



Issue Date: 16 November 2017

BALCA Case No.: 2018-TLN-00005

ETA Case No.: H-400-17219-872973

In the Matter of:

APOLLON CONTRACTING, LLC,

Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary non-agricultural employment provisions of the Immigration and Nationality Act (“INA,” or “the Act”), 8 U.S.C. § 1101(a)(15)(H)(ii), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States “if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(15)(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). For the reasons set forth below, the Certifying Officer’s (“CO”) denial of temporary labor certification is affirmed.

STATEMENT OF THE CASE

H-2B Application and Notice of Deficiency

On August 8, 2017, Apollon Contracting, LLC, (“Employer”) filed an H- 2B Application for Temporary Employment Certification (“ETA Form 9142B”) for the job titled “Construction Managers,” Standard Occupational Classification (“SOC”) code/occupation title 11-9021. (AF 156.)² Employer requested one Construction Project Manager from October 22, 2017 to October 21, 2018. (*Id.*) Employer listed the nature of the temporary need as a “one-time occurrence.”

¹ 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. See 80 FED. REG. 24042, 24109 (Apr. 29, 2015) (“2015 IFR”). The 2015 IFR applies if an employer filed its temporary labor certification application after April 29, 2015 and requested a start date after October 1, 2015. In the present case, Employer filed its temporary labor certification application after April 29, 2015, requesting a start date of need after October 1, 2015. Thus, the 2015 IFR applies.

² For purposes of this opinion, “AF” stands for “Appeal File.”

(Id.) Employer explained that it was hired for a multifamily residential apartment construction project in Louisville, Kentucky. (Id.) Employer went on to state that its construction project managers are “working on other projects in different parts of the country and as a result, we need a temporary worker with the expertise to fulfill these services in the Kentucky project.” (Id.)

On August 16, 2017, the CO issued a Notice of Deficiency (“NOD”), notifying Employer that its application failed to meet the acceptance criteria in light of four deficiencies. (AF 141-148.) Employer cured three of the four deficiencies, leaving one deficiency at issue on appeal.

Employer appeals the deficiency finding that it failed to establish that the job opportunity is temporary in nature pursuant to 20 C.F.R. §655.6(a)-(b). (AF 144.) The CO found that Employer did not submit sufficient information to establish its requested employment period. (Id.) The CO further noted that Employer requested a worker for an acquired project and that Employer employs “otherwise-qualified workers who are currently unavailable.” (Id.)

To remedy the deficiency, the CO directed Employer to submit the following items:

1. A description of the employer’s business history and activities and schedule of operations through the year;
2. An explanation regarding why the nature of the employer’s job opportunity and foreign worker being requested for certification reflect a temporary need; and
3. Signed service contracts from customer(s) describing the scope and duration of the identified project during the requested period of employment.

(AF 144-145.)

Employer’s Response to Notice of Deficiency

On August 30, 2017, Employer responded to the CO’s request, providing documentation in support of its application. (AF 44-132.) In response to the CO’s request for documentation, Employer submitted: an “O&S work order”, a scope of work letter, copy of an affidavit concerning a building permit newspaper posting, copy of a newspaper posting about a building permit, and building permit information. (AF 53-132.)

Employer amended Section B.9, Statement of Temporary Need. (AF 53.) The Section now provided that the Kentucky project is a one-time project with no plans to schedule future operations in Kentucky. (Id.) Employer has other projects scheduled this year which are located in New York, New Jersey, Florida, and Pennsylvania. (Id.) Employer included the building permits and the flood plan permits for the Kentucky project. (AF 59.) Employer explained that contracts will be executed upon the issuance of these permits. (Id.) Employer also posted newspaper advertisements allowing the community to comment on the requested building permits. (Id.) Employer attested that it has never used the H-2B program for this position and is not going to use this program in the future. (Id.)

Employer explained that it needs a Construction Project Manager for a short duration because the duties for this full-time position are not on-going; the engineering services will terminate upon the completion of the project. (Id.) Employer wrote that it anticipates that the need for these duties will end in one year. (Id.) In support of its argument, Employer submitted a work order dated June 30, 2017 from O&E Associates, consulting engineers. (AF 95-104.) This work order describes the work that will be done for the Kentucky project but does not provide the beginning or end dates for the project. (Id.)

Employer also provided its “scope of work” letter. (AF 105-118.). The letter is undated and describes the work to be performed for the project but does not list the duration or the beginning and end dates of the project. (Id.) Employer provided an Affidavit of Publication, showing that notice for the work permit was published on 8/04/2017, 08/05/2017, and 08/06/2017. (AF 119.) Employer included a copy of the posted notice. (AF 124.) Finally, Employer included copies of its building permit applications. (AF 125-132.)

Final Determination and Appeal

On October 6, 2017, the CO issued a Non-Acceptance Denial (“Denial”). (AF 14-27.) The CO also found that Employer failed to show that its job opportunity is temporary in nature. (Id.) The CO noted that Employer based its temporary need on a geographic issue. (AF 17.) The CO summarized Employer’s Statement of Need, noting that Employer’s operations focus mostly on the East Coast. (AF 18.) Employer attested that the project in Kentucky is a one-time project with no plans to schedule future operations in Kentucky. (AF 18.) Employer stated that its other qualified workers are working on other contracts and will be able to resume the work on the Kentucky project in a year. (Id.) The CO found that because Employer conducts work nationally, “the fact that this contract is in Kentucky does not make its need a one-time occurrence. Instead, the employer appears to have a staffing challenge.” (Id.)

On October 20, 2017, Employer submitted a request for review before the Board of Alien Labor Certification Appeals (“BALCA”). (AF 1-13.) Employer requested the opportunity to submit a brief. (Id.) A Notice of Assignment and Expedited Briefing Schedule directed parties to submit briefs within seven business days after they receive the appeal file.

The undersigned received the Appeal File on October 30, 2017. The undersigned received the CO’s and Employer’s briefs on November 8, 2017. In its brief, the Solicitor argued that Employer failed to meet its burden of establishing temporary need because Employer did not provide documentation to substantiate its need and did not demonstrate a temporary event of short duration. (CO’s Brief at 3.) Employer argued that its need for a Construction Project Manager fits the definition of a one-time occurrence need under the regulations. Employer asserted that the CO focused on the nature of the duties rather than the nature of Employer’s need. (Employer’s Brief at 5.)

SCOPE OF REVIEW

BALCA has a limited standard of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer's request for review, which may only contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.33(e). As discussed above, Employer submitted several exhibits along with its legal brief. All of these exhibits are copies of documents already in the Appeal File. After considering the evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO's denial of temporary labor certification, or
- (2) Direct the CO to grant temporary labor certification, or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.33(e)(1)-(3).

DISCUSSION

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security ("DHS"). See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 20 C.F.R. § 655.6(b). The employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); see also Tampa Ship, 2009-TLN-44, slip op. at 5 (May 8, 2009). A bare assertion without supporting evidence is insufficient to carry the employer's burden of proof. AB Controls & Technology, Inc., 2013-TLN-00022 (Jan. 17, 2013). In evaluating whether a job opportunity is temporary, "[i]t is not the nature or the duties of the position which must be examined to determine the temporary need," rather, "[i]t is the nature of the need for the duties to be performed which determines the temporariness of the position." Matter of Artee Corp., 18 I. & N. Dec. 366 (1982), 1982 WL 190706 (BIA Nov. 24, 1982).

The regulations provide that "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." 20 C.F.R. § 655.6(b)(ii)(B). Here, Employer requests temporary workers for a "one-time occurrence." In order to establish a one-time occurrence:

The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

8 C.F.R. § 214.2(h)(6)(ii)(B)(1). The CO found that Employer did not establish a temporary need because Employer's temporary need was based on a "staffing challenge." (AF 18.) Specifically, the CO found that: "[g]iven that the employer conducts work nationally, the fact that this contract is in Kentucky does not make its need a one-time occurrence." (AF 18.) Employer argued that the fact that the company is national and contracts nationally "has no bearing on the temporary need of the employer or whether or not it is a one-time occurrence." (Employer's Brief at 5.)

1. Has Employer established a temporary event of short duration?

In its brief, Employer based its one-time occurrence need on the second prong of 8 C.F.R. § 214.2(h)(6)(ii)(B)(1), namely "that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker." (Employer's Brief at 4.) Employer argued that the temporary need is due to the unavailability of construction managers. (*Id.*) Thus, Employer argued that it is basing its temporary need not on the geographic location of the project but on the unavailability of construction managers to work on the project.

BALCA has held that a single contract does not create a one-time occurrence need where the employer's business model is based on taking contracts all over the country. Cajun Constructors, Inc., 2010-TLN-00079, slip op. at 5 (BALCA Oct. 5, 2010). BALCA has also held that if the employer routinely enters into unique and discrete contracts, the combination of these contracts creates a permanent need. KBR, Inc., 2016-TLN-00038, slip op. at 8 (BALCA May 16, 2016). Furthermore, the "scale or particular requirements of a contract cannot establish a temporary need when it is an employer's business model to contract for services on successive projects." (*Id.* at 8-9.) BALCA has consistently rejected employers' requests for non-agricultural workers where the one-time occurrence need was based on a contract and the employer's business was based on continuous contract procurement. Herder Plumbing Inc., 2014-TLN-00010, slip op. at 6 (BALCA Feb. 12, 2014); Turnkey Cleaning Services, GOM, LLC., 2014-TLN-00042, slip op. at 5 (BALCA Oct. 1, 2014); Cajun Constructors, Inc., 2009-TLN-00096 (BALCA Oct. 9, 2009).

In KBR Inc., an employer requested workers based on a one-time occurrence need, arguing that it received a unique construction project in La Porte, Texas. 2016-TLN-00038, slip op. at 2. BALCA found that there is no evidence that the need for labor is limited to a one-time occurrence as the employer was engaged in several other projects that require similar workers. (*Id.* at 9.) BALCA also found that the employer did not indicate that its need for workers will stop after the project because it will continue to procure other projects. (*Id.*) BALCA concluded that

The Employer is in the business of fulfilling successive engineering and construction contracts and has not demonstrated that its needs for this project are different from its similar needs on other projects in other locations or that its overall need for such workers is a temporary need that will end in the near, definable future.

(Id. at 10.) The facts of the present case are similar to KBR Inc.; Employer is seeking a temporary worker based on a new construction contract. However, Employer is in the business of acquiring various construction contracts. Furthermore, Employer has Construction Project Managers that would be qualified to work on the Kentucky project if they were available. The basis of Employer's argument is the fact that it does not have enough workers for the Kentucky project. This project appears to be similar to Employer's other projects as other Construction Project Managers could take over this project once the temporary worker leaves.

Employer's argument does not establish why the temporary need will end in the near definable future; as Employer's business model is based on fulfilling successive contracts, there is no evidence that shows that Employer will not need these types of workers in the future. Employer may be correct that the nature of this particular need may be temporary; the Kentucky project will end and Employer will no longer need a Construction Project Manager for the project. However, Employer will continue to acquire projects nationally. Employer has not established why it will not need additional Construction Project Managers in the future. In Herder Plumbing, BALCA found that the employer's new contract was not a temporary event but rather evidence that the employer continued to grow its business. 2014-TLN-00010, slip op. at 6.

Here, Employer has not established that its Kentucky project is a temporary event and that Employer is not expanding its business. Even if Employer does not contract to work on projects in Kentucky in the future, Employer has not explained why it will not need Construction Project Managers as it receives additional construction contracts. Thus, Employer has failed to establish a one-time occurrence need under the second prong of 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

2. Has Employer established that it has not employed workers to perform the services in the past and will not need workers to perform the services in the future?

Employer cannot establish a one-time occurrence need under the first prong, namely that "it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future." 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). To establish its temporary need, Employer attested that it has not hired H-2B workers in the past and will not hire workers in the future. Employer explained that although it has qualified construction managers, all of its managers are currently "working on other projects in different parts of the country." (AF 19.) Employer further explained that it does not anticipate having future Kentucky projects, but if it does, "our construction project managers, who are working on other sites now, can resume the work, if necessary, in one year." (AF 162.)

BALCA has held that the location of a construction project is insufficient to establish a one-time need for workers. KBR, Inc., 2016-TLN-00038, slip op. at 7. Employer explained that it will not need construction project managers in the future because it has other construction project managers to take over the work. Employer's argument does not explain why it is insufficiently staffed for the present contract but will have sufficient staff in the future. Notably, Employer does not explain why its need for additional construction project managers will end if Employer is in the business of acquiring construction projects.

In sum, Employer has not demonstrated that it has a one-time occurrence need for a Construction Project Manager from October 22, 2017 to October 21, 2018. The CO properly found that Employer's explanation does not establish that its need is temporary.³

ORDER

In light of the foregoing, it is hereby ORDERED that the Certifying Officer's Final Determination denying Employer's ETA Form 9142, H-2B Application for Temporary Employment Certification is AFFIRMED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

³ In its brief, the Solicitor argued that Employer failed to establish temporary need by failing to provide documentation to support its need. (CO's Brief at 3.) However, the CO did not base the denial on Employer's failure to provide documentation; in the Denial, the CO did not address whether Employer's documents were sufficient to establish temporary need. Instead, the CO focused on Employer's explanation of its temporary need. As the CO's denial was not based on the insufficiency of Employer's documentation, this argument is not considered on appeal. In the NOF, the CO wrote that Employer "has not submitted sufficient documentation to substantiate its temporary need during the requested period of employment." (AF 144.) The CO did not raise this argument in the Denial after Employer submitted its supporting documentation.