



Issue Date: 27 March 2018

BALCA CASE NO.: 2018-TLN-00080

ETA CASE NO.: H-400-17358-675535

In the Matter of:

COOPER ROOFING & SOLAR,
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the labor certification process for temporary non-agricultural employment in the U.S. under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart A.¹ 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 Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(ii)(B).²

On February 16, 2018, the Certifying Officer (“CO”) for the Office of Foreign Labor Certification denied the H-2B Application for Temporary Employment Certification (“Application”) of Cooper Roofing & Solar (“Employer”) because the job request failed to establish the job opportunity as temporary in nature. *See* 20 C.F.R. § 655.6(a) and (b). Employer timely requested administrative review on March 1, 2018, and the Appeal File (“AF”) was provided on March 13, 2018. Neither Employer nor the CO filed a brief on appeal.

This proceeding is before the Board of Alien Labor Certification Appeals (“the Board”) pursuant to § 655.61(a).³ As explained below, this Decision and Order affirms the denial of certification and denies Employer’s request for relief.

¹ On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security (“DHS”) jointly published an Interim Final Rule amending the regulations at 20 C.F.R. Part 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) (“2015 IFR”). The H-2B program currently operates under the 2015 IFR.

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

³ The Chief ALJ may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.61(d).

Background

Employer is a roofing company operating in Las Vegas and Reno, Nevada. AF at 106. On January 1, 2018, Employer filed its Application seeking certification to hire 20 helpers-roofers from April 1, 2018, to December 15, 2018. AF at 97. In its “Statement of Temporary Need,” Employer stated:

This is a petition for re-certification: H-400-16027-544186; same number of employees; two week earlier start date.

As with last year, we are asking the DOL to certify that a sufficient number of able, willing and qualified U.S. workers are NOT available at the time and place needed to fill the roofer-helper opportunities for which this certification is being requested because of the winter-related slow down in residential building in Nevada.

Id. Attached to Employer’s current Application was an application that was certified on April 25, 2016, for 20 helpers-roofers from April 25, 2016, to December 15, 2016 (case number H-400-16027-544186). AF at 106-114. In the 2016 application, Employer stated that its “need for temporary employees is in response to a peak load event which in Reno, NV begins in April and extends to Mid-December of each year.” AF at 106. Employer’s yearly schedule is determined by how major housing developers operate, described thusly:

Developers in Reno Metropolitan area will use January through March as their home planning and new model building months where only a few slabs are poured which is typically slow season for us. Most builders imposed themselves yearly goals, based on a myriad of economic variables. Roofers start getting busier in the Reno, NV market right after the framers in April (depending on how early in the year every gets in gear and this is where our peak season begins) due to the fact that we are right after framing. The early goal for most developers is to build and ready homes at subdivisions for the showroom season which is in the spring season. With orders at hand, then we get even busier through-out the summer months and all the way through mid-December because we need to fulfill the demand sold and additional spec homes demanded by builders for year-end closings and public reporting. Finally, late December through March is slow again and it will usually be used for repairs and pick up work.

AF at 106, 112. In the 2016 application, Employer asserted that it manages its workload during its slow time with its permanent workforce, but that it had not been able to find the needed temporary helpers during the peakload need. AF at 112. Also attached to Employer’s current Application was the notice of acceptance of case number H-400-16361-435932, dated February 27, 2017. AF at 116.

On January 24, 2018, the CO issued a Notice of Deficiency (“NOD”), stating that Employer failed to establish that the job opportunity was temporary in nature in accordance with 20 C.F.R. § 655.6(a) and (b). AF at 94. The CO stated that the Employer’s request to refer to case H-400-16027-544186 alone did not justify its requested peakload need. *Id.* The CO noted that Employer explained it needed help due to the winter-related slowdown in residential building, but the CO contended that the Employer is located in Nevada, “which has weather conditions relatively favorable to year-round outside work.” *Id.* The CO stated it was not clear if the peak season was

“centered on [Employer’s] past ability to acquire a temporary workforce,” and contended that “it is unclear why the employer does not secure sufficient contracts during its nonpeak times, December through March.” AF at 94-95. The CO stated that a labor shortage in and of itself, no matter how severe, is not inherently a temporary event. AF at 95. Finally, the CO concluded that it was not clear if there is a “true peak” in Employer’s business during the dates requested and if Employer will experience a lull in business from December 16th through March 31st. *Id.* The CO requested additional information to cure the deficiency, including an updated statement of temporary need, and certain evidence and documentation, including: summarized monthly payroll reports from two previous years identifying the hours and earnings for full-time permanent and temporary workers in the requested occupation; a summary of monthly projects from two previous years in Employer’s area of intended employment; signed contracts for each project identified in Employer’s project summary; evidence that the work cannot be done during certain times of the year; and any other evidence justifies the standard of need and dates of need being requested for certification. AF at 95-96.

Employer responded to the NOD on February 7, 2018, providing various documents. *See* AF 23-90. Employer provided a copy of the Form I-797B Notice of Action from the Department of Homeland Security (“DHS”) for allowance of 20 workers in 2016; a request for evidence letter from DHS asking Employer to justify its need for 25 workers, also from 2016; Employer’s response to DHS, dated June 6, 2016; another copy of the certified application from 2016 certifying 20 workers for Employer (case number H-400-16027-544186); weather history for Reno for July 2013; and a number of articles about the housing industry and housing demand in Reno. *Id.* The June 6, 2016 response to DHS was based on Employer’s need for 25 workers for the 2016-2017 season and provided a chart showing monthly overtime paid from 2013-2015 that omitted the months of January and February. AF at 41. The response also described the nature of Employer’s business and stated that Employer “satisfies the majority of its work as promised in contracts and statements-of-work with southern Nevada general construction contractors during the summer construction season” and its “ability to hire sufficient temporary workers locally for spring-to-fall construction is virtually nil (zero).” AF at 38, 41. In its emailed response to the NOD, Employer also disagreed that the local weather allows for year-round construction as “Reno is a winter-resort destination.” AF at 23.

On February 16, 2018, the CO issued a Non Acceptance Denial Letter because Employer did not sufficiently demonstrate a peakload need. AF at 10-22. The CO asserted that in its response to the NOD, Employer submitted no documentation to demonstrate that it secured “additional business opportunities and work projects as a result of the growing housing market in Northern Nevada.” AF at 15. The CO argued that a growing housing market does not necessarily support a temporary need that is not year-round. *Id.* The CO then noted that Employer submitted documents related to its previous application, H-400-16027-544186, and that Employer stated in Section B.9 of its current Application that this is a petition for “re-certification” of the previous case. *Id.* The CO asserted that the regulations require that Employer substantiate its temporary peakload need for the period requested on the instant application, April 1, 2018, through December 15, 2018. *Id.* According to the CO, “[e]ach application is reviewed and evaluated on its own merits,” and Employer did not provide any supporting documentation for its current need. *Id.* The CO dismissed the climate data provided as “incomplete and obsolete,” concluding the document provided did not sufficiently establish that winter weather conditions in Reno influenced Employer’s peakload need. *Id.* The CO also noted that Employer failed to provide the requested monthly payroll reports, a summary of prior monthly projects in Employer’s area of intended employment,

and any signed contracts or work agreements, nor any alternative documentation to establish a temporary peakload need for the period of need requested. *Id.* Therefore, the Application was denied. AF at 16.

Scope and Standard of Review

The scope of the Board's review in the H-2B program is limited. When an employer requests a review by the Board under section 655.61(a), the Board may consider only "the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5).

Neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review of the CO's denial of certification, but the Board has fairly consistently applied the arbitrary and capricious standard in reviewing the CO's determinations. *Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016)⁴; *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017). However, some opinions have not discussed a standard of review, and others issued by the Board have suggested that the CO's determinations should be reviewed, at least at times, *de novo*. See, e.g., *Roadrunner Drywall Corp.*, 2017-TLN-00035, slip op. at 3, n.11 (May 4, 2017) (citing *Albert Einstein Medical Center*, 2009-PER-00379 (Nov. 21, 2011) (*en banc*)); *Sands Drywall, Inc.*, 2018-TLN-00007, slip op. at 3. (Nov. 28, 2017), *Zeta Worldforce, Inc.*, 2018-TLN-00015, slip op. at 4 (Dec. 15, 2017) (suggesting a hybrid approach where a CO's policy-based determinations would not be overturned unless arbitrary, capricious, or inconsistent with the established policy interpretation, but absent such an established policy-based interpretation of the regulations, reviewing the CO's denials *de novo*).

In this case I would affirm the CO's decision whether I afforded it deference or not.

Discussion

An employer seeking certification must show that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by DHS.⁵ 8 C.F.R. § 214.2(h)(6)(ii)(B); 20 C.F.R. § 655.6(a), (b). Temporary service or labor "refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary." 8 C.F.R. § 214.2(h)(6)(ii)(A); 20 C.F.R. § 655.6(a). The DHS regulations provide that employment "is of a temporary nature when the employer needs a worker for a limited

⁴ A three-judge panel of the Board adopted the "arbitrary and capricious" standard in *Brook Ledge* after referencing *J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2015), a case reviewing the denial of labor certification under the H-2A program. *Brook Ledge Inc.*, slip op. at 5-6. After noting that the CO argued that the Board should defer to the OFLC's interpretation of a regulation unless it is arbitrary, capricious, an abuse of discretion or not in accordance with law, the panel stated, "Generally speaking we do not disagree with the CO's characterization of its role vis a vis OFLC. We have previously acknowledged that BALCA reviews decisions under an arbitrary and capricious standard. See *J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2015). We take no issue with the assertion that BALCA should defer to OFLC's rational and reasonable interpretation of an ambiguous regulatory term." *Id.* at 5.

⁵ Since the definition of temporary need derives from DHS regulations that have not changed, 8 C.F.R. § 214.2(h)(6)(ii), pre-2015 decisions of the Board on this issue remain relevant.

period of time. The employer must establish that the need for the employee will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). The employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. *Alter and Son Gen. Eng'g*, 2013-TLN-00003, slip op. at 4 (Nov. 9, 2012); *BMGR Harvesting*, 2017-TLN-00015, slip op. at 4 (Jan. 23, 2017). 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); *Masse Contracting*, 2015-TLN-00026 (April 2, 2015). 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. *Empire Roofing*, 2016-TLN-00065 (Sept. 15, 2016).

Applications are properly denied where the employer did not supply requested information in response to a Notice of Deficiency. 20 C.F.R. § 655.32(a) (“The employer’s failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification.”); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016); *Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017). However, where an employer explains why it cannot produce the requested documentation and provides alternative evidence, it is an abuse of discretion for the CO to deny certification without considering whether such alternative evidence is sufficient to carry the employer’s burden. *International Plant Services, LLC*, 2013-TLN-00014, slip op at 6 (Dec. 21, 2012).

The CO’s reasoning was flawed in certain respects. First, the CO apparently did not consider Employer’s statement that Reno is a winter resort destination, instead only finding that the weather data provided by Employer was “incomplete and obsolete” and did not establish that winter weather conditions in Reno “would influence the employer’s need for a peakload workforce during the dates of need requested.” AF at 15. This conclusion reflects a failure to consider all of the relevant information provided by Employer regarding the impact of the weather on Employer’s operations.⁶ More seriously, the CO appeared to overlook Employer’s description of how major housing developers operate in Reno, Nevada and why this creates a general peakload need between April and mid-December. This explanation, albeit part of Employer’s 2016 application, shows that Employer’s alleged peakload need is related to the timing of various stages of construction in Reno. However, while the CO appeared to overlook Employer’s explanation for why there is a general peakload need for workers from April through mid-December, the CO did not err in determining that Employer failed to support its current need.

Employer relied almost entirely on its 2016 application and related documents, in addition to the number of articles demonstrating a housing shortage in the Reno area. Employer cannot simply rely on the certification of a previous application to meet its burden to show that its need is

⁶ There is also no apparent basis for the CO’s original conclusion that weather conditions in Nevada are “relatively favorable to year-round outside work.” Nevada is a large state with varying weather patterns; the CO’s bare assertion that work can be conducted outside year-round, which is without any support in the record, undermines her conclusions. This is especially so after Employer brought to the CO’s attention the fact that Reno is a winter resort destination and the CO continued to dismiss weather as a reason for a winter-related slowdown in the construction industry. If this were the only reason for the CO’s denial, it is unlikely the decision could be affirmed under even the “arbitrary and capricious” standard.

temporary. *DialogueDirect, Inc.*, 2011-TLN-00038 and 00039, slip op. at 8, n.5 (Sept. 26, 2011) (the CO's prior decision to grant certification does not constitute a waiver of the regulatory requirement that the employer demonstrate that its need is temporary); *Rollings Sprinkler & Landscape*, 2017-TLN-00020 (Feb. 23, 2017) ("The fact that the CO may have approved similar applications in the past is not ground for reversal of the denial."). Recently, the Board has held that while certification is not guaranteed based on previous years' approvals and each application must stand on its own merits, current applications should reasonably be reviewed within the context of previous certifications, and the understanding that the CO had concluded that the basic requirements for certification had been met in the previous years. *H & H Tile and Plaster of Austin, Ltd.*, 2018-TLN-00049, slip op. at 11 (ALJ Feb. 16, 2018), citing *Jose Uribe Concrete Constr.*, 2018-TLN-00044 (Feb. 2, 2018). In these recent cases, however, the employer had provided some supporting evidence of its current temporary need. Here, in contrast, Employer provided no recent payroll evidence, no contracts or letters of intent, no description of recent projects, and no other evidence demonstrating it has a temporary need for the dates requested. Therefore, even within the context of Employer's previous certification, Employer did not sufficiently demonstrate that its current application should be certified.

The Board has observed that a general industry-wide increase in work will not necessarily result in a peakload need for a specific employer; the employer still needs to demonstrate that it actually has a temporary need. *Munoz Enterprises*, 2017-TLN-00016, slip op. at 7 (Jan. 19, 2017) ("a general increase in construction work...will not necessarily result in a 'peakload' need for the Employer, rather it depends on the amount of work the Employer is contractually obligated to perform, when such work must be performed, whether the Employer's contractual obligations overlap, and how many permanent workers are employed by the Employer."). While there may be a general housing construction boom in Reno, Employer failed to provide sufficient evidence linking this general increase to a current, specific temporary need. For example, the chart provided in Employer's 2016 response to DHS shows overtime paid per month from 2013 to 2015, but omits the months of January and February. AF at 41. Not only is the chart three years old, it does not demonstrate that there is a slowdown in Employer's alleged off-peak months. It is therefore insufficient to demonstrate that it has a legitimate current peakload need from April through mid-December, 2018. Additionally, in its 2016 response to DHS, Employer merely stated it "satisfies the majority of its work as promised in contracts and statements-of-work with southern Nevada general construction contractors during the summer construction season." AF at 38, 41. Employer stated in its 2016 application that it has a temporary need in Reno, Nevada from April to mid-December "each year." AF at 106. These statements, without supporting documentation, are insufficient to carry its burden to show that it has a current temporary need. *AB Controls & Technology*, 2013-TLN-00022 (Jan. 17, 2013) (bare assertions without supporting evidence are insufficient to carry the employer's burden); *accord, BMC West*, 2016-TLN-00039, slip op. at 5 (May 18, 2016).

The CO also properly denied the application because Employer failed to supply requested information in response to the NOD and provided no explanation for this failure. *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016); *Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017). The CO specifically requested various documents demonstrating Employer's temporary need for the current Application. In response, Employer provided none of the documentation requested to substantiate its current need, such as recent payroll records, a summary of monthly projects, and signed contracts, and Employer offered no explanation why it could not produce such documentation.

For the forgoing reasons, the CO's denial of certification is affirmed.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge