



Issue Date: 14 May 2018

BALCA Case No.: 2018-TLN-00120
ETA Case No.: H-400-17330-529135

In the Matter of:

HERNANDEZ TEXAS FIVE STAR CONSTRUCTION, INC.,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearance: Robert Kershaw, Esq.
The Kershaw Law Firm, PC
Austin, Texas
For the Employer

Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Jason A. Golden
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from Hernandez Texas Five Star Construction, Inc.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Non Acceptance Denial in an H-2B temporary alien labor certification matter. The H-2B non-immigrant 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 seek to hire foreign workers under this

¹ 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).

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. §

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. A CO in the Office of Foreign Labor Certification of the Employment and Training Administration (“ETA”) reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or the “Board”). 20 C.F.R. § 655.61(a).

BACKGROUND

A. Employer’s H-2B Application

On January 1, 2018, the ETA received an Application for Temporary Employment Certification from the Employer (“Application”). The Employer sought a temporary labor certification to hire 10 carpenter-helpers from April 1, 2018 to December 31, 2018 (or 9 months). (AF 10.)³ The Employer described the nature of its temporary need as “peakload,” and justified such need as follows:

This is an application for re-certification: H-400-16357-542963; two additional temporary workers and the same dates of need--still in-line with the DOL Sept 2016 guidance on re-registration.

Our company currently requires the services of laborers to perform manual labor associated with construction such as cleaning and preparing worksites, fastening timber and lumber with the glue, performing tie spacing and measuring, drilling holes in timber and lumber, and loading and unloading materials. No education required. Transportation is provided to and from area work sites at employer’s expense from centralized pickup location. Our company has a temporary peakload need for persons with these skills because our busiest seasons are traditionally tied to the spring, summer and fall months, from approximately April 1st to December 31st, during which time we need to substantially supplement the number of workers for our labor force for these positions.

* * *

As is well known, **Texas Winters (during which time our business slows significantly each year due to the harsh winter weather conditions)** are normally predictable, and it is possible for us to predict that these dates are regularly when the coldest and slowest part of the season will be. These winter 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 months (we do however continue to employ some year round workers). Our temporary peak load workers are only needed during our busy season and do not become a part of our

655.4(e). The rules provided in the IFR apply to this case. All citations to 20 C.F.R. Part 655 in this Decision and Order are to the IFR.

³ References to the appeal file in this Decision and Order are abbreviated with an “AF” followed by the page number.

permanent labor force. **Due to the nature of our work we are unable to engage in much business during the winter months, of approximately December 31st to March 31st because the cold and wet weather is not conducive to framing and other residential construction.**

(AF 27, 37 (emphasis added).) The Employer identified locations in Burnet, Llano, Hays, and Travis Counties in Texas as the areas in which the carpenter-helpers would work. (AF 30, 38, 46.)

B. CO's Notice of Deficiency and Employer's Response

On January 30, 2018, the CO issued a Notice of Deficiency ("NOD"). The CO identified the following deficiencies in the Employer's Application: (1) a failure to establish that the job opportunity is temporary in nature; and (2) a failure to establish temporary need for the number of workers requested. The CO explained the first deficiency by stating that the Employer did not submit sufficient information to establish its requested standard of need or period of intended employment. The Employer cited harsh winter weather conditions as the reason for its annual slowdown in business and resulting peak need from April 1 to December 31. (AF 21-26.) However, the CO noted that:

[H]istorical weather data for the employer's area of intended employment (AIE) contradicts the employer's reason for its temporary need. The lowest average temperature is a mere 50° (in both December and January), whereas May remains the highest month of precipitation.

* * *

Based on this data, the claim of a peakload need between April and the end of December appears questionable as the employer intends to conduct operations within AIEs conducive to year-round work.

(AF 24-25.)

With respect to the second deficiency, the CO explained that the Employer's Application seeks certification for 10 carpenter-helpers, but the addendum to the Application seeks only 8 carpenter-helpers. The CO stated that "[i]t remains unclear as to whether the employer requires either 8 or 10 temporary workers, as well as the employer's need for either 8 or 10 workers." (AF 26.)

The CO requested that the Employer submit additional documentation to cure these deficiencies, including: (1) a statement describing the Employer's business history and activities and schedule of operations throughout the year; (2) an explanation and supporting documents that substantiate the Employer's statement that construction activity slows significantly each year due to harsh winter weather conditions in the AIE; (3) summarized monthly payroll reports for a minimum of 2 previous calendar years; (4) an explanation with supporting documentation of why the employer is requesting the desired number of carpenter-helpers; and (5) if applicable,

documentation supporting the employer's need for the desired number of carpenter-helpers such as contracts, letters of intent, etc. that specify the number of workers and dates of need. (AF 25-26.)

In response to the NOD, the Employer submitted a letter of intent to use Employer's services from McClung Custom Homes ("McClung"). The letter states that McClung intends to use Employer's services in 2018; that the peak months that services are performed for McClung by the Employer are January through December 2018; and, it is difficult, if not impossible, to find U.S. workers ready, willing and able to perform this work. (AF 20.)

C. CO's Non Acceptance Denial and Request for Administrative Review

On April 10, 2018, the CO denied the Employer's Application. In reaching her final determination, the CO considered the Employer's Application and its response to the NOD. The stated deficiencies underlying such denial were the same as those in the NOD. The CO found that the Employer's response to the NOD did not include the documentation requested by the CO; the letter from McClung actually contradicted the Employer's claimed peakload need because McClung sought the Employer's services for the full calendar year of 2018; and, the Employer had not overcome the stated deficiencies. (AF 8-12.)

The Employer submitted this timely appeal to the Board on April 24, 2018, within 10 business days of the CO's decision. As the basis for its appeal, the Employer asserted that the CO "determined that [the Employer] failed to establish that it failed to properly timely recruit. See 20 C.F.R. Secs. 655.6(a) and (b)." (AF 1.)⁴ The parties' briefs were due no later than May 11, 2018. The Employer filed its brief on May 9, 2018. The CO has not filed a brief.

DISCUSSION AND APPLICABLE LAW

A. Standard of Review

The Board's standard of review in H-2B cases is limited. The Board 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 the CO issued a final determination. 20 C.F.R. § 655.61. After considering the evidence of record, the Board 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).⁵

⁴ The Employer appears to have erred in stating its basis for appealing the Non Acceptance Denial since the stated basis has nothing to do with the Non Acceptance Denial or the arguments in Employer's brief. Nonetheless, I will consider the arguments raised by the Employer in its brief.

⁵ Additionally, the Board has adopted the position that review of the CO's determination of H-2B applications is governed by the "arbitrary and capricious" standard. *Three Seasons Landscape Contracting Service, Inc. DBA Three Seasons Landscape*, 2016-TLN-00045, *19 (Jun. 15, 2016); *Brooks Ledge, Inc.*, 2016-TLN-00033, *4-5 (May 10, 2016); see also *J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016).

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, *7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, *2 (Sep. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, *5 (Jul. 28, 2009). 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), 655.11(a)(3). The Employer “must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” 20 C.F.R. § 655.6(a). The applicable regulation at 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 alleges that it has a peakload need for 10 carpenter-helpers. In order to establish 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).

B. The CO’s Determination that the Employer Failed to Establish that the Job Opportunity is Temporary in Nature

The CO’s determination that the Employer failed to establish its claimed peakload need from April 1 to December 31, 2018, was based on the Employer’s failure to submit adequate documentation and the CO’s apparent research of historical weather data regarding the weather in the Employer’s area of intended employment (AIE). According to the CO, the historical weather data showed that the lowest average temperature is a 50° in both December and January, and May has the highest precipitation of any month. This data certainly makes it reasonable to question the Employer’s assertion that it has a peakload need from April 1 to December 31, 2018, because of cold and wet weather.

The Employer’s response to the NOD did not attempt to refute the historical weather data or explain the inconsistency between such data and Employer’s assertion regarding the weather. Instead, the Employer’s response further contradicted its claimed peakload need because McClung described its need for the Employer’s services as being from January through December 2018, not from April 1, 2018 through December 2018.⁶ Moreover, the Employer’s response did not provide the documentation requested by the CO.

⁶ The CO did not include a copy of her cited, historical weather data research in the appeal file. I do not find this problematic here because the Employer did not attempt to refute such data in its NOD and its response actually

The Employer's brief sheds no additional light on the basis for the Employer's alleged peakload need. The brief states:

[The Employer] already *had* explained why its peak season occurs in the non-winter months, and it has little to do with the weather. AR.P13-38. . . . There is no identified basis for the CO's patently subjective assessment of Nevada's winter climate or its suitability for residential construction, and none whatsoever appears anywhere in the record.

(Emp. Brf. 9.)⁷ The brief does not articulate a basis for the claimed peakload need that "has little to do with the weather," and I find no such basis in the record. Moreover, as discussed above, the CO's assessment of the weather in the AIE was not "patently subjective" as argued by the Employer. Instead, it was based on historical weather data, i.e., objective information.

The CO examined the relevant data and articulated a satisfactory explanation for her denial of Employer's Application. The CO's explanation is consistent with the evidence. Thus, the CO's decision that the Employer failed to establish that the job opportunity is temporary in nature was rational and supported by the evidence. It was not arbitrary and capricious.

C. The Employer's Reliance on the 9/16 Guidance

The Employer references the Employment and Training Administration's *Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers: Submission of Documentation Demonstrating "Temporary Need"* (Sep. 1, 2016) ("9/16 Guidance")⁸ in its Application, and heavily relies on the 9/16 Guidance in its brief. (AF 27, Emp. Brf.) The Employer argues that had the CO followed the 9/16 Guidance, she should have granted the Employer's Application without requesting additional supporting documentation. And, this alleged error by the CO requires reversal of her decision. The Board has rejected this exact argument before in *Cooper Roofing & Solar*, 2018-TLN-00056, PDF at 7-9 (Feb. 15, 2018).

In *Cooper Roofing & Solar*, assuming *arguendo* that it could consider the 9/16 Guidance, the Board found that once the CO requested additional documentation from the employer, it was incumbent upon the employer to produce such information. The Board also found that the employer failed to demonstrate that the CO was prohibited from requesting additional information. *Id.* PDF at 8-9.

The reasoning of the Board in *Cooper* is equally applicable here. Similar to the employer's application in *Cooper*, the Employer's Application in this case requested an increase in the number of additional workers for whom certification was sought. Assuming *arguendo* that the CO was required to follow the 9/16 Guidance, the fact that the Employer's Application

contradicts its claimed peakload need. However, it would be a better practice, helpful to the administrative law judge, and, in other cases, might be necessary for the CO to include a copy of such research in the appeal file.

⁷ Although the above quote refers to Nevada's winter climate, I assume the Employer is referring to the winter climate in Texas, the State in which the AIE is located.

⁸ [https://www.foreignlaborcert.doleta.gov/pdf/FINAL Announcement H-2B Submission of Documentation Temporary Need 082016.pdf](https://www.foreignlaborcert.doleta.gov/pdf/FINAL%20Announcement%20H-2B%20Submission%20of%20Documentation%20Temporary%20Need%20082016.pdf).

varied from the prior certification it obtained justified the CO's request for additional information. The Employer failed to provide the CO with such requested information. It failed to prove that it is entitled to temporary labor certification.

D. The CO's Determination that the Employer Failed to Establish Temporary Need for the Number of Workers Requested

Under the arbitrary and capricious standard, if there is any rational basis for the CO's determination, it must be sustained. *See Dellew Corp. v. United States*, 108 Fed. Cl. 357, 368 (Fed. Cl. 2012); *Erinys Iraq Ltd. v. United States*, 78 Fed. Cl. 518, 525 (Fed. Cl. 2007); *see also Spokane County Legal Services, Inc. v. Legal Services Corp.*, 614 F.2d 662, 669, n.11 (9th Cir. 1980). Since I have already found that the first deficiency in the NOD was a rational basis for denying Employer's Application, I will not address the second deficiency in the NOD, i.e., whether the Employer failed to establish temporary need for the number of workers requested.

ORDER

For the foregoing reasons, the Certifying Officer's final determination denying certification is **AFFIRMED**.

For the Board:

JASON A. GOLDEN
Administrative Law Judge