

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 22 March 2018

Case No.: 2018-TLN-00073
ETA Case No. H-400-17307-122152

In the Matter of:

**ALMA COLLIER, INC.,
d/b/a COBURN & CO.,**

Employer.

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

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Before: **TRACY A. DALY**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

1. Nature of Appeal. This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h)¹ and 20

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2017, Pub. L. No. 115-30, Division H, Title I, § 113 (2017). This definition has remained in place through

C.F.R. Part 655 Subpart A. It involves Employer's Employment and Training Administration (ETA) Form 9142B application for temporary labor certification for 28 temporary nonagricultural workers and an administrative review of the application's denial.²

2. Procedural History and Findings of Fact.

a. On January 20, 2016, Alma Collier, LLC (Employer) filed ETA Form 9142B application for temporary labor certification with the Certifying Officer (CO) at the Chicago National Processing Center (CNPC) for 20 temporary "Commercial Painters" to perform work from March 1, 2016 through December 1, 2016 based on Employer's claimed peakload need for temporary workers. On February 25, 2016, the CO granted certification. (AF 122-138)³

b. On December 29, 2016, Employer filed a second ETA Form 9142B application with the CO for 24 "Commercial Painters" to perform work from February 15, 2017 through November 15, 2017. On January 26, 2017, the CO granted certification. (AF 110-121)

c. On November 3, 2017, Employer filed a third ETA Form 9142B application with the CO for 28 "Commercial Painters" to perform work from February 1, 2018 through November 1, 2018. (AF 85-109)

d. On November 14, 2017, the CO issued a Notice of Deficiency (NOD) on three grounds. The CO explained the application contained the following deficiencies based on Employer's failure to: 1) establish the job opportunity as temporary in nature, as required by 20 C.F.R. § 655.6(a)-(b); 2) establish temporary need for the number of workers requested, as required by 20 C.F.R. § 655.11(e)(3)-(4); and 3) submit an acceptable job offer, as required by 20 C.F.R. §§ 655.16, 655.18. (AF 76-84)

e. The CO received Employer's response to the NOD on November 20, 2017. Employer stated it is "the premier commercial craft sub-contractor in Central Texas." It explained its business "significantly lulls during the mid-winter because of the lack of construction partially attributable to the winter conditions, but more likely due to the holiday season beginning on Halloween and lasting through the beginning of the year." Employer further stated it does not "understand the specific reason for the lull in construction activity" during these months. In addition, Employer submitted monthly payroll summaries and signed contracts for three projects expected to begin in February 2018. These projects included the: 1) St. David's Expansion; 2) Redeemer Lutheran Church; and 3) J.J. Pickle Federal Building. Employer also submitted a list of overtime hours worked by its H-2B workers as justification for Employer's request for an additional four H-2B workers. (AF 4, 32-75)

subsequent appropriations legislation, including the current continuing resolution. *See* Further Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-123, Division B, Title XII, Subdivision 3, § 20101 (2018).

² 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 established by the "2008 Rule" found at 73 Fed. Reg. 78020. *See* 80 Fed. Reg. 24042, 24109 (2015 IFR). The procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR, and apply to this appeal.

³ References to the Appeal File are by the abbreviation AF and page numbers.

f. On February 12, 2018, the CO issued a non-acceptance letter and denied certification. First, the CO explained Employer failed to establish the job opportunity was temporary in nature because it did not sufficiently explain what causes it to have a recurring need for workers during the requested period of need. Specifically, the CO found the dates of need requested by Employer indicate that its business operations continue on a year-round basis and extend beyond the dates of need requested in the application. The CO stated Employer is “in the business of fulfilling successive contracts to provide services and has not demonstrated that its needs for these projects are different from its similar needs on other projects or that its overall need for such workers is a temporary need that will end in the near, definable future.” The CO noted that the contacts submitted by Employer provided it would not provide any work on specific projects during various months of Employer’s claimed period of peakload months. Further, the CO stated Employer’s payroll and staffing summary charts did not support a consistent or peakload need for workers during Employer’s claimed period of need. Second, the CO found that Employer failed to establish a temporary need for the number of workers requested. The CO explained Employer’s payroll documentation establishes its “workers consistently work overtime during all 12 months of the year, however, [Employer’s] staffing levels do not fluctuate in alignment with any recognizable peak or pattern” The CO further stated Employer’s documentation did not “specify the number of workers required to perform the work indicated and therefore [did] not provide any further support to [Employer’s] request for 28 additional H-2B workers.” (AF 2-10)

g. On February 23, 2018, Employer requested administrative review of the CO’s denial of certification pursuant to 20 C.F.R. § 655.61. (AF 1)

h. On February 23, 2018, the Board of Alien Labor Certification Appeals (BALCA) docketed this appeal. On February 28, 2018, the undersigned issued a Notice of Case Assignment and Order Establishing Brief Filing Deadlines. The CO transmitted the Appeal File to BALCA on March 5, 2018.

i. On March 1, 2018, Employer filed an unopposed motion to extend the brief filing deadline. The undersigned granted Employer’s request.

j. Consistent with 20 C.F.R. § 655.61(c), on March 16, 2018, the Employer submitted a brief urging BALCA to reverse the CO’s decision denying Employer’s ETA Form 9142B application.⁴ The CO did not file an appeal brief.

3. Applicable Law and Analysis.

a. *H-2B Program.* The H-2B nonimmigrant visa program enables United States nonagricultural employers to employ foreign workers on a temporary basis to perform nonagricultural labor or services if unemployed persons capable of performing such service or labor cannot be found in this country. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL. 20 C.F.R. § 655.20.

⁴ Employer’s brief is marked EB-1.

b. *Standard of Review.* BALCA's standard of review in H-2B cases is limited. Specifically, 20 C.F.R. § 655.61 provides that BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the employer's request for administrative review, which may only contain legal arguments and evidence that was actually submitted to the CO in support of the employer's application. After considering the evidence of record, BALCA must: (1) affirm the CO's decision to deny temporary labor certification; (2) direct the CO to grant certification; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e)(1)-(3). 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).

c. *Burden of Proof.* The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361; *Eagle Indus. Prof'l Servs.*, 2009-TLN-00073 (July 28, 2009); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (employer bears burden of proof to establish its eligibility to employ foreign workers under the H-2B program). A bare assertion without supporting evidence is insufficient to carry the employer's burden of proof. *AB Controls & Tech., Inc.*, 2013-TLN-00022 (Jan. 17, 2013).

d. *The CO's Delay in Issuing Final Determination.* The H-2B regulations provide that "if the CO determines the Application for Temporary Employment Certification and/or job order is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in this subpart, the CO will notify the employer within 7 business days from the CO's receipt of the Application for Temporary Employment Certification." 20 C.F.R. § 655.31(a). If the CO finds the response to Notice of Deficiency unacceptable, the CO will deny the Application for Temporary Employment Certification in accordance with the labor certification determination provisions in § 655.51. 20 C.F.R. § 655.32(c).

In this case, the CO issued a NOD on November 14, 2017, and received Employer's timely response on November 20, 2017. The CO did not take any further action until February 12, 2018, which was approximately three months after receiving Employer's reply. Employer notes in its brief the CO failed to timely take action, despite the fact it contacted the CO on two occasions during this period to check the status of the pending application. (EB-1, p. 8; AF 28-29) Employer argues such an "extraordinary delay" warrants reversal. (EB-1, p. 10) However, the regulations provide no procedural or substantive rights or remedies to an employer when the CO does not timely process an application. Such a delay does not render the CO's denial of certification invalid. *Stadium Club, LLC*, 2012-TLN-00002 (Nov. 21, 2011); *see also Frey Produce & Frey Bros. #2 and Frey Produce & Frey Bros. #3*, 2011-TLC-403 and 404 (June 3, 2011) (finding that the CO's failure to comply with the H-2A regulation that the CO provide a notice of deficiency or determination within seven calendar days of receipt of the application did not invalidate the notice of deficiency).

Employer also argues that its application at issue should have been approved based on its two prior, and nearly identical, approved applications for peakload need and recent guidance issued by the Employment & Training Administration. (EB-1, p. 5) *See* Employment & Training Admin, U.S. Dep't of Labor, *Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers: Submission of Documents Demonstrating "Temporary*

Need” (Sept. 1, 2016). However, this guidance specifically cautions applicants that the “issuance of prior certifications to the employer does not preclude the CO from issuing a NOD to determine whether the employer’s current need is temporary in nature.” *Id.* Employer’s prior approvals do not govern the outcome of this case; the CO’s prior decisions to grant certification does not constitute a waiver of the regulatory requirement that the employer demonstrate that its need is temporary. *DialogueDirect, Inc.*, 2011-TLN-00038 and 00039 (Sept. 26, 2011). The fact that the CO may have approved similar applications in the past is not ground for reversal of the denial. *Rollings Sprinkler & Landscape*, 2017-TLN-00020 (Feb. 23, 2017).

e. *Temporary Peakload Need for Workers.* An employer seeking certification must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 20 C.F.R. § 655.6(a). The employer's need is considered temporary if justified to the CO as one of the following: a one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by Department of Homeland Security (DHS) regulations. 20 C.F.R. § 655.6(b). An employer’s need is temporary if the need is limited and will “end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B).

To qualify as 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 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 burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers. *Chippewa Retreat Spa*, 2016-TLN-00063 (Sept. 12, 2016).

In this case, Employer’s claimed period of temporary peakload need ranges from February 1, 2018 through November 1, 2018. In support of its assertion, Employer offered various theories and explanations to the CO for an increased need during the requested peak periods. For example, Employer stated a lull in the construction industry outside its claimed period of need is due to winter weather conditions. In the alternative, Employer stated it was more likely the lull is attributable to the “holiday season” beginning in Halloween and lasting through the beginning of the year. However, Employer then claimed that it did not understand the specific reason for a recurring yearly lull in the construction industry. As a result, based in part on Employer’s contradicting reasons for its claimed peakload need, the CO reasonably concluded Employer did not sufficiently establish that it demonstrated a temporary need for the requested workers.

The CO also considered three of Employer’s contracts from general contractors in Gantt chart format that Employer submitted in response to the NOD. As explained by the CO, the “St. David’s Expansion” project did not require Employer to perform any labor during June 2018, a one-month period of claimed peakload need. The “Redeemer Lutheran Church” project did not require Employer to perform any labor during September and October 2018, a two-month period of claimed peakload need. The “J.J. Pickle Federal Building” project did not require Employer to perform any labor during March, August, and September 2018, a three-month period of claimed peakload need. Employer argues that it is not required to establish that “every project

contributing to the peak employ [Employer's] workers in every month of the requested period.” (EB-1, p. 11) Although Employer may raise a valid argument, the fact that these three major projects do not require any of Employer's workers on a specific project during several months of its period of claimed peakload need casts significant doubt on Employer's assertion that it needs to supplement its permanent staff on a temporary basis. *Progressio, LLC, d/b/a La Michoacana Meat*, 2013-TLN-00007 (Nov. 27, 2012) (affirming denial where the employer's payroll records did not demonstrate a consistent need for increased labor during the entire alleged period of temporary need).

In addition, the CO reviewed Employer's full payroll records and staffing levels for calendar years 2015 and 2016, and partial records from January through October 2017. In December 2015, Employer employed 93 permanent workers, all of whom in total performed 20,671 hours of work during that month. With the exception of October 2015, where 101 employees performed 22,460 hours of work, the December 2015 staffing levels represent the highest number of total hours worked by Employer's permanent employees in 2015. Similar to the employment records from 2015, Employer's December 2016 payroll and staffing records reveal that permanent and temporary employees worked a total of 20,101 hours. With the exception of 20,401 hours in July 2016 and 21,781 hours in September 2016, the December 2016 staffing levels represent the highest number of total hours worked by Employer's permanent and temporary employees in 2016. Because December is not a period of Employer's claimed peakload need, the CO reasonably found that such a pattern did not appear to support a consistent peakload need for workers during the requested months of February through October. These records are inconsistent with Employer's position that it has a temporary, peakload need for workers during the months of February through October. BALCA panels have held that an increase in need during an off-peak month severely undermines an employer's purported peakload dates of need. *See Top Flight Entertainment, Ltd.*, 2011-TLN-37, slip op. at 8 (Sept. 22, 2011) (affirming denial of certification where the employer had more employees during some of its purported non-peak months than it did in its claimed peak months). The Board has consistently affirmed denials of certification applications where an employer's own records belie its claimed peak load periods of need. *DDM Haulers LLC*, 2018-TLN-037, slip op. at 6 (Jan. 12, 2018); *Cody Builders Supply*, 2018-TLN-053, slip op. at 9 (Feb. 8, 2018).

f. *Temporary Need for Number of Workers Requested.* The CO will review the H-2B Registration and its accompanying documentation for completeness and make a determination based the following: the number of worker positions and period of need are justified and the request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3)-(4). “[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.” *N. Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012).

In response to the NOD, Employer stated that its request for four additional workers, for a total of 28 temporary workers, was justified based on the number of overtime hours worked by temporary workers during October 2017 and prior months. The CO found that the payroll information submitted by Employer demonstrates that its workers consistently work overtime during all 12 months of the year; however, Employer's staffing levels did not fluctuate in alignment with any recognizable peak or pattern. The CO further stated that Employer's

documentation did not specify the number of workers required to perform the work and did not further support Employer's request for 28 temporary workers.

Employer did not employ any temporary workers in 2015. In 2016, Employer employed no more than 18 temporary workers in any given month. In 2017, Employer employed 21 temporary workers in September and October, and 24 temporary workers in October. Other than for October 2017, where 24 temporary workers performed 448 hours of overtime work, Employer's documentation does not specifically detail the number of overtime hours worked by its permanent and temporary employees. Rather, it only provides the number of total workers, total hours worked, and earnings received by its employees. The CO reasonably concluded Employer's documentation did not specify the number of workers required to perform the work indicated. The CO also stated Employer did not offer satisfactory documentation or evidence of peakload need for any specific number of workers during the requested peak months. Thus, Employer did not carry its burden to provide adequate documentation to the CO to support its request for 28 temporary workers. *See Empire Roofing*, 2016-TLN-00065 (Sept. 15, 2016) ("An employer cannot just toss hundreds of puzzle pieces . . . on the table and expect a CO to see if he or she can fit them together."). The CO reasonably found that "Employer has a year-round labor shortage which fluctuates with no consistent peak."

4. Ruling. Employer failed to carry its burden to establish its eligibility for H-2B labor certification. The CO's denial of Employer's Application for Temporary Employment Certification is AFFIRMED.

SO ORDERED.

TRACY A. DALY
Administrative Law Judge