

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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BALCA Case No.: 2018-TLN-00013
ETA Case No.: H-400-17228-898042

In the Matter of:

NELSON LEWIS, INC.

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Kevin Lashus, Esq.
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For the Employer

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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 Nelson Lewis, Inc.’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), pursuant to the Continuing Appropriations Act, 2018, Pub. L. No. 115-56, Division D, § 101(a)(8) (2017).

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*

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 August 17, 2017, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 10 laborers for the period of November 1, 2017 to August 31, 2018. AF 137-161.³ 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:

Our company currently requires the services of laborers to perform manual labor associated with construction such as cleaning and preparing worksites, for setting, mixing and pouring cement; resurfacing, setting concrete, grading, digging, and loading and unloading materials. No education required. Transportation is provided to and from area work sites at employer’s expense from centralized pick up location. Our company has a temporary peakload need for persons with these skills because our busiest seasons are traditionally tied to the winter, spring and summer months, from approximately November 1st to August 31st, during which time our clients begin to receive federal funds for construction projects because of the federal fiscal year.

(AF 137).

Employer also attached to its application payroll records for its permanent workforce for the years 2014 – 2016. (AF 159).

The CO issued a notice of deficiency on August 28, 2017, in the current case, listing two deficiencies in the Employer’s application. (AF 131- 137). The CO noted the first deficiency as the Employer’s “failure to satisfy the definition of employer” and the second deficiency as “failure to establish the job opportunity as temporary in nature.” As Employer cured the first deficiency, only the second deficiency, Employer’s failure to establish the job opportunity as temporary in nature, will be addressed in this decision. 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.” The CO noted that an employer’s need is considered temporary if it is justified to

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.

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 sufficiently demonstrated the requested standard of temporary need, which as stated in the Employer's application was "peakload."

The CO determined that the Employer had not "substantiated what events cause the peakload need with supporting documents." The CO found that the Employer did explain the specific period of time in which it would need the services or labor but the documentation supplied did not support the explanation. The CO noted that the Employer submitted payroll records that indicate enough overtime hours worked by its permanent workers to substantiate the number of workers requested, however the payroll did not indicate "a peak in business that would support the period of need." The CO observed that [s]everal of the months that are included in the requested period of need indicate fewer hours worked than in months not included in the peak period. (AF 135). The CO also pointed out that employer did not include adequate attestations to justify the change in the dates of need from the employer's prior application which requested 10 laborers from April 15, 2017 through January 15, 2018. The CO concluded that it was unclear how the employer determined the dates of need requested. (AF 135).

The CO requested an updated temporary need statement including a description of employer's business activities and schedule of operations through the years and an explanation regarding how the request for certification reflected a temporary need, and in particular, how the request meets the regulatory standard of a one-time occurrence, a seasonal need a peakload need, or an intermittent need. The CO also requested supporting evidence and documentation justifying the chosen standard of need including monthly invoices from previous calendar years showing the work performed for each month during the requested period, as well as signed service contracts from customers for the previous one calendar year and the upcoming calendar year that encompasses the period of need. (AF 136).

Employer's response was due within ten business days of August 28, 2017 (September 12, 2017). By email sent on September 8, 2017 Employer requested a ten day extension to respond to the Notice of Deficiency. (AF 130). There is no indication that the CO responded to the Employer's request.

On September 14, 2017, Employer filed a response to the Notice of Deficiency. Employer stated that its company is engaged in the construction business in Burnet County Texas and its services include municipal pipe and electric installation for local governments. (AF 84-129). Employer further stated that the vast majority of funding provided for municipal construction flows from the federal government and the federal fiscal year begins on October 1 each year. Therefore, Employer asserted that "the most need for temporary peak load workers is November 1, 2017 to August 31, 2018."

Employer asserted that it has a peakload need for "manual labor associated with utility construction" because its "busiest seasons are traditionally tied to the fall, winter, and spring months from approximately November 1st to August 31st, during which time we need to substantially supplement the number of workers for our labor force for these positions... These

mid-fall dates are the dates that we have the least need for workers, and therefore do not need the temporary peak load workers during these months (we do however continue to employ some year round workers).”

Employer provided additional documentation which included two contracts which are ongoing and would extend into 2018. Submitted contracts include 1) Contract with the City of Sonora, Texas dated March 20, 2017 for work to be performed May 8, 2017 through March 5, 2018. (AF 89 – 106); and 2) Contract with NE Construction LLP for work at Residences at Panther Hollow dated 8/23/17. (107 – 129).

Employer also asserted that its peakload need has not changed substantially from previous years applications and that it has attempted to recruit U.S. workers for these positions without success. (AF 86).

On September 27, 2017 Employer filed a supplemental response to the Notice of Deficiency which included documentation including an additional contract dated August 9, 2017 with ICI Construction Inc. for work at Villages of Windcrest. (AF 16-83).

By letter dated October 25, 2017, the CO issued its final determination, denial of certification, on the basis that Employer had failed to establish the job opportunity as temporary in nature.⁴ (AF 3-15). The CO reiterated the reasons for denial on the basis, as stated in its previous Notice of Deficiency, that Employer had failed to demonstrate its requested standard of need which employer stated is a peakload need. The CO stated,

[I]n order to establish a peakload need, the 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 petitioners regular operation...

(AF 5).

The CO stated that the employer did explain the specific period of time in which it will not need the services or labor however the documentation supplied did not support the stated explanation. The payroll information submitted “indicates enough overtime hours worked by its permanent workers to substantiate the number of workers requested. However, the payroll does not indicate a peak in business that would support the period of need the employer has

⁴ The CO also noted that the Employer did not timely respond to the Notice of Deficiency. I reject this contention of the CO because the record reflects that the Employer had requested a ten day extension to respond to the Notice of Deficiency on August 28, 2017 to which the CO apparently had not responded. As Employer’s response would have originally been due on September 12, 2017, a ten business day extension would have extended the deadline to September 26, 2017. As the CO had failed to respond to the request for an extension, either allowing it or denying it, it is not reasonable to hold the Employer to the original deadline. Further, all of Employer’s submissions were considered by the CO in its final determination, including Employer’s supplemental response filed on September 26, 2017. Therefore I find the Employer’s response to the notice of deficiency was filed in a timely manner.

requested.” The CO further noted that several of the months that are included in the requested period of need indicate fewer hours worked than months not included in the peak. (AF 6).

The CO determined that the documentation submitted by the Employer did not overcome the deficiency, noting that the three contracts submitted by the Employer did not support a temporary peakload need for the dates of need requested. (AF 7-8).

The CO also determined that the Employer’s statement of need is contrary to the Employer’s filing history which includes a request for laborers from April 15, 2017 to January 15, 2018 in the Employer’s previous application H-400-17030-876390. The two applications when considered together would reflect a request for temporary workers between April 2017 through August 2018 representing a “year long need for workers.” (AF 8).

Employer timely requested 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 November 28, 2017, 2017 Attorney Robert P. Hines, of the U.S. Department of Labor Regional Solicitor’s office (“Solicitor”), gave notice that he would not be filing a brief on behalf of the CO in this matter. No brief was received by the Employer by the deadline of December 8, 2017, which was established by the Order Setting Briefing Schedule issued by the undersigned on November 30, 2017.

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 standard⁵ 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).

⁵Similarly, 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).

ISSUE

Whether the Certifying Officer properly denied the Employer's H-2B application due to Employer's failure to meet its burden of establishing that its request for 10 laborers for the period of November 1, 2017 to August 31, 2018, is based upon a "temporary" employment need, according to the Employer's stated standard of "peakload" need?

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).⁶ 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

⁶ 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 10 laborers 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).

In support of its temporary labor certification application, Employer asserts that it has a peakload need for “manual labor associated with utility construction” because its “busiest seasons are traditionally tied to the fall, winter, and spring months from approximately November 1st to August 31st, during which time we need to substantially supplement the number of workers for our labor force for these positions... These mid-fall dates are the dates that we have the least need for workers, and therefore do not need the temporary peak load workers during these months (we do however continue to employ some year round workers).”

Employer further states that the vast majority of funding provided for municipal construction flows from the federal government and the federal fiscal year begins on October 1 each year. Therefore, Employer asserts that “the most need for temporary peak load workers is November 1, 2017 to August 31, 2018.”

Employer attached to its application, payroll records for its permanent workforce for the years 2014 – 2016. Employer also provided additional documentation which included several contracts which are ongoing and would extend into 2018. Submitted contracts include 1) Contract with the City of Sonora, Texas dated March 20, 2017 for work to be performed May 8, 2017 through March 5, 2018. (AF 89 – 106); 2) Contract with NE Construction LLP for work at Residences at Panther Hollow dated 8/23/17. (107 – 129) and 3) Contract dated August 9, 2017, with ICI Construction Inc. for work at Villages of Windcrest.

After reviewing the Employer’s supporting information the CO determined that based on the documentation submitted, that the employer had not proven a peakload temporary need. The CO concluded that the employer did explain the specific period of time in which it will not need the services or labor however the documentation supplied did not support the stated explanation.

To qualify as a peak load 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) (to utilize the peak load standard, the employer must have permanent workers in the occupation).

In this case the payroll information supplied by the Employer supports that Employer does have a permanent workforce and that it is required to offer overtime to its permanent workers to meet its contractual obligations. As the CO noted, the payroll information submitted "indicates enough overtime hours worked by its permanent workers to substantiate the number of workers requested. However, the payroll does not indicate a peak in business that would support the period of need the employer has requested." The CO further noted that several of the months that are included in the requested period of need indicate fewer hours worked than months not included in the peak.

A review of the payroll information supplied does not show an increase in the employer's payroll for the months of November through August (alleged peakload months). To the contrary, the highest monthly payroll occurred in the allegedly "nonpeak" months of October, in 2014 and 2015, and in September in 2016. Accordingly the CO correctly determined that the payroll information did not support the Employer's allegation that its business slows in the non-peak months of September and October. *See D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (affirming denial where the employer failed to sufficiently explain how its request for temporary labor certification met the regulatory criteria for a peak load, temporary need); *See also Progressio, LLC, d/b/a La Michoacana Meat*, 2013-TLN-00007 (Nov. 27, 2012) (affirming denial where the employer's payroll records did not demonstrate a consistent need for increased labor during the entire alleged period of temporary need).

The CO also correctly noted that the three contracts submitted by the Employer did not support a temporary peakload need for the dates of need requested. The three contracts provided by the Employer were ongoing contracts, none of which support or coincide with the requested peakload period of November 1, 2017 through August 31, 2018. None of these ongoing contracts give any information to support that the months of September and October would be excluded from the work schedule, or that Employer's contractual obligations would slow down during these months. Further, there is no information contained in these contracts, all of which were signed between March 20, 2017 and August 23, 2017 that would tie the execution or funding of these contracts to the government's fiscal year as asserted by the Employer to support its stated period of peakload need.

The CO also determined that the Employer's statement of need is contrary to the Employer's filing history which includes a request for laboreres from April 15, 2017 to January 15, 2018 in the Employer's previous application H-400-17030-876390. The two applications when considered together would reflect a request for temporary workers between April 2017 through August 2018 representing a "year long need for workers."

The CO reasonably determined that the Employer's pattern of submitting H-2B applications provides additional support for the fact that its need for foreign workers is continuous and year round, rather than temporary. *See Kiewit Offshore Services, LTD.*, 2013-TLN-00020 (Jan. 15, 2013) (affirming denial where the employer's documentation revealed that

the employer's alleged "peak load" need spanned at least a 19-month period). *See also William Ashby Maltsberger d/b/a Maltsberger Ranch*, 2016-TLC-00078, 86 (Sept. 28, 2016)(finding employer's two labor certification applications, though separate, demonstrated a year-round need when combined, because of the overlapping nature of the dates of need and the similarities in job requirements and duties). *See also JAJ Hauling, LLC*, 2016-TLN-00054(ALJ July 18, 2016)(affirming denial of certification where fluctuation in application timeframe suggested that Employer's need appeared to be "year-round need rather than seasonal").

The DHS and DOL jointly-issued preamble to the most recently passed H-2B regulations, applicable to this H-2B application, also known as the Interim Final Rule ("IFR"), makes it clear that the purpose of the H-2B program is to address temporary and not permanent employment needs.

Routinely allowing employers to file seasonal, peakload or intermittent need applications for periods approaching a year would be inconsistent with the statutory requirement that H-2B job opportunities need to be temporary. In our experience, the closer the period of employment is to one year in the H-2B program, the more the opportunity resembles a permanent position ... Recurring temporary needs of more than 9 months are, as a practical matter, permanent positions for which H-2B labor certification is not appropriate.

(82 Fed. Reg. 24056 (April 29, 2015)).

For the foregoing reasons, the CO properly determined that the Employer has failed to demonstrate that its need for 10 laborers between November 1, 2017 and August 31, 2018 represents a temporary need on the basis of a peakload standard.

Employer has given some reasonable and valid reasons for its request to utilize foreign labor to fulfill its ongoing labor requirements. Employer asserted that its peakload need has not changed substantially from previous years applications and that it has attempted to recruit U.S. workers for these positions without success.

However, it is clear that the Department of Labor did not contemplate an employer utilizing this particular program, the H-2B temporary labor certification program, to address an employer's need to meet its ongoing and continuous need to supply its permanent labor needs. One might ask whether Congress and/or the Department of Labor has considered the utility of establishing a program to address this type of foreign labor need, especially in light of the Employer's assertion that its continued attempts to recruit U.S. workers for these positions have not been successful.

CONCLUSION

For the reasons stated above, Employer has failed to meet its burden of showing how its employment need for 10 laborers between November 1, 2017 and August 31, 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). 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