip op. at 8 (Jan. 23, 2017) (evaluating payroll summaries based on total number of hours worked). Further, the CO did not address Employer’s explanation of why the payroll summaries did not accurately reflect its peakload – namely, that it was not able to hire the workers it needed in 2016 – although I note that Employer did not provide any explanation for any deficiencies in the 2014 and 2015 payroll summaries. AF at 23.

However, any error the CO committed in evaluating the record does not render the Denial arbitrary and capricious. The CO must state a “rational connection between the facts found and the

⁴ Employer also notes that for the first quarter of 2017, it has started on average more than 75 new tract home contracts per month, information which was not available previously. Employer’s Brief 2. Because this evidence was not presented to the CO, I do not consider it. 20 C.F.R. § 655.61(a)(5). However, even if I considered this evidence, I would still affirm the CO’s Denial.

⁵ In its brief, Employer provided calculations based on the amount of square footage of its planned projects and the amount of roofing one worker can complete per month (based on the average number of workers in 2016) in order to demonstrate it “desperately” needs the requested 30 temporary workers. Employer’s Brief at 3. However, even though it is based on information provided to the CO, this calculation was not “actually submitted to the CO before the date the CO’s determination was issued,” 20 C.F.R. § 655.61(a)(5), and I therefore do not consider it in my review of the CO’s decision. 20 C.F.R. § 655.61(e).

choice made.” *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962). The CO observed that Employer’s ability to take on additional projects appears to be based on the number of workers it employs rather than a peakload event. AF at 12. Employer explains in its brief that while it uses permanent workers to perform its roofing services, it is “unable to find workers willing to work locally to meet our contract obligations.” Employer’s Brief at 2. This suggests that the CO’s observation was likely correct; Employer’s need appears related to a permanent labor shortage rather than a temporary, peakload need.

The CO also accurately concluded that Employer’s submitted contracts contained no information to support any peakload period. AF at 12. The provided contracts do not show schedules, executions dates, nor projected contractual milestones. *See* AF at 28-50. Employer provided a chart showing the “permit start per month” in the Las Vegas, Nevada metropolitan area for 2014 through 2016, which it alleged represented a “direct reflection of our peakload.” AF at 21. However, this chart does not specifically demonstrate Employer’s need for temporary workers. *See Erickson Construction d/b/a/ Erickson Framing AZ LLC*, 2016-TLNL-00060, slip op. at 5 (Aug. 19, 2016) (finding U.S. Census data showing an industry-wide increase of building permits “fell short of specifically demonstrating [the] employer’s [peakload] need for temporary workers.”).

Further, the projected square footage of Employer’s projects did not track with Employer’s requested period of need (April 1, 2017, through November 18, 2017). In 2016, the months with the highest square footage for scheduled projects were January, and March through July. AF at 23. In 2017, the months with the highest projected square footage were January, and March through August. AF at 23. This is at odds with Employer’s repeated statement that the peakload “shoulders” in February, peaks in the summer months, and then “shoulders back down in late-November.” AF at 23. Additionally, although I acknowledge Employer’s explanation for why its payroll summary for 2016 did not reflect a peakload, none of the payroll summaries support a finding of a peakload for the requested period of need.

Based on the evidence of record, I find that Employer has failed to demonstrate that its need for workers from April 1, 2017, through November 18, 2017, is related to any peakload event. Therefore, I affirm the CO’s denial Employer’s Application.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge