U.S. Department of Labor

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Issue Date: 01 February 2018

BALCA Case No.: 2018-TLN-00052

ETA Case No.: H-400-17273-052731

In the Matter of:

COOPER'S TRUCK N RV WASH,
Employer.

Appearance: Jeffrey L. Nesvet, Esquire
Wei (Katherine) Zhao, Esquire
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Christopher Larsen
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

Cooper's Truck N RV Wash ("Employer") requests review of the Certifying Officer's ("CO") decision to deny an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);[1] 20 C.F.R. § 655.6(b).[2] Employers who

[1] The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-120, Division B (2018).

seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* ("Form 9142"). A CO in the Office of Foreign Labor Certification ("OFLC") of the Employment and Training Administration reviews applications for temporary labor certification.

The CO (acting for the Secretary of Labor, 20 C.F.R. §655.2, subsection (a)) can issue the labor certification only after determining (1) that there are not sufficient U.S. workers who are qualified and available to perform the work in question and (2) that employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. §655.1, subsection (a). The burden of proof is on the employer to show it is entitled to the labor certification. 8 U.S.C. §1361.

If the CO denies the application under 20 C.F.R. § 655.53, the employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.61(a). By designation of the Chief ALJ, I am BALCA for purposes of this appeal. 20 C.F.R. §655.61, subsection (d).

Standard of Review

BALCA reviews H-2B decisions under an "arbitrary and capricious" standard, *Brook Ledge, Inc.,* 2016-TLN-00033, at *5 (May 10, 2016), meaning I must uphold the CO's decision as long as its construction of the regulations is permissible and its "path may be reasonably discerned." *Motor Vehicles Mfrs. Ass'n. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983). I may reverse the CO's determination for a clear error of judgment, but I may not substitute my own judgment for the CO's. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Statement of the Case

As its name suggests, Employer is in the business of washing trucks and recreational vehicles. On or about November 1, 2017, Employer applied to the Department of Labor's Employment and Training Administration ("ETA") for a temporary labor certification. AF pp. 107-121.[3] In its application, Employer contended it had a temporary need for six foreign laborers to wash trucks:

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[2] On April 29, 2015, the Department of Labor ("DOL") 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. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications "submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015." IFR, 20 C.F.R. §655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

[3] I abbreviate references to the appeal file with an "AF" followed by the page number.

> Workers are needed to clean equipment as local workforce is insufficient to do so.

(AF p. 107).

The CO responded by identifying five deficiencies in the application, and requesting further information to remedy them (AF pp. 100-106). Although Employer submitted additional information, in the CO's view, two of those deficiencies remained. First, the application was untimely, having been filed only fifty-four days before its date of need, instead of seventy-five days before its date of need as required under 20 C.F.R. §655.15(b). Second, the CO concluded Employer had not demonstrated its need for foreign workers was temporary under 20 C.F.R. §655.6(a) and (b). (AF pp. 73-77). For these reasons, on December 18, 2017, the CO denied the application (AF pp. 71-72).

After the CO's denial, Employer submitted additional payroll and other information for consideration (AF pp. 2-70).

Discussion

1. Timeliness

Employer does not dispute the requirement of 20 C.F.R. §655.15(b) to its application.

Notifying Employer of the deficiency, the CO laid out three options. First, Employer could submit an emergency request "that meets the requirements outlined in 20 CFR 655.17." Second, Employer could amend the start date of need to comply with the seventy-five-day requirement (or give the CO written permission to modify the application accordingly). Third, Employer could withdraw the application altogether. The CO also directed Employer to other immigration programs which might be available. (AF pp. 100-101).

On November 27, 2017, Employer responded:

> The employer submits this emergency request as a first time filer. The employer states that it was his understanding that the 75-90 day prefiling period included the time for his Prevailing Wage Determination. The PWD was filed on 10/02/2017 and the employers *[sic]* beginning date of need is 12/26/2017. This would have been 85 days. The employer did not understand the 75-90 day time frame was from the time he needed to file his H2B application as this is his first time to use the H2B

> program. The employer requests you allow him to process his application and not delay his start date.

(AF p. 87).

In essence, Employer was asking the CO to overlook its own inexperience and accept the application in spite of its untimeliness. The CO was unmoved by this plea for lenience, possibly because Employer had chosen none of the three alternatives the CO had outlined. Employer had not submitted an emergency request conforming to 20 C.F.R. §655.17, had not changed its date of need (or authorized the CO to change the date of need on its behalf), and had not withdrawn its application. It had merely asked the CO to waive the regulatory requirement. (AF p. 74). It might have been helpful or courteous for the CO to do so, but in fairness, the CO's job is to enforce the regulations, rather than to waive them. More specifically, part of the CO's job is to make sure the domestic labor market cannot meet the Employer's need before issuing a Temporary Labor Certification (AF p. 74). Here, Employer did not give the CO time to complete that task, and did not make the case for an exception.

After the CO's denial, Employer, on January 4, 2018 (AF p. 1), e-mailed permission for the CO "to amend its start date to the time frame of 75 days from the date of the application filing." (AF p. 2). But I need not consider whether this belated authorization warrants the CO's reconsideration, because, as discussed below, I conclude Employer has not established a "temporary need," as the regulations define that term.

2. Temporary Need

The CO concluded the application did not establish a temporary need for non-agricultural services or labor (AF p. 101).

With this requirement, misunderstanding is common. "Temporary need," as the regulations define it, is something other than what an employer might identify as a "temporary need." As the CO told Employer,

> 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 DHS regulations* (emphasis added).

(AF p. 101). What employers frequently fail to appreciate is that the terms "one-time occurrence," "seasonal need," "peakload need," and "intermittent need" are specifically defined elsewhere in the Code of Federal Regulations at 8 C.F.R. §214.2, subsection (h)(6)(ii)(B):

> (B) Nature of petitioner's need. 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. . . . 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.
>
> (1) 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.
>
> (2) Seasonal need. The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.
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> (3) Peakload need. The petitioner 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.
>
> (4) Intermittent need. The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

Nowhere in the record before the CO's denial does Employer ever say, in so many words, that its need for workers is temporary because of a one-time occurrence, seasonal need, peakload need, or intermittent need.[4] In fact, judging from

[4] *After* the denial, on January 4, 2018, Employer stated "[t]he job opportunity is . . . intermittent in nature. During hurricane season the business has had a major weather related event. Hurricane Harvey flooded the area. Any workers that I had left for storm clean up and my business was nearly

the record, the importance of defining its need in one of these terms appears to have escaped Employer entirely. In the broadest sense, this is understandable. In Employer's view, it "needs an H2B labor certification to remain in business." (AF p. 2). There is no emergency more severe in business than a threat to the survival of the business itself. Nothing requires more urgent or immediate attention. But the CO must ensure that even a business facing such a threat does not resort to importing foreign workers when the domestic market can meet the need. It is the employer's responsibility to demonstrate it satisfies one of the conditions outlined in the regulations.

Thus, the CO was dissatisfied with the statement in the application that "[w]orkers are needed to clean equipment as local workforce is insufficient to do so." The CO observed,

> The employer did not sufficiently demonstrate how its need meets the regulatory standard. Further, the employer did not explain in detail what events caused the intermittent or other temporary need and/or that it has not employed permanent or full-time workers to perform the services or labor in the past.

(AF p. 101). The CO asked Employer to describe its "business history and activities (i.e. primary products or services) and schedule of operations throughout the year" – presumably to see which of the four regulatory categories of "temporary need" might apply here – and "[a]n explanation regarding why the nature of the job opportunity and number of foreign workers being requested for certification reflect an intermittent, temporary need." (*Id.*)

Employer replied,

> The job opportunity is for 6 foreign workers that will have the understanding that there will be times where there will be several trucks waiting to be cleaned and times when no trucks are there. The foreign workers will be paid hourly and will understand this. The local workers were never happy with this system and would only show up occasionally causing customers not to return to my truck wash. Operations are first in first out. Seasonality is a huge part of the business as rainfall is excessive. Due to the geographic location at times rainfall will

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forced to close because of no workers" (AF p. 2). This explanation does not meet the regulatory definition of an "intermittent need." On the contrary, it sounds much more like a "one-time occurrence." But if Employer intends to show a temporary need because of a one-time occurrence, it should provide some estimate of how long after Hurricane Harvey the temporary workers would be needed before the domestic workers might be expected to return. For all I can tell, or for all the CO could tell, Employer might intend to keep the foreign workers on the job forever.

> occur 4 to 5 days non stop. The local workers would not be available as work resumed during sunny weather. See monthly attached invoices. There are no signed service contracts. Summarized payroll is attached.

(AF p. 88).

At this point, it appears to me the parties are talking past one another. Employer, instead of establishing an intermittent need, now suggests a seasonal need – a suggestion the CO apparently considered, despite a paucity of supporting information (AF pp. 76-77). What is more, Employer appears to suggest it wishes to hire foreign workers because they will tolerate working conditions domestic workers will not, an assertion that, at a minimum, does not show any form of temporary need.

The burden is on Employer to demonstrate "temporary need," as the regulations define it. Here, the Employer did not. On the record before me, I conclude the CO's denial was neither arbitrary nor capricious.

I can understand why a business owner who believes the future of his business is in jeopardy might have little patience for fine legal distinctions. I can even understand how a tax-paying American might feel badly served by a government agency which, when his business is going under, refuses to throw him a lifeline. But when an Employer seeks visas to bring foreign workers into the United States, the CO has a job to do, and must treat all applicants equally under the regulations. Employer is free to hire as many domestic workers as it likes, on whatever terms to which they may agree, without involving the CO in any way.

Conclusion

The CO's denial of certification is affirmed.

SO ORDERED.

For the Board:

CHRISTOPHER LARSEN
Administrative Law Judge