



Issue Date: 26 January 2018

BALCA CASE NO.: 2018-TLN-00033

ETA CASE NO.: H-400-17272-323354

In the Matter of:

APEX LANDSCAPE & IRRIGATION, LLC.,
Employer.

DECISION AND ORDER

This matter is before the Board of Alien Labor Certification Appeals on Employer Apex Landscape & Irrigation, LLC.'s application for a certification under the H-2B nonimmigrant alien worker program.¹ The certifying officer at the Department of Labor's Employment and Training Administration denied the application on December 4, 2017. Employer timely requested BALCA review.²

This Decision and Order is based on a written record, which consists of the Appeals File and Employer's request for review. 20 C.F.R. § 655.61(e). The Administrator of the ETA elected not to file a brief. Employer filed a brief on January 17, 2018. Although the regulations do not expressly allow employers to file briefs, the regulations permit the Administrator to file one. I therefore order Employer's brief filed and will consider it. Having considered the full record, I affirm the certifying officer's denial of the labor certification.

Findings of Fact

Employer describes itself as a "municipal utility contractor." AF at 17.³ From Employer's evidence it appears Employer's relevant work is to provide landscaping, maintenance of landscaping, and landscape-related construction for certain Texas municipalities.

Employer applied for the H-2B Temporary Employment Certification based on an asserted peakload temporary need. AF at 31. It sought to hire ten laborers for construction work in four Texas counties (Lee, Fayette, Washington, and Milam). *Id.* at 31, 34, 37. It stated that the

¹ See Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, and certain of its implementing regulations at 20 C.F.R. Part 655, subpart A.

² This Decision and Order was delayed because of complications with ETA's service of the Appeal File on Employer (thus delaying Employer's brief) and because of a government shutdown.

³ "AF" refers to the Appeals File.

workers would complete what appears to be construction work along public roadways. *Id.* at 31, 33. As Employer explained:

Our services include [work] for local governments. Those governments receive payment from the U.S. Department of Transportation on the [federal] fiscal year [in the beginning of each October]. AF at 17]. Meaning, most [customers] contract in August/September for work to be completed in October through the [following] summer because that's when payment is due to the contractor. Accordingly, the dates during which most of our business activity occurs, and during which we have the most need for temporary peak load workers is December 12, 2017 to September 13, [2018].⁴

* * *

As is well known, Texas summers – during which time our business slows significantly each year due to the harsh weather conditions – are normally predictable, and it is possible for us to predict that these dates are regularly when the warmest and slowest part of the season will be. These summer dates are the dates that we have the least need for workers, and therefore do not need the temporary peak load workers during these winter [sic] months (we do however continue to employ some year round workers) . . . Due to the nature of our work we are unable to engage in much business during the late summer months, of approximately September 12th to December 12th, because, by then, our customers have run out of money.

AF at 46.

This explanation is internally inconsistent and inconsistent with Employer's application in ways that I cannot reconcile. Employer states that its work greatly increases each October, yet it is applying for H-2B workers to start in mid-December, not October. It offers no explanation for this. Next, Employer asserts that the workload declines in summer, yet Employer includes the summer months of 2018 as part of its peakload need for temporary extra workers. Having explained that there is little work in the summer months because of extreme heat, Employer relates this to not needing peakload workers in *winter* (as opposed to summer). Employer states that its government customers run out of money in late summer. In Texas, late summer includes September (also a time at the end of the government fiscal year. Yet, Employer includes the first half of September 2018 in the peakload period. From all this, I cannot understand when or why the asserted peakload is said to begin or end.

Employer offered a second reason for needing temporary workers: an increase in business. AF at 47. It submitted three contracts apparently to show the increase. AF at 49. The largest of the contracts is for \$1,985,000 and is to be completed in 252 working days. The other two contracts are for somewhat over \$600,000 each and allow 175 and 120 working days respectively. AF at

⁴ Employer gave an end date of September 13, 2017. This has to have been a typographical error: Employer could not have meant that its need for temporary workers would conclude three months *before it began*. I infer that Employer meant September 13, 2018.

52-59. Employer submitted what appears to be its timeline for performing the longest contract (252 “working days”). The timeline shows a start date of November 15, 2017, and an end date of July 27, 2018. AF at 60.⁵ Employer’s vice-president stated as to that contract: “As many as 15 temporary workers would be useful, [but] ten additional workers [is] the minimum that I feel is necessary to accomplish what we have under contract.” AF at 24.

The vice-president also stated that an average contract (typically in the low \$600,000 range) took four or five months to complete. The new, large contract (\$1,985,000) was three times the size of an average contract, yet Employer was required to complete it in ten months – little more than twice the time. Meanwhile, Employer would also have to complete the two other (average size) contracts along with the large contract.

Employer also submitted payroll records for 2015 and 2016 that show for each month the total number of permanent employees, their total hours worked, and their total earnings. Employer did not have temporary employees in 2015 or 2016. The hours worked and the earnings received for the months of September, October, November, and December, more often than not, are somewhat higher than the other months. AF at 61.

But Employer offered no explanation of how the total amount of work required for the three contracts it submitted compared with the total amount of work Employer generally performed, such as in 2015 and 2016, when Employer completed all of its work with no temporary workers. For example, Employer could have had eight average size contracts in the same months in 2016-17. If Employer’s only contracts in 2017-18 were the three that it submitted, it did more work in 2016-17 than it is planning to do in 2017-18 (despite the new, large contract). There is no peakload or other increase in demand for its services. As Employer was able to complete its work in 2015 and 2016 without any temporary workers, it could do the same for the months for which it is currently requesting H-2B workers.

Employer’s compliance with the certifying officer’s demands for information. While this matter was at ETA, the certifying officer issued a Notice of Deficiency on October 5, 2017. She found that the information Employer had submitted to that point: (1) failed to justify the dates that Employer stated that it needed temporary workers, and (2) failed to establish the number of temporary workers needed. (AF at 28-29.) The certifying officer required Employer to submit further information and documentation to address these deficiencies.

On the dates of need, the certifying officer required Employer to submit detailed information about Employer’s business history, its primary services, its schedule of operations throughout the year, and an explanation of how it determined the dates it needed the additional workers. The certifying officer required Employer to supply supporting evidence. This was to include a summary of payroll reports by month for 2015, 2016, and 2017 to date; a summary of projects in 2015 and 2016; and contracts for all projects that contributed to Employer’s need for temporary workers. AF at 28-29.

⁵ Employer asked its government client if it could begin the project on November 15, 2017, rather than an earlier possible start date of September 22, 2017. It explained that it made better sense to let the plants grow through the summer before starting the project. AF at 62.

As is apparent from the discussion above, records that, for example, summarized the projects in 2015 and 2016 could have been helpful to establish that the need for the covered months in 2017-18 was greater because of increased customer demand. But Employer did not submit a summary of earlier projects.

On the number of workers needed, the certifying officer required Employer to clarify how it determined the number. Employer could use the payroll data but would need additional evidence to establish the need for ten workers. AF at 29-30. Employer submitted nothing more than its vice-president's statement described above that 15 additional workers would be helpful on the new, large contract, but he could manage with 10.

The certifying officer denied the application on December 4, 2017. AF at 10.⁶

Discussion

Standard of review. The regulations are silent about the deference that the Board of Alien Labor Certification Appeals should accord to a certifying officer's determination. When the certifying officer's determination turns on the Employment and Training Administration's long-established policy-based interpretation of a regulation, it would seem that considerable deference is owed ETA. Compare deference courts give administrative agencies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In such cases, BALCA likely should not overturn a certifying officer's determination unless it is arbitrary, capricious, or inconsistent with the ETA's established policy interpretation. Absent ETA's long-standing, policy-based interpretation of a regulation, it would appear that BALCA should review the certifying officer's denial *de novo*. On the present record, I need not determine the deference owed the certifying officer, for I would affirm her denial of the application on *de novo* review.

H-2B program requirements. An employer seeking certification under the H-2B program must "establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary."⁷ An employer's need is temporary if it is: a one-time occurrence; a seasonal need; a peakload need; or an intermittent need.⁸ An employer establishes a "peakload need" if it shows 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."⁹ The employer must also demonstrate that the number of positions is justified and that the request represents a *bona fide* job opportunity.¹⁰

⁶ The certifying officer concluded that Employer had failed to justify the dates of need and the number of temporary workers needed for the alleged peakload. For that matter, she concluded that Employer had not established a peakload need. AF at 14.

⁷ 20 C.F.R. § 655.6(a); 8 C.F.R. § 214.2(h)(6)(ii)(B).

⁸ 20 C.F.R. § 655.6(b).

⁹ 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

¹⁰ 20 C.F.R. § 655.11(e)(3) and (4).

Failure to comply with Notice of Deficiency. Applications are properly denied when the employer fails to comply with a Notice of Deficiency, “including not responding in a timely manner or not providing all required documentation.”¹¹ The certifying officer’s Notice of Deficiency here required, among other material, a monthly summary of all projects for 2015 and 2016. Employer failed to comply. As discussed above, this monthly summary in conjunction with the payroll records would show how much work Employer can accomplish with a certain number of employees. This could be compared to the work Employer expects it will have to perform during the months for which it seeks H-2B workers. This, for example, might establish a temporary need for additional workers because of the new, large contract. Employer’s failure to supply the documentation foreclosed this analysis.

Employer also failed to submit payroll summaries for 2017 to date. Those would have allowed a comparison of the number of permanent employees Employer has now with the number it had in 2015 and 2016. This would, in turn, assist in determining how much work Employer will be able to do in the relevant months (in 2017-18) with its current permanent workforce.

I therefore affirm the certifying officer’s denial of the application because of Employer’s failure to comply fully with the Notice of Deficiency, standing alone. Nonetheless, and in the alternative, I will address Employer’s remaining arguments and conclude that the application would be denied even were I to reach these arguments.

Peakload need. As discussed above, Employer’s statements were inconsistent to the point that I cannot infer what the peakload need is supposed to be and when Employer expected it to occur. Employer offered a variety of reasons that seemed to suggest that it almost never was performing much work: temperatures were too hot in summer; customers had too little money in late summer; and winter was a quiet time. I cannot reconcile these statements with a temporary peakload need from December 12, 2017 through September 12, 2018. Excluding summer, late summer, and winter would seem to eliminate December, January, February, June, July, August, and early September from the peakload period, yet all of those are months for which Employer seeks H-2B workers.

Also as discussed above, Employer has not established that obtaining a new, large contract has increased the overall demand on its workers.¹² I accept that the large contract will pay about three times as much one of Employer’s average contracts and yet must be completed in only twice the time. But, to determine whether there has been an increase in Employer’s need for workers, I would have to know *the total* amount of work to be done during these months and compare it to *the total* work Employer performed in the same months during 2015 and 2016,

¹¹ 20 C.F.R. § 655.32(a); *see Desert Runner*, 2018-TLN-00002, slip op. at 8 (Oct. 26, 2017) (Clark, ALJ) (“failure to provide the requested documentation alone is grounds for finding the CO’s denial of certification was proper”); *Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017) (Romero, ALJ); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016) (King, ALJ).

¹² *See Munoz Enterprises*, 2017-TLN-00016, slip op. at 1 (Jan. 19, 2017) (Romero, ALJ) (affirming denial of H-2B application based on peakload need when employer failed to document sufficiently the temporary need); *BMC West Corporation*, 2016-TLN-00039, slip op. at 5 (May 18, 2016) (Timlin, ALJ) (“A bare assertion without supporting evidence is insufficient to carry the employer’s burden of proof.”).

when Employer had no temporary workers. Employer’s permanent workforce grew from 2015 to 2016. I would need to know if that continued into 2017. That way, I could determine about how much work the permanent workforce could do during the relevant months in 2017-18, and I could decide whether some additional temporary workers would be needed. In addition, according to Employer’s timeline, the large contract is to be completed by July 27, 2018, yet Employer is asking for H-2B workers through September 13, 2018 –weeks after the large project would be complete. Employer failed to provide persuasive evidence to address any of these points, a failure that is fatal to its application.¹³

Employer did not establish that the number of workers it needs to hire. The payroll records do not demonstrate a need for ten new construction laborers. Nor does the vice-president’s statement that “as many as 15 temporary workers would be useful,” but it could “make do” with 10. This conclusory statement is insufficient. Had the vice-president explained how he came to his conclusion, that might have met the regulatory requirement. It would have allowed for a meaningful consideration of evidence. But a bald conclusion without explanation is not persuasive.

I have already affirmed the certifying officer’s denial based on Employer’s failure to comply fully with the Notice of Deficiency. In the alternative, I affirm the certifying officer because Employer has failed to establish a temporary need and failed to establish how many temporary

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¹³ Employer did not assert a one-time occurrence, and I find none. There is no evidence about Employer’s expectations for the future. *See* 8 C.F.R. § 214.2(h)(6)(ii)(B).

Prior to filing its closing brief, Employer also did not assert that its temporary need is seasonal. But Employer did raise and emphasize a seasonal need in its brief. The evidence does not support such a conclusion. In particular, the payroll records do not show a seasonal increase in work during mid-December through mid-September (the dates that Employer asserts as its peakload need). Employer does not assert some shorter or different season. The only reference to “season” is to the heat of the summer. But Employer’s request for H-2B workers concerns the months from December through September. This *includes* (and does not exclude) the summer; it similarly includes the last month (September) immediately at the end of each fiscal year, when government funding is supposed to be most scarce. The months for which Employer seeks H-2B workers are inconsistent with its asserted seasonal need.

workers it needs.¹⁴

Order

The certifying officer's denial of Employer's application is AFFIRMED.

For the Board of Alien Labor Certification Appeals

STEVEN B. BERLIN
Administrative Law Judge

¹⁴ The application also fails for a reason on which the certifying officer did not rely: Employer is seeking multiple workers for worksites that are insufficiently close and that are not listed in the application. Workers must be certified to work in specified geographic places of employment. If, as here, an employer is requesting certification for multiple employees in one application, all of the workers must perform in the same area of intended employment. *See* 20 C.F.R. § 655.15(e).

The large contract and Employer's bid for it mention only Denton County. AF 53, 62. The two smaller contracts respectively mention Bastrop and Jefferson counties. AF 49, 57. In its H-2B application, Employer listed only Fayette, Lee, Washington, and Milam Counties. AF at 34, 37. It therefore did not correctly specify the locations where the H-2B workers were to work on any of the three contracts.

To be in the same area of intended employment, the workers must be assigned to geographic areas "within normal commuting distance" of the worksite address. 20 C.F.R. § 655.5. "There is no rigid measure of distance which constitutes a normal commuting distance," but, for example, locations within the same Metropolitan Statistical Area are "deemed" to be within a normal commuting distance. *Id.*

Here, all of the reported worksite counties are more than a three-hour drive from Denton County and do not fall within the same Metropolitan Statistical Area as does Denton. This is not a "normal commuting distance." Thus, this would be another basis to deny the application.

But, as Employer did not have notice of these geographical issues, it was not given an opportunity to supply evidence or argument about them. I therefore do not reach or rely on the geographical issues.