

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 08 February 2018

BALCA Case No.: 2018-TLN-00051

ETA Case No.: H-400-17312-343328

In the Matter of:

J F LUNA CONSTRUCTION, LLC
Employer

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Sam Haddad, Esquire
Austin, Texas
For the Employer

Micole Allekotte, Esquire
Division of Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, DC
For the Certifying Officer

Before: **CLEMENT J. KENNINGTON**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h) and 20 C.F.R. Part 655 Subpart A. This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to J F Luna Construction, LLC’s (“Employer”) request for administrative review of the Certifying Officer’s (“CO”) denial of temporary labor certification under the H-2B program. For the following reasons, the Board affirms the CO’s denial of certification.

BACKGROUND

On November 8, 2017, Employer applied for temporary employment certification through the H-2B program to fill ten positions for “Cement Masons and Concrete Finishers” for the period of January 23, 2018 through November 23, 2018. (AF 136-232).¹

On November 17, 2017, the CO issued a Notice of Deficiency citing deficiencies regarding 20 C.F.R. §§ 655.6(a) and (b) and 655.11(e)(3) and (4).² (AF 129-135). Specifically, the CO notified Employer that its H-2B application was deficient pursuant to Sections 655.6(a) and (b) because Employer failed to 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 employer’s regular operation. Also, the CO noted it was not clear if the employer experiences a true peak in its business during its requested dates of need, and if the employer experiences a slowdown in business during its nonpeak dates. (AF 132-133).

The CO also determined that Employer did not sufficiently demonstrate that the number of workers requested on the application is true and accurate and represents bona fide job opportunities. In addition, the CO found Employer did not include adequate attestations to justify the need for ten cement masons and concrete finishers during the period of January 23, 2018 through November 23, 2018 pursuant to 20 C.F.R. §§ 655.11(e)(3) and (4). (AF 134-135).

On December 5, 2017, Employer responded to the CO’s Notice of Deficiency and submitted a response letter along with copies of previous certified employment applications, an amended Form 9142, statement of temporary need, quarterly tax reports, quarterly wage reports, letters of intent, invoices, and an economic forecast for Texas’s largest metropolitan areas. (AF 57-128).

On December 20, 2017, Employer requested to amend its dates of need from January 23, 2018 through November 23, 2018 to February 6, 2018 through November 9, 2018. (AF 52-54).

On January 1, 2018, the CO made its final determination regarding Employer’s H-2B application. (AF 35-51). The CO denied Employer’s application due to its failure to establish that the job opportunity is temporary in nature pursuant to 20 C.F.R. §§ 655.6(a) and (b) and due to its failure to establish its temporary need for the number of workers requested pursuant to 20 C.F.R. §§ 655.11(e)(3) and (4). (AF 37-43).

Specifically, the CO found that Employer did not submit sufficient information in its application to establish its requested standard of need or period of intended employment. While Employer explained it has a peakload need due to the natural climate changes, weather

¹ In this decision, AF is an abbreviation for “Appeal File.”

² On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. § 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015). These rules are effective and govern this case.

conditions, and customer needs for construction-related services, the CO noted the documentation to support its explanation was insufficient. The CO found Employer failed to submit the summarized payroll requested in the Notice of Deficiency for 2016 and up-to-date 2017 and it did not identify the total numbers of workers or staff employed, total hours worked, and total earnings received. Submitted tax documents were not specific to the requested position and did not include monthly hours worked by concrete finishers. Further, the economic forecast article indicated a shortage of workforce and was not specific to Employer's temporary need. Other documentation submitted by Employer did not make clear if its scheduled work would occur during its period of need. Finally, the CO noted Employer's request to amend its dates of need did not overcome its temporary need deficiency. (AF 37-40).

In addition, the CO also found Employer failed to establish a temporary need for the number of workers requested. Rather, the CO found Employer did not include adequate attestations to justify the need for ten workers during its period of need. While Employer provided customer letters of intent to support its temporary peakload dates of need, the CO found it did not submit documentation that showed how it quantitatively determined its number of workers needed. Rather, the CO noted the staffing and payroll documentation submitted was insufficient to establish Employer's need for workers on the dates requested. The CO also found it was unclear how many workers were needed for each project. Finally, the CO stated Employer's reliance on prior participation in the program did not establish its temporary need for workers. Thus, the CO determined Employer failed to meet the regulatory requirements at 20 C.F.R. §§ 655.6(a) and (b) and 20 C.F.R. §§ 655.11(e)(3) and (4) and denied Employer's application. (AF 41-43).

On January 9, 2018, Employer submitted a request for administrative review to the Board of Alien Labor Certification Appeals ("BALCA") appealing the CO's Final Determination in the above-captioned H-2B matter. (AF 1-34). On January 23, 2018, BALCA docketed the appeal and issued a Notice of Case Assignment. Pursuant to the Notice of Case Assignment, the CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services ("the Solicitor") in accordance with 20 C.F.R. § 655.33(b) on January 23, 2018. Because H-2B appeals are expedited, and in accordance with 20 C.F.R. § 655.33, the parties were given a brief due date of February 1, 2018. Thereafter, the parties timely submitted briefs.

On February 7, 2018, Employer filed a "follow-up" to its pending appeal brief in which it cited recent relevant BALCA decisions involving similar issues, similar dates of need, and Employer's Counsel. In addition, Employer also reiterated arguments presented in its appeal brief. (Emp. Supp. Br., pp. 1-4).

APPLICABLE LAW

The H-2B program permits employers to hire foreign workers on a temporary basis to "perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States]." 8 U.S.C. § 1101(a)(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). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* (“ETA Form 9142”) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20. After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer (“CO”), who will either request additional information or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012), “[t]he scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application.” 20 C.F.R. § 655.33(a), (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).

After considering all 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. § 655.61(e)(1)-(3).

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.”); *Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016).

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. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b); 20 C.F.R. § 655.11(a)(3). 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 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.” 8 C.F.R. § 214.2(h)(6)(ii)(B). That period of time is usually limited to less than one year but may last up to three years in cases of a one-time event. (*Id.*) 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 Tampa Ship*, 2009-TLN-44, slip op. at 5 (May 8, 2009).

Employer alleges it has a peakload need for ten cement masons and concrete finishers from January 23, 2018 through November 23, 2018. In order to establish a peakload need, Employer must establish 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). Generally, the regulations state that a temporary need lasts for less than a year, though certain circumstances can warrant extensions of time. 8 C.F.R. § 214.2(h)(6)(ii)(B).

Federal regulations require that the *Application for Temporary Labor Certification* under the H-2B program be denied where the employer has a “need” lasting more than nine months, unless the need is based on a “one time occurrence.” 20 CFR §655.6(b); also, 80 Fed. Reg. 24055-24056 (Apr. 29, 2015). For the “one time occurrence” exclusion, the Employer “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 CFR §214.2(h)(6)(ii)(B)(1). “The use of this [one time occurrence] category is limited to those circumstances where the employer has a non-recurring need which exceeds the 9 month limitation.” 80 Fed Reg. 240056 (Apr. 29, 2015). In this case, Employer has demonstrated a recurring need for H-2B foreign workers for cement masons and concrete finishers in 2016 and 2017. Accordingly, Employer’s current application cannot be considered a “one time occurrence.”

Employer states it is a “concrete construction business, with a permanent work force, which has a seasonal peakload need for the specified positions, because of the construction market and customer demand for construction related work. [Its] business is tied directly to the construction market and peakload customer demand for such cement and concrete construction services.” (AF 60). Employer further explained it has a peakload need for additional workers as a

result of the seasonal nature of its business being tied to other construction industries that are affected by the seasonal nature of the work. (AF 136, 142).

Employer submitted a chart indicating the total number of employees in 2016 were 11 in January; 11 in February; 12 in March; 22 in April; 23 in May; 24 in June; 24 in July; 23 in August; 24 in September; 21 in October; 20 in November; and 13 in December. (AF 76). It also submitted the Texas Unemployment Insurance Contribution Report which indicated that in 2016 Employer paid 11 employees in January, 11 in February; 12 in March; 22 April; 23 in May; 24 in June; 24 in July; 23 in August; 24 in September; 21 in October; 20 in November; and 13 in December. (AF 78-80). However, Employer did not submit signed and attested summarized monthly payroll reports for 2016 and up-to-date 2017 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, as requested by the CO in the November 17, 2017 NOD. (AF 133-134).

Without the requested signed and attested summarized monthly payroll reports identifying the monthly number of cement masons and concrete finishers working as permanent employees and those working as temporary employees, as well as the number of hours worked by the cement masons and concrete finishers in each category, for the period of 2016 through the “up-to-date” 2017 period, it is not possible to determine the base-line production of permanent employee cement masons and concrete finishers on a full-time basis, which is needed to establish if there are periods of demand that cannot be met by the Employer’s permanent cement masons and concrete finishers. While Employer asserts a ten month period of temporary need during which time its permanent cement masons and concrete finishers will not be able to meet production, Employer’s claim of an extended peakload period cannot be determined without the specifically requested employment data. Here, it is clear Employer failed to submit the specifically requested information as directed when it had the opportunity to make a timely submission.

Consequently, when the credible evidence submitted to the CO prior to the January 1, 2018 denial determination is considered as a whole, Employer has failed to meet its burden to establish that it has a peakload temporary need for cement masons and concrete finishers for the period January 23, 2018 through November 23, 2018.

In addition, I find Employer failed to meet its burden of establish that the requested ten cement masons and concrete finishers are needed during its requested period of need. In its brief, Employer indicates it was previously approved to hire up to ten cement masons and concrete finishers for the period beginning on February 8, 2016 and ending on November 15, 2016 and up to ten cement masons and concrete finishers for the period beginning on February 15, 2017 and ending on November 15, 2017. (Emp. Br., p. 7).

As noted above, Employer did not submit signed and attested summarized monthly payroll reports for 2016 and up-to-date 2017 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, as requested by the CO in the November 17, 2017 NOD. (AF 133-134). Similar to the discussion above, it is not

possible to determine the need for augmentation of the permanent cement masons and concrete finishers work force with H-2B cement masons and concrete finishers; if there is a period of increased need for the requested number of H-2B cement masons and concrete finishers based on past monthly production; or if permanent full-time U.S. workers are being displaced by H-2B cement masons and concrete finishers without the requested signed and attested summarized monthly payroll reports.

Therefore, for the reasons stated above, Employer has failed to meet its burden of showing how its employment need for ten workers covering ten consecutive months is temporary in nature based on peakload need or that the number of worker positions and period of need are justified. Therefore, I find the CO's determination is neither arbitrary nor capricious. Accordingly, the denial of Employer's H-2B certification must be affirmed.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

ORDERED this 8th day of February, 2018 at Covington, Louisiana.

CLEMENT J. KENNINGTON
Administrative Law Judge