



**Issue Date: 16 April 2018**

**BALCA Case No.: 2018-TLN-00104**  
ETA Case No.: H-400-17363-890075

*In the Matter of:*

**AMERICAN RACK SYSTEMS,**  
*Employer.*

Appearances: Robert Kershaw, Esq.  
Kevin R. Lashus, Esq.  
The Kershaw Law Firm, P.C.  
Austin, Texas  
*For the Employer*

Before: John P. Sellers, III  
Administrative Law Judge

### **DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to American Rack Systems’ (the “Employer”) request for review of the Certifying Officer’s (“CO”) Non-Acceptance Denial in the above-captioned H-2B temporary labor certification matter.<sup>1</sup> The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis.<sup>2</sup> Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”). 8 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer 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).

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<sup>1</sup> On April 29, 2015, the Department of Labor (the “Department”) and the 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. 80 Fed. Reg. 24042 (Apr. 29, 2015). In this Decision and Order, all citations to 20 C.F.R. Part 655 are to the IFR.

<sup>2</sup> 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 definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B), pursuant to the Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

## STATEMENT OF THE CASE

On January 1, 2018, the Employer filed with the CO an Application for Temporary Employment Certification, ETA Form 9142B (“Application”). (AF 37-72.)<sup>3</sup> The Employer requested certification for eight helpers/production workers,<sup>4</sup> from April 1, 2018 until December 31, 2018, based on an alleged peakload need for workers during that period. (AF 37.)

On February 5, 2018, the CO issued a Notice of Deficiency (“NOD”), which outlined three deficiencies in the Employer’s Application. (AF 30-36.) The CO gave the Employer the opportunity to either submit a modified Application and supporting documentation within ten days of the date of the NOD or request administrative review before BALCA. (AF 31.) On February 19, 2018, the Employer responded to the NOD with a letter of explanation. (AF 28.)

On March 9, 2018, the CO issued a Non-Acceptance Denial denying the Employer’s request for temporary labor certification. (AF 12-27.) In support of its denial, the CO concluded that the Employer did not meet the requirements of 20 C.F.R. § 655.6(a) and (b) because it failed to: (1) establish that it had a peakload need for workers; (2) show that its job opportunity was temporary in nature; and (3) submit sufficient information to justify the dates of need requested. (AF 15-17.) Moreover, the CO concluded that, pursuant to 20 C.F.R. § 655.11(e)(3) and (4), the Employer failed to demonstrate that it had a need for eight temporary workers. (AF 17-19.) Finally, the CO explained that, under 20 C.F.R. § 655.18(a)(1), the Employer was required to offer U.S. workers no less than the same benefits, wages, and working conditions that it was going to offer H-2B workers, but the Employer’s job order and Application listed different daily work hours. (AF 19-20.) For all of these reasons, the CO issued a Non-Acceptance Denial.

By letter filed on March 23, 2018, the Employer requested administrative review of the CO’s Non-Acceptance Denial. (AF 1-11.) On March 29, 2018, the undersigned issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). On April 4, 2018, the undersigned received the Appeal File from the CO. The Employer filed a brief on April 9, 2018, and the record is now closed.

## DISCUSSION AND APPLICABLE LAW

BALCA’s standard of review in H-2B cases is limited. 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 the Employer actually submitted to the CO before the date of the CO’s determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA must: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7

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<sup>3</sup> “AF” refers to the Appeal File.

<sup>4</sup> SOC (O\*Net/OES) occupation code 51-9198.

(Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer's Application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

### The Employer's Arguments

On its Application, the Employer explained that "most of" its "business activity" occurred from April 1 through December 31. (AF 37.) Moreover, in response to the NOD, the Employer explained that during "the cold months," work slowed "down considerably." (AF 28.) The Employer added that with "the size and weight" of most of its loads, "weather" could "delay or postpone the work [from] December thr[ough] April." (*Id.*) The Employer added that the improved U.S. economy had made it more difficult to find U.S. workers during its peak season. (AF 28-29.) Moreover, the Employer explained that higher-paying disaster relief and oilfield jobs had created a temporary labor shortage. (AF 29.) Thus, the Employer urged the CO to certify its request for ten H-2B workers.<sup>5</sup> (*Id.*)

In its brief, counsel for the Employer ("Counsel") alleged that the Employer's renewal Application "should have been granted on its face, without call for supplying additional supporting documentation." (Applicants Br. on Appeal at 3.) Citing guidance published by the Department in 2016,<sup>6</sup> Counsel argued that the CO should have granted the Employer's Application based on the Employer's prior H-2B certification history. Moreover, Counsel accused the CO of failing to follow the Department's 2016 Guidance.<sup>7</sup>

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<sup>5</sup> Although the Employer filed an Application for eight H-2B workers, in its response to the NOD, it wrote that it had a need for ten H-2B workers. (AF 29.)

<sup>6</sup> See *Announcement of Procedural Change to Streamline the H-2B Process for Non- Agricultural Employers: Submission of Documentation Demonstrating "Temporary Need"* (Sep. 1, 2016) ("Department's 2016 Guidance"), available at [https://www.foreignlaborcert.doleta.gov/pdf/FINAL\\_Announcement\\_H-2B\\_Submission\\_of\\_Documentation\\_Temporary\\_Need\\_082016.pdf](https://www.foreignlaborcert.doleta.gov/pdf/FINAL_Announcement_H-2B_Submission_of_Documentation_Temporary_Need_082016.pdf).

<sup>7</sup> In reviewing Counsel's arguments, I note that the regulations prohibit BALCA from considering legal arguments and evidence that the Employer did not submit to the CO. See 20 C.F.R. § 655.61. Because Counsel did not submit evidence of the Department's 2016 Guidance or the Employer's prior H-2B certification history when this case was pending before the CO, BALCA is not permitted to consider such evidence now. Even assuming, *arguendo*, that the regulations permitted BALCA to consider evidence and arguments that were not raised before the CO, I find that Counsel mischaracterized the contents of the Department's 2016 Guidance and the nature of the CO's actions. Notably, the Department's 2016 Guidance states, "[A]n employer need not submit additional documentation *at the time of filing the Form ETA-9142B* to justify its temporary need." (Department's 2016 Guidance at 1.) It further provides that evidence documenting an employer's temporary need "must be retained by the employer and provided to the Chicago NPC in the event a Notice of Deficiency (NOD) is issued by the CO." (*Id.* at 2.) In this case, the Employer voluntarily submitted payroll evidence and supporting documentation with its initial Application. (AF 37-72.) The CO issued a NOD on February 5, 2018, as permitted by the regulations, after concluding that the Employer's Application was deficient. In response, the Employer failed to remedy the deficiencies in its Application and further failed to submit documentation establishing that it has a peakload need for H-2B workers. The CO's actions and requests were entirely consistent with the Department's 2016 Guidance and the applicable regulations. For these reasons, the arguments that Counsel advanced in his brief are without merit. Moreover, as explained in the

#### THE EMPLOYER FAILED TO SUBMIT AN ACCEPTABLE JOB ORDER

The regulation at 20 C.F.R. § 655.18(a)(1) provides that the Employer’s “job order must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer’s H-2B workers.”

The Employer’s Application listed a work schedule from 6:30 a.m. until 2:30 p.m., which equates to eight hours of work per day. (AF 39.) In contrast, the Employer’s job order listed a work schedule from 8:00 a.m. until 5:00 p.m., which equates to nine hours of work per day. (AF 68.) Although the CO requested that the Employer either submit a revised job order or amend its Application so that the job order and the Application reflected the same daily work hours, the Employer failed to make the required changes in response to the NOD. Moreover, even though the CO informed the Employer that she required the Employer’s written permission to make any amendments to the Employer’s Application, the Employer did not give the CO permission to amend its Application. Consequently, because the Employer failed to offer U.S. workers the same benefits and working conditions than it intended to offer H-2B workers, the CO properly denied certification under 20 C.F.R. § 655.18(a)(1).

#### THE EMPLOYER FAILED TO ESTABLISH A PEAKLOAD NEED FOR EIGHT H-2B WORKERS

Although, as discussed above, the CO properly denied certification pursuant to 20 C.F.R. § 655.18(a)(1), the Employer also failed to demonstrate a temporary need for eight H-2B workers from April 1, 2018 through December 31, 2018.

To obtain certification under the H-2B program, the Employer 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. 20 C.F.R. § 655.6(b); 20 C.F.R. §655.11(a)(3). Pursuant to § 113 of the 2018 Consolidated Appropriations Act, “for the purpose of regulating admission of temporary workers under the H-2B program, the definition of temporary need shall be that provided in 8 CFR 214.2(h)(6)(ii)(B).” Accordingly, 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

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. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner’s need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

In this case, the Employer alleged a peakload need for eight helpers/production workers from April 1, 2018 through December 31, 2018. (AF 37.) In order to establish a peakload need,

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text above, I find that the evidence establishes that the CO properly concluded that the Employer failed to establish a peakload need for H-2B workers from April through December.

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).

Although the Employer argued that it has a peakload need for eight H-2B workers from April through December, its payroll data from 2017 does not support its allegation that it historically hired more temporary workers from April through December than it did throughout the rest of the year. The Employer submitted a chart documenting payroll data from 2017, which included the number of permanent and temporary workers it employed, total hours each category of employee worked, and total earnings received. (AF 49.) The data reveals that in 2017, the Employer hired 31, 33, 31, and 39 temporary workers in March, April, May, and June, respectively. (*Id.*) Although the Employer hired more temporary workers during these four months than any other time of year, I find it notable the Employer did *not* include March in its dates of alleged peakload need, even though it hired a considerable number of temporary employees that month. (AF 37.) Moreover, the Employer did not hire *any* temporary workers in October or November 2017, and it only hired five temporary workers in December 2017, even though it alleged that it has a peakload need during all three months. (*Id.*) As evidenced by these numbers, the Employer’s own payroll data does not support its assertion that it needs to supplement its permanent staff on a temporary basis from April through December. Therefore, I find that the CO properly concluded that the Employer failed to show that it has a peakload need for eight H-2B workers from April through December.

### **ORDER**

In light of the foregoing, it is **ORDERED** that the Certifying Officer’s decision denying certification to American Rack Systems is **AFFIRMED**.

For the Board:

JOHN P. SELLERS, III  
Administrative Law Judge