

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 March 2018

BALCA Case No.: 2018-TLN-00072
ETA Case No.: H-400-17361-992417

In the Matter of:

HIRSCHI MASONRY LLC,
Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Kevin Lashus, Esq.
Fisher Broyles, LLP.
Austin, Texas
For the Employer

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

Before: **CARRIE BLAND**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from Hirschi Masonry LLC’s (“Employer”) request for 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 non-agricultural 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 seeking to utilize this program must apply for

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2017, Pub. L. No. 115-30, Division H, Title I, § 113 (2017). This definition has remained in place through

and receive labor certification from the U.S. Department of Labor using Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). 8 C.F.R. § 214.2(h)(6)(iii). A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies the application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA”). 20 C.F.R. § 655.61(a).

BACKGROUND

On January 1, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer. AF 44-71.³ Employer requested certification for 25 “Helpers—Brickmasons, Blockmasons, Stonemasons, and Tile and Marble Setters” from April 1, 2018 until October 15, 2018. AF 44. Employer indicated that the nature of its temporary need was a peakload need, and explained that:

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 October 15th, during which time we need to substantially supplement the number of workers for our labor force for these positions.

AF 44.

On January 23, 2018, the CO issued a Notice of Deficiency (“NOD”) citing four deficiencies in Employer’s application. AF 35 – 42.

First, the CO identified a “failure to establish temporary need for the number of workers requested,” and stated that the employer “has not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities.” AF 38. The CO noted that the employer also received certification for 25 Mason-Helpers from January 16, 2018 to October 15, 2018 in its previous application, H-400-17306-894078. The employer therefore, by this request, had requested a total of 50 workers for its 2018 season. The CO stated that the employer did not indicate how it determined that it needs 25 additional workers during the requested period of need.

subsequent appropriations legislation, including the current continuing resolution. *See* Further Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-123, Division B, Title XII, Subdivision 3, § 20101 (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. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

³ References to the 71-page appeal file will be abbreviated with an “AF” followed by the page number.

To correct Employer's failure to establish temporary need for the number of workers requested, the CO requested that the Employer submit supporting evidence and documentation to support the number of positions being requested, including, but not limited to:

1. A statement indicating the total number of workers the employer is requesting for the 2018 season;
2. An explanation with supporting documentation of why the employer is requesting an additional 25 workers for the same worksites; and
3. If applicable, documentation supporting the employer's need for an additional 25 workers such as contracts, letters of intent, etc. that specify the number of workers and dates of need.

AF 38.

Second, the CO identified a "failure to establish the job opportunity as temporary in nature" and requested further information and documentation to demonstrate Employer's temporary peakload need. Specifically, the CO requested that Employer provide:

1. A description of the employer's business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need;
3. An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need;
4. Signed service contracts from customers for the previous one calendar year; and
5. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system.

AF 40.

Third, the CO identified a "failure to submit an acceptable job order" in that the job order did not specify the worksite location and the dates of need on the job order did not match the dates of need on Form 9142. The CO requested the employer submit an already-amended job order that contains all required language indicated below or submit amended job order language, which includes the following required information:

1. Indicate the geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor; and

2. Describe the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity.

AF 42.

Fourth, and finally, the CO identified a “failure to submit a complete and accurate ETA Form 9142” in that the dates of need in the job order were inconsistent with the employer’s application. The CO noted that “the job order indicates that the dates of need are January 15, 2018 to October 15, 2018. However, the ETA Form 9142 indicates that the dates of need are April 1, 2018 to October 15, 2018.” The CO requested modification of the application to make the dates of need consistent in the employer’s application. AF 43.

On February 6, 2018, Employer responded via email to the NOD, including in its response an amended job order; residential sales trends and workload; outstanding bids and projected awards from November 2017 through February 2018; and statistics showing overtime trends for April 2016 through November 2017.⁴ AF 26 – 34. With regard to its amended statement of temporary need, Employer explained:

Last year, we requested 50 workers. This year, we need to insure against essentially what has occurred—the expiration of the 1st half visas, and the over-competition for the 2nd half visas. The data—particularly overtime hours and dollars spent shows two peakload seasons. The both conclude during the same mid-October period of time. We still require 50 workers, just in two separate admissions. We don’t require workers after mid-October. We never have. The application referred to in Deficiency 2 was withdrawn without prejudice and shouldn’t be used in comparing these 2018 dual requests.

AF 26.

After reviewing the documentation that Employer submitted in response to the NOD, the CO concluded that Employer did not meet the regulatory requirements and issued a Final Determination denying the Employer’s application for temporary labor certification. AF 11 – 25. The CO denied Employer’s application because Employer failed to correct two of the stated deficiencies in the NOD. AF 13. Specifically, the CO noted that the Employer failed establish the job opportunity as temporary in nature (AF 13) and failed to establish temporary need for the number of workers requested (AF 16).

The CO determined that Employer did not demonstrate how its need met the regulatory peakload need standard. AF 14 – 16. The CO further explained the reasoning for the denial:

⁴ The CO contends that the response to the NOD was due on February 6, 2018, and was not received at the Chicago NPC until February 8, 2018. However, the Response was emailed to the Chicago NPC on February 6, 2018, 3:29 P.M. CST.

The Employer states it has two peakload seasons and references the overtime chart provided as proof of this. However, it failed to explain what it believes are its two peakload periods and the Department cannot ascertain this from the overtime chart. The overtime chart does show a drop in overtime hours and wages in January, February and March; however, based on the Employer's explanations, it is unclear if the Employer has an actual peakload need or if its need is subject to shifting based on when new contracts may be awarded.

In its NOD response the Employer again reinforces the timeline of when a contract is awarded and the corresponding start date for work to begin, which the Employer indicates is typically three months after the contract award date. A chart provided by the Employer in its response to the NOD shows the relation between contract award date and workload. The Department understands and accepts that there is a delay between when a contract is awarded and when the work actually begins. However, no information was provided as to *why* contracts are awarded at certain times of the year more so than others. The Employer clearly states that it's not necessarily about weather, but provided the following reasoning, "[t]his is residential and commercial construction. Activity drops during November through April." This statement was provided without any explanation as to why activity drops November through April for the type of work in an area of intended employ[ment] where weather does not affect the ability to perform the work. The Employer is in the business of accepting contracts for work and, absent information and documentation to support a temporary need, it appears that it has a year-round need for workers.

The Employer also submitted a document demonstrating the sales trend for four quarters, but did not provide any information to tie it with the Employer's stated temporary need. In the *Outstanding Bids/Projected Awards* section, the Employer provided a list of work that the employer is projected to win over the next several months; however, the start and end dates and worksites of the projects are not specified, nor does this necessarily support a *temporary need* as opposed to the ongoing securing of contracts for services.

In the section of the document entitled *Backlog*, the Employer states that, "work is scheduled to start in the next 3-4 months. This statement contained in the Employer's NOD response is dated February 5, 2018. If, according to the Employer, work is to begin in three to four months that would place the Employer's expected start date in May or June, which is contrary to the Employer's stated start date of need for this current application which is April 1, 2018.

Finally, the Employer was specifically requested to provide summarized payroll in a specific format. The employer did not respond to this request and provided no explanation as to why the payroll was not provided.

The employer has failed to show that it needs to temporarily supplement its

permanent staff at the place of employment due to a seasonal or short-term demand. The employer has also failed to comply with Departmental regulations at 20 CFR 655.6(a) and (b), in that it has failed to show that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.

AF 15 – 16.

The CO also determined that the Employer did not indicate how it determined that it needs 25 additional workers during the requested period of need. AF 16-17. Further explanation and documentation was required in order to establish the Employer's need for a total of 50 workers. The CO wrote:

The documentation provided by the employer such as charts showing sales trend, backlog, outstanding bids, projected awards, overtime trend, do not serve to validate the Employer's request for 25 workers. The Employer failed to directly address this issue in its response and failed to explain how the documentation provided supports its request for 25 workers.

AF 17.

On February 23, 2018, Employer requested administrative review of the CO's Final Determination/Denial. AF 1-10.

On March 5, 2018, the CO notified this Office via email that she did not intend to file a brief. Employer was afforded the opportunity and on March 9, 2018, filed its *Applicant's Brief on Appeal* (hereinafter "Employer's Brief") via email, with opposing counsel copied onto the communication. In its brief, Employer argued that the CO failed to follow recent departmental guidance regarding the processing of renewal applications like its own. Employer further argued that ignoring its filing history despite the recent guidance's clear directive to take such history into account was arbitrary and capricious and warrants reversal on its face.

Employer stated that "[t]he clearest basis for reversing the denial of Hirschi's application is that the decision is starkly at odds with the Department of Labor's 2016 guidance regarding subsequent determinations of an employer's previously certified temporary need and the evidence necessary to support such a subsequent determination." Employer's Brief at 3. Employer points to language used in a 2012 Interim Rule (the "2012 Rule") as well as a 2015 Interim Rule (the "2015 Rule") provided by the Department of Labor on the evidence necessary to substantiate an employer's temporary need.⁵ Employer equates certain language in these rules as a "reduced burden to prove (and correspondingly lessen [the] degree of regulatory scrutiny of)

⁵ The "2012 Rule" refers to *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 77 Fed. Reg. 10,038 (Feb. 21, 2012), an interim final rule that was ultimately struck down. The "2015 Rule" was an interim final rule that was jointly published by the Department of Labor and the Department of Homeland Security on April 29, 2015. *See supra*, at fn. 2.

temporary need for employers that have previously demonstrated such need's existence in their businesses.”⁶

Under the 2012 Rule, for the first time, employers would file a multi-year registration of temporary need; if approved, “the registration would be valid for a period of up to 3 years, absent a significant change in conditions.” 77 Fed. Reg. at 10,058.

...

In particular, like the 2012 Rule, the 2015 Interim Rule “adopts an employer registration process that requires employers to demonstrate their temporary need for labor or services before they apply for a temporary labor certification,” which, upon approval, “remain[s] valid for up to three years, thereby shortening the employer’s certification process in future years.” 80 Fed. Reg. 24,042 (Apr. 29, 2015).

Employer’s Brief at 4.

APPLICABLE LAW

BALCA’s standard of review in H-2B cases is limited. BALCA reviews H-2B decisions under an arbitrary and capricious standard. *See Brooks Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). BALCA 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 the Final Determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA 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).

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, slip op. at 7 (Jan. 10, 2011); *Andy and Ed, Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer’s application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

Employer is required to establish that its need for the workers requested is “temporary.” Temporary is defined by the regulation at 8 C.F.R. § 214.2(h)(6)(ii). That regulation states, in pertinent part:

⁶ Employer’s Brief at 5.

(A) Definition. Temporary services or labor under the H-2B classifications 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.

(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. 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.

8 C.F.R. § 214.2(h)(6)(ii)(A)-(B).

The employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; *Alter & 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). Pursuant to 20 C.F.R. § 655.6(a)-(b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peakload, or intermittent need. An employer establishes a “peakload need” if it shows it “regularly employs permanent workers to perform the services 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).

The employer must also demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3)-(4); *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017).

If I affirm the CO’s denial on any singular basis, I need not look further to other denial reasons to decide whether those would also be affirmed.

DISCUSSION

The CO denied certification because the Employer failed to correct two of the four deficiencies noted in the NOD. Specifically, the CO determined that the Employer failed to justify the temporary need for the number of workers requested and failed to establish that the job opportunity is temporary in nature. AF 11 – 25.

Employer’s argument regarding the 2016 Guidance is unconvincing on multiple grounds. First, the 2016 Guidance does not have regulatory effect and uses discretionary language. Next, even if the 2016 Guidance were controlling, Employer mistakenly interprets this language as an overall application to “temporary need.” The registration process mentioned in both the 2012 Rule and the 2015 Rule is specifically for a one time occurrence temporary worker—not

peakload need, which is the stated reason for the Employer's request for certification. With regard to a one time occurrence temporary worker, "[t]he 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.*" 8 C.F.R. § 214.2(h)(6)(ii)(B) (emphasis added). This provision does not apply to a peakload need. With regard to peakload need, there is no reduced burden for proving temporary need for employers that have proven such temporary need in the past. Employer has failed, on this basis, to show that the CO's denial of certification was arbitrary or capricious or otherwise not in accordance with law.

Employer next argues that the CO's conclusion that it failed to demonstrate a temporary peakload need is inconsistent with its past certifications and the record evidence of present need. In this regard Employer stated:

Moreover, when Hirschi's filing history is properly taken into account, the CO's substantive determination—that Hirschi failed to demonstrate a temporary peakload need for additional workers—represents a clearly erroneous conclusion in light of the entire administrative record. In truth, the evidence Hirschi supplied thoroughly debunked the unfounded concerns raised in the notice of deficiency, none of which could justify denial of the requested certification.

Employer's Brief at 7 – 8. Employer further argues that "[a]t its root, the CO's rational for rejecting Hirschi's application rested on her evaluation of a single phrase: 'no information was provided as to *why* contracts are awarded at certain times of the year more so than others.'" Employer argues that it had already adequately explained why its peak season occurs in non-winter months and argued that the CO's determination to deny was unsupportable because it was based on "the CO's patently subjective assessment of Nevada's winter climate ... and her own idiosyncratic meteorological biases about whether weather in other parts of the country truly qualifies as 'wintry.'" Employer's Brief at 8.

Employer applied for temporary labor certification for 25 workers which included "brickmasons, blockmasons, stonemasons, and tile and marble setters" on a "peakload" basis. AF 44. In the NOD, the CO requested that Employer submit additional information to remedy the deficiencies in the initial application.

The CO requested, among other things, that Employer submit supporting evidence and documentation that justifies the chosen standard of temporary need in the form of (1) signed service contracts from customers for the previous one calendar year; and (2) summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month, and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation was to be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system.

In its response to the NOD, Employer provided documentation in the form of data including residential sales trends, outstanding bids, and overtime hours/dollars spent. AF 28-32.

Employer argued that the data—particularly overtime hours and dollars spent—shows two peakload seasons. Employer stated that they required 50 workers in total for the 2017 year, and they still require 50 workers for 2018, but in two separate admissions. The Employer, however, failed to provide many of the requested documents, including summarized payroll, signed service contracts, and an explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need.

In the instant case, the Employer attempts to lay the blame for its deficient application at the feet of the CO by asserting that “the CO permitted [her] subjectivity [regarding the weather] to infect her analysis” and decision. Employer’s Brief at 9. What Employer ignores is that Employer—upon whom the burden of proof rests—failed to provide information necessary to review and grant its certification application. The signed service contracts were reasonably necessary to demonstrate when throughout the year Employer has a peakload need for temporary workers. Rather than comply with the CO’s request, Employer submitted an overtime chart as demonstration of its alleged two peakload seasons. The CO reasonably stated in her denial that Employer “failed to explain what it believes are its two peakload periods and the Department cannot ascertain this from the overtime chart.” AF 15. The CO’s request and denial of certification on this basis was not arbitrary and capricious or otherwise not in accordance with law in this regard.

In another instance, the CO requested summarized monthly payroll reports to ascertain the number of full time workers employed by Employer and the temporary need for workers from, at minimum, the previous year. The Employer failed to provide this information and provided no explanation as to why the necessary payroll information was not provided. As noted above, to establish a peakload need, the law requires an employer to establish that it is temporarily supplementing its regularly employed labor force due to a seasonal or short-term demand. Employer failed to provide this information to the CO as requested. The CO’s request for information and subsequent denial of certification was not arbitrary and capricious or otherwise not in accordance with law.

I find that the record demonstrates that the CO’s denial of certification based on the Employer’s failure to demonstrate a temporary need was not arbitrary and capricious or otherwise not in accordance with law. I also find that the Employer failed to justify the number of temporary workers requested. The Employer was asked to submit supporting documentation to establish that the number of worker positions being requested for certification is true and accurate and represents bona fide job opportunities. The Employer provided documentation in the form of charts showing sales trends, backlog, outstanding bids, projected awards, and overtime trends. The CO noted in its Final Determination that the documentation presented by Employer did not serve to validate the Employer’s request for 25 workers. The CO stated that Employer failed to directly address this issue in its response and failed to explain how the documentation provided supports its request for 25 workers. I agree with the CO. Nothing in the documentation provided by Employer demonstrates its need for 25 additional workers, and Employer failed to explain how the documentation supported such a need. It is Employer’s burden to prove the need and it did not. The CO’s denial of certification on this basis was not arbitrary and capricious or otherwise not in accordance with law.

CONCLUSION

For the reasons above, I find that the evidence presented by the Employer fails to support its temporary need for an additional 25 workers for the 2018 year. Based on the facts presented, I find that the CO's decision to issue a denial of Employer's application was not arbitrary and capricious or otherwise not in accordance with law.

In light of the foregoing, the Certifying Officer's decision denying certification is **AFFIRMED**.

SO ORDERED.

For the Board:

CARRIE BLAND
Administrative Law Judge

Washington, D.C.