



Issue Date: 06 February 2018

BALCA Case No.: 2018-TLN-00050
ETA Case No.: H-400-17314-485047

In the Matter of:

LIQUID WASTE SOLUTIONS, LLC

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Sam Haddad, Esq.
Austin, Texas
For the Employer

Jeffrey L. Nesvet, Esq.
Kathleen F. Borschow, Esq.
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Richard A. Morgan
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from Liquid Waste LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny its applications 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 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). 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).

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. 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

On November 10, 2017, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 5 portable toilet cleaners for the period of January 24, 2018 to November 23, 2018. AF 43-121.³ Employer indicated that the nature of its temporary need was “peakload.” On Employer’s application (Form 9142), in response to its statement of temporary need, Employer stated:

Despite efforts to hire U.S. workers through advertising in local newspapers and through State Workforce Agency job postings, our Company has not been able to attract U.S. workers during our peak load seasonal period during the year. Employment is peak load and temporary, for a specific period, and there are not sufficient U.S. workers ready, willing, and available for the job. Our need for additional workers is peak load, because the seasonal nature of our business results in a peak in our workload during portions of the year. Because our business is tied to other construction industries that are affected by the seasonal nature of the work, there are times during the year when certain construction work is reduced or halted due to the seasonal fluctuations. Since our business functions within the project plans and schedules of our customer's construction needs, our peak load is tied to the seasonal nature of the other construction businesses. We are submitting support documents that support our seasonal peak load need. Due to a natural seasonal slowdown of work given to us by our customers, there is a regular reduction in our workload, and therefore, a reduction in our workforce. However, each year when the workload demands from our customers increases, we experience a peak load period of need, directly tied to customer and market demands. Therefore, we need additional workers for this peak-seasonal period. For our Company, there are times during the year when there is much more work. Due to the natural climate changes, weather conditions, and the customer needs for our services, our needs are peak load and seasonal. Our Company is chosen by customers to perform services. There is a peak period during the year (seasonal) when there is more work to be performed in this type of work. We have permanent employees and we only need additional workers during the peak

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 have 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 appeal file will be abbreviated with an “AF” followed by the page number.

load portion of the year, and it is difficult to obtain these peak and temporary workers when we need them. During our peak load period we need additional workers and despite recruiting and advertising we have not been able to find them in the area the Company is located or where the work is to be performed. For the combined reasons listed above, our Company's need for this type of labor is peak load and temporary.

(AF 43, 49).

Employer also attached to its application an explanation of its business, a client list and letters of intent. It also included a service order with the Favergray Company for work at Springs at Lakeline dated, September 14, 2016 and May 30, 2017, a contract with Flintco dated October 8, 2015 with the contract term not indicated, a purchase order from Colorado River constructors dated January 10, 2017 and service agreements dated October 3, 2017, September 13, 2017, August 21, 2017, August 29, 2017 and June 16, 2017 with various clients. Multiple invoices were submitted for portable toilet rentals for various periods between January 9, 2017 to November 7, 2017. (AF 55-106).

The CO issued a notice of deficiency on December 6, 2017, listing two deficiencies in the Employer's application. (AF 32-37). The CO noted the first deficiency as the Employer's "[f]ailure to establish the job opportunity as temporary in nature" and the second deficiency as "[f]ailure to establish temporary need for the number of workers requested."

The CO cited 20 C.F.R. §655.6(a) and (b) for the requirement that "an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary." (AF 35),

The CO noted that an employer's need is considered temporary if it is justified to the CO as one of the following: 1) a one-time occurrence; 2) a seasonal need; 3) a peakload need; or 4) an intermittent need as defined by DHS regulations. The CO determined that the Employer in this case had not submitted sufficient information to establish its requested standard of need or period of intended employment. *Id.*

The CO stated the employer did not include adequate attestations to justify the change in dates of need from the employer's prior certification, H-400-17032-383311, which requested 4 Janitors and Cleaners from April 12, 2016 through December 16, 2016 while the current application requests 5 Janitors and Cleaners from January 24, 2018 through December 23, 2018

The CO noted that employer's letter of explanation based its change in dates of need on projections and submitted letters of intent to support those dates. However, the CO stated:

[C]onfirmation of work during the period of need requested does not on its own, show that a temporary need exists. The fact that the dates of need have shifted almost three months brings into question the temporariness of the job opportunity. If the employer were allowed to shift its dates of need each season by such a

significant period it could easily have ‘temporary’ workers working all 12 months of the year.

(AF 35).

The CO determined therefore that it was unclear why the employer’s dates of need had changed from its previous certification.

The CO requested further documentation which included a description of the business history and activities and a schedule of operations throughout the year, an explanation how the request meets one of the regulatory standards of temporary need and an explanation as to why the requested dates of need have significantly changed from the employer’s prior application. The CO also requested supporting documentation which included summarized monthly payroll reports for a minimum of one previous year that identify for each month separately full time permanent and temporary employment. (AF 36).

In regard to the second deficiency – Failure to establish temporary need for the number of workers requested, the CO cited 20 C.F.R. §655.11(e)(3) and (4). The CO determined that employer had not adequately justified its need for five workers for the period of need requested or that the job request represents a bona fide job opportunity. Again the CO requested specific documentation including summarized monthly payroll reports for a minimum of one year that identify full time permanent and temporary employment in the requested occupation as well as the total number of workers, total hours worked and total earnings received and the documentation must be signed by the employer attesting that the information was compiled from the employer’s actual accounting records. (AF 37).

On December 21, 2017 (eleven business days after the issuance of the NOD) Employer filed a response to the Notice of Deficiency consisting of an email and an attached one page letter. In its letter Employer pointed out that in the Notice of Deficiency the CO had incorrectly stated that employer’s requested dates of need were January 24, 2018 to December 23, 2018 but in fact employer’s original requested dates of need were January 24, 2018 to November 23, 2018. However, employer had decided to amend its dates of need from its original requested dates of January 24, 2018 to November 23, 2018 to February 7, 2018 to November 9, 2018 and therefore the Employer requested that the CO amend the Employer’s application to indicate the modified dates of need. (AF 29-31). Employer submitted no other explanation for its changing dates of need, nor any of the documentation requested by the CO in the Notice of Deficiency.

On December 25, 2017 the CO issued a Non-Acceptance Denial in regard to the Employer’s original request for 5 janitors and cleaners (portable toilet cleaners) for the originally requested period of need of January 24, 2018 to November 23, 2018. The CO restated the original deficiencies and noted that the employer did not submit sufficient information to establish its requested period of intended employment. The CO stated that the employer did not address the deficiency in its NOD response and therefore it had not justified its need for five temporary workers and had not cured the deficiency. Accordingly the CO denied the Employer’s application.

On January 8, 2018 Employer made a timely request for administrative review of the CO's determination. (AF 1).

The CO and the Employer were given the opportunity to file briefs in support of their positions. On January 26, 2018, Attorney Wei (Katherine) Zhao, of the U.S. Department of Labor Regional Solicitor's office ("Solicitor"), gave notice that she would not be filing a brief on behalf of the CO in this matter.

On January 31, 2018, Employer filed a timely brief. In its brief Employer argues generally that the CO made factual errors, failed to consider all relevant evidence submitted, failed to follow applicable regulations and failed to consider its request to amend its dates of peakload need from January 23, 2018 through November 23, 2008, to a modified period of February 6, 2018 through November 9, 2018.

SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer's request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO's determination; or
- (2) Reverse or modify the CO's determination; or
- (3) Remand to the CO for further action.

(20 C.F.R. § 655.61(e)).

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge's review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard⁴ to its review of the CO's determination in H-2B temporary labor certification cases. *See Brook Ledge Inc.*, 2016 TLN 00033 at 5 (May 10, 2016); *see also J and V Farms, LLC*, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).

ISSUES

Whether the Certifying Officer properly denied the Employer's H-2B application due to:

⁴Similarly, judicial review under the Administrative Procedure Act provides that an agency's actions, findings and conclusions shall be set aside that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C § 706(2).

- 1) Employer's failure to establish that its request for 5 portable toilet cleaners for the period of January 24, 2018 to November 23, 2018 was based upon a "temporary" employment need, according to the Employer's stated standard of "peakload" need; and
- 2) Whether the employer had established the temporary need for the number of workers requested?

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is "temporary." Temporary need is defined by the DHS regulation at 8 C.F.R. §214.2(h)(6)(ii).⁵ This regulation states:

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

The DHS regulation further states in regard to the 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 peakload need, or an intermittent need.

(8 C.F.R. §214.2(h)(6)(ii)(B)).

The DOL regulation addressing temporary need in H2-B cases also states:

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.

(20 C.F.R. §655.6).

The DOL regulation also specifies that certification will be denied if the "employer has a need lasting more than 9 months" while the DHS regulation only indicates that the need will

⁵ Pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (Dec. 18, 2015) the definition of temporary need is governed by Department of Homeland Security (DHS) regulation, 8 C.F.R. §214.2(h)(6)(ii). See also 20 C.F.R. §655.6(b).

generally “be limited to one year or less” except in cases of a “one time event” which “could last up to 3 years.” *See* 20 C.F.R. § 655.6(b) and 8 C.F.R. §214.2(h)(6)(ii)(B).

In the current case, the Employer applied for temporary labor certification for 5 portable toilet cleaners for the period of January 24, 2018 to November 23, 2018, on a “peakload” basis. In regard to peakload need the DHS regulation states, “[t]he 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.”

The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. *See, e.g., Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

An Employer must also demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. §655.11(e)(3) and (4). *See Roadrunner Drywall*, 2017-TLN-00035, slip op. at 9-10 (May 4, 2017) (affirming denial where the employer’s temporary and permanent employee payroll data did not support its claimed number of workers or period of need);

In the Notice of Deficiency issued in this case the CO stated the employer did not include adequate attestations to justify the change in dates of need from the employer’s prior certification, H-400-17032-383311, which requested 4 Janitors and Cleaners from April 12, 2016 through December 16, 2016 while the current application requests 5 Janitors and Cleaners from January 24, 2018 through December 23, 2018.

The CO noted that employer’s letter of explanation based its change in dates of need on projection and submitted letters of intent to support those dates. However, the CO stated:

confirmation of work during the period of need requested does not on its own, show that a temporary need exists. The fact that the dates of need have shifted almost three months brings into question the temporariness of the job opportunity. If the employer were allowed to shift its dates of need each season by such a significant period it could easily have ‘temporary’ workers working all 12 months of the year.

(AF 35).

The CO determined therefore that it was unclear why the employer’s dates of need had changed from its previous certification.

The CO reasonably requested further documentation which included a description of the business history and activities and a schedule of operations throughout the year, an explanation how the request meets one of the regulatory standards of temporary need and an explanation as to why the requested dates of need have significantly changed from the employer's prior application. The CO also requested supporting documentation which included summarized monthly payroll reports for a minimum of one previous year that identify for each month separately full time permanent and temporary employment. (AF 36).

In the Employer's response to the Notice of Deficiency the Employer supplied none of the requested documentation to support its requested dates of need. Instead the Employer filed a brief one page letter requesting to modify its requested dates of need. The Employer pointed out that the CO had at one point in the Notice of Deficiency incorrectly stated that employer's requested dates of need were January 24, 2018 to December 23, 2018 when in fact employer's original requested dates of need were January 24, 2018 to November 23, 2018. However, in its response to the NOD employer stated that it had decided to amend its dates of need from January 24, 2018 to November 23, 2018 to February 7, 2018 to November 9, 2018 and therefore the employer requested that the CO amend its application to indicate the modified dates of need. (AF 29-31).

Most significantly the Employer still failed to include any of the documentation the CO had requested to support any of the Employer's dates of need. Employer did not submit any of the requested payroll records broken into a monthly calculation listing permanent and temporary employees nor did the Employer submit any other documentation which would reasonably allow the CO to determine that the Employer had established its requested dates of need or a bona fide need for the number of workers requested. Employer failed to provide adequate support for any of the requested dates of need including the one from its prior application (4/12/16 – 12/16/16), the one originally requested in its current application (1/24/18 – 12/23/18) or the amended dates Employer requested in its response to the NOD (2/7/18 – 11/9/18).

Employer must establish that “[t]he number of worker positions and period of need are justified; and [t]he request represents a bona fide job opportunity.” *Roadrunner Drywall Corp.* 2017-TLN-00035 (May 4, 2017), slip op. at 8, quoting 20 C.F.R. §655.11(e)(3)-(4). *See also North Country Wreaths*, 2012-TLN-00043 (Aug. 9 2012), slip op. at 6 (“it is the Employer's burden to prove that the requested positions represent bona fide job opportunities, and the CO is not required to take the Employer at its word”).

For the reasons stated above, the CO reasonably and properly determined that the Employer failed to meet its burden of establishing a peakload temporary need for the number of workers requested during the requested period of need.

CONCLUSION

Employer has failed to meet its burden of showing how its employment need for 5 portable toilet cleaners for the period of January 24, 2018 to November 23, 2018, is temporary based on Employer's stated “peakload” standard, as defined by the applicable regulation at 8 C.F.R. §214.2(h)(6)(ii) or that the request represents a bona fide job opportunity. The CO's

determination is neither arbitrary nor capricious. Accordingly, the CO's denial of Employer's application for temporary labor certification is affirmed.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

RICHARD A. MORGAN
Administrative Law Judge