

U.S. Department of Labor

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

BALCA Case No.: 2018-TLN-00119
ETA Case No.: H-400-17362-153167

In the Matter of:

POWER HOUSE PLASTERING, INC.,

Employer.

Appearance: Kevin Lashus, Esquire
FisherBroyles, LLP
Atlanta, GA
For the Employer

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

Before: Scott R. Morris
Administrative Law Judge

DECISION AND ORDER
DIRECTING GRANT OF ACCEPTANCE

This case arises from Power House Plastering, Inc.’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 nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

² On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in

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 December 31, 2017, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer. AF 49.³ Employer requested certification of fifteen “Plaster Helpers,” for an alleged period of temporary need from April 1 to December 15, 2018. AF 38.

On February 5, 2018, the CO issued a Notice of Deficiency, finding four grounds for denial of Employer’s application. AF 29-37. First, the CO concluded that Employer failed to establish that the job opportunity was temporary in nature under 20 C.F.R. § 655.6(a-b). The CO questioned Employer’s assertion that a peakload need existed due to a “winter-related slow down in residential building in Arizona,” and instructed Employer to submit a detailed explanation of why the job opportunity reflected a temporary need. AF 32-33. Second, the CO concluded that Employer had failed to establish a need for the number of workers requested as required by 20 C.F.R. § 655.11(e)(3-4), and instructed Employer to submit evidence containing an explanation as to how it determined the number of workers requested for certification. AF 34. Third, the CO found that Employer failed to submit an acceptable SWA job order under 20 C.F.R. §§ 655.16 and 655.18. Finally, the CO determined that Employer failed to submit a complete and accurate ETA Form 9142. AF 35-37.

By undated letter, Employer responded to the CO’s Notice of Deficiency. AF 25-28. Employer alleged that its peakload seasons of lath and stucco installation occur between April 1 and December 1, though it noted that the exact dates can vary from year to year. AF 25. It explained that work is limited during the winter months due to weather conditions and the builders’ slower sales seasons. Accordingly, guest workers return home for the winter months and return during peakload seasons the following year if needed. AF 25. Employer stated that this peakload season required it to add at least fifteen laborers to its workforce on April 1. In support of these assertions, Employer submitted letters from two builders: Lennar Arizona Construction Company and D.R. Horton. Both builders stated that Employer had been contracted to provide stucco services for various developments in 2018, and that their build schedules and sales decrease in the winter months. AF 26-27. Per the CO’s request, Employer also included a chart of its 2017 payroll data, including a monthly breakdown of its number of permanent and temporary employees, their hours worked, and their total earnings. AF 25. Employer also included a chart of estimated 2018 payroll numbers. AF 26.

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

On April 10, 2018, the CO issued a Non-Acceptance Denial, finding that two deficiencies remained with Employer's application despite its submissions. AF 11-24. First, the CO again concluded that Employer had failed to substantiate a peakload need under 20 C.F.R. § 655.6(a-b). The CO stated that Employer did not provide any supporting documentation for its assertion that stucco construction in Arizona slows in the winter due to weather and slow sales. Employer's letters from D.R. Horton and Lennar Construction did not adequately support the Employer's alleged dates of peakload need because they did not include the anticipated start and end dates of each project and worksite address. While the CO acknowledged that these letters mirrored the Employer's assertion that residential construction's "build season" correlates with its "selling season" and that both decrease during the winter months, the CO stated that "it remains unclear what drives this schedule and if such a schedule truly occurs." AF 15. In addition, the CO noted that Employer's payroll data for 2017 showed that Employer employed more temporary workers in the non-peakload months of January and March than it did in the peakload months of September and October. AF 16.

Second, the CO again found that Employer had failed to establish a temporary need for fifteen Plaster Helpers. AF 16-18. The CO stated that letters of intent from D.R. Horton and Lennar Construction, which summarized 2018 projects, "do not take the place of fully executed contracts" or indicate the extent of work that would require fifteen workers. AF 17. The CO also noted that Employer's 2017 payroll showed that every temporary worker worked less than 160 hours per month, which indicated that Employer's number of workers requested might not represent bona fide full-time job opportunities. AF 18. Since Employer's 2018 estimates showed temporary workers employed for similar hours per month, the CO concluded that Employer had not adequately attested and supported a temporary need for fifteen Plaster Helpers.⁴ AF 18.

On April 23, 2018, Employer appealed the CO's denial.⁵ This Tribunal issued a Notice of Assignment and Expedited Briefing Schedule on May 7, 2018. The CO has not filed a brief.

STANDARD OF REVIEW

The scope and standard of review in the H-2B program are limited. When an employer requests a review by the Board under 20 C.F.R. § 655.61(a), the request for review may contain only legal arguments and evidence which were actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The Board "must review the CO's determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. § 655.61(e). The Board must affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action. *Id.* While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the

⁴ The CO did not reiterate the previously-identified deficiencies of failure to submit an acceptable SWA job order and a complete and accurate ETA Form 9142.

⁵ Employer failed to include any legal arguments in its appeal. As noted in this Tribunal's Notice of Assignment, the regulations instruct an employer to include any legal argument and evidence in its initial appeal of the CO's H-2B determination. *See* 20 C.F.R. § 655.61(a)(2), (3), (5).

Board has adopted the arbitrary and capricious standard in reviewing the CO's determinations. *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017).

DISCUSSION

A. Legal Standard

An 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; *BMGR Harvesting*, 2017-TLN-15, slip op. at 4 (Jan. 23, 2017); *Alter and Son Gen. Eng'g*, 2013-TLN-3, slip op. at 4 (Nov. 9, 2012). Under 20 C.F.R. § 655.6(a) and (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.⁶ Temporary service or labor “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). An employer establishes a “peakload need” if it shows 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).

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); *Roadrunner Drywall*, 2017-TLN-35, 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); *Sur-Loc Flooring Systems, LLC*, 2013-TLN-46 (Apr. 23, 2013) (reversing denial where the employer sufficiently justified the number of workers requested in its application); *North Country Wreaths*, 2012-TLN-43 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that its current need for workers was greater than its need in a prior year).

B. Analysis

As explained above, the CO's ultimate denial rested on two findings: (1) that Employer failed to substantiate its alleged peakload season from April 1 to December 15, and (2) that Employer failed to establish a need for fifteen Plaster Helpers. Upon review of the Appeal File and Employer's request for review, this Tribunal determines that the CO's denial of Employer's application was arbitrary and capricious. For the reasons that follow, the Tribunal reverses the CO's determination and remands this matter for acceptance and recruitment under § 655.40.

⁶ Since the definition of temporary need derives from DHS regulations that have not changed, 8 C.F.R. § 214.2(h)(6)(ii), pre-2015 decisions of the Board on this issue remain relevant. An appropriation rider currently in place requires the DOL to exclusively utilize the DHS regulatory definition of temporary need. *Consolidated Appropriations Act of 2017*, P.L.115-31, Division H.

1. Temporary Need

Employer's submitted materials amply demonstrate a peakload season of temporary need from April 1 to December 15. Employer attested that stucco installation work is limited during the winter months due to weather conditions and the builders' slower sales seasons. AF 25. It submitted letters of intent from two Arizona builders, D.R. Horton and Lennar Construction, who both stated that their build schedules and sales decrease during the winter months, primarily during December and January. AF 27-28. Employer's 2017 payroll data confirm that Employer experiences a sharp decrease in its workload during January, February, March, and December. These 2017 non-peakload months required an average of just over 3000 temporary employee working hours, while 2017 peakload months required an average of just under 5000 hours. In fact, the slowest month in Employer's 2017 peakload season was July, which still required 894 more temporary employee hours than the busiest 2017 non-peakload month of March. AF 25. Based on this uncontradicted evidence, the only reasonable conclusion is that Employer has established a peakload season of need for temporary labor from approximately April to December.

The CO made several errors in analyzing Employer's evidence. Most notably, the CO mistakenly used the *number of temporary workers* employed per month rather than the *number of hours worked* per month to discern peakload need. Since Employer's payroll data showed that it employed more temporary workers in some non-peakload months than in some peakload months, the CO concluded that Employer had not adequately supported its alleged peakload season.⁷ Such an analysis rests on the assumption that the number of temporary workers employed in a given month accurately reflects the amount of work performed—an assumption that only holds if each temporary employee worked full-time for Employer for the entire month. Here, however, Employer's payroll data do not indicate the precise date on which each worker was hired, and a greater number of temporary workers listed in a given month could indicate that Employer hired a number of temporary workers at the end of the month.⁸ Accordingly, the *number of temporary workers* employed by Employer per month is an unreliable measure of its peakload season. In contrast, the *number of hours worked* by Employer's temporary workers in each month is a better metric for determining peakload need because it directly approximates the amount of monthly work performed by Employer. And as explained above, the hours worked by Employer's temporary workers in 2017 shows a clear peakload season from April to December.

In addition, the CO improperly required Employer to provide an exacting explanation of the cause of its peakload season. After recounting Employer's attestation that its business experiences a "winter-related slow down in residential building in Arizona," the CO stated: "It remains unclear . . . how the weather conditions in [Arizona] prevent lath and stucco installation

⁷ Employer's payroll data show that it consistently employed three permanent employees in 2017, whose hours only minimally varied. See AF 25.

⁸ The fluctuating number of "temporary workers" listed on Employer's 2017 monthly payroll could also include part-time employees and subcontractors, both of which could have worked varying hours per month.

during the attested non-peakload months of December through March.”⁹ AF 15. Similarly, the CO noted the supporting attestations of D.R. Horton and Lennar Construction that the residential “build season” correlates with the residential “selling season,” both of which decrease over winter months, but wrote: “it remains unclear what drives this schedule” AF 15.

The CO’s insistence that Employer prove the underlying cause of its “winter-related slow down” is improper, and Employer’s failure to do so does not support a denial. The regulations only require an Employer to prove the *existence* of its peakload season—not the *cause* of such a peakload season. *See* 20 C.F.R. § 655.6(b); 8 C.F.R. § 214.2(h)(6)(ii). While a CO could properly reject an employer’s unsubstantiated and questionable explanation of an alleged peakload season when no evidence of that peakload season otherwise exists, a CO may not require an employer to prove the cause—economic, weather-related, or otherwise—of a properly substantiated peakload season. Since Employer’s peakload season is adequately documented by its 2017 payroll data, the CO’s skepticism regarding the underlying cause of such a peakload season is irrelevant.

2. Number of Workers Requested

Employer’s submitted documentation also adequately demonstrates a seasonal need for approximately fifteen Plaster Helpers from April to December. Unhelpfully, the regulations do not specify how an adjudicator must quantify an employer’s labor needs, nor what quanta of need will justify a request for each additional worker. *See* 20 C.F.R. § 655.11(e)(3). Case law similarly provides little specific guidance to this inquiry. However, a few regulations are instructive: § 655.20(d) requires that an employer’s job opportunity be for a “full-time temporary position,” which § 655.5 defines as “35 or more hours of work per week.” The undersigned finds the Department’s decision to set 35 hours per week as the lowest amount of work considered “full-time” employment an appropriate benchmark by which to adjudicate an employer’s request for a number of workers. Accordingly, for Employer’s documentation to support its requested number of workers, it must bear some relation to the Department’s definition of “full-time”: 35 hours per week per worker.

For the 2017 peakload months of April to November, Employer’s temporary employees worked an average of 4981 hours per month. In the remaining 2017 non-peakload months, Employer’s temporary employees worked an average of 3208 hours per month. Thus, the average difference between peakload and non-peakload monthly hours worked by Employer’s temporary employees in 2017 is 1773 hours. October 2017 was the busiest 2017 peakload month for Employer’s temporary employees, with 5670 hours worked, while March was the busiest non-peakload month, with 3378 hours worked. The difference between its busiest peakload and non-peakload months of March and October is 2292 hours. *See* AF 25.

Applied against the Department’s minimum “full-time” standard, Employer’s 2017 payroll data generally support its request for fifteen additional workers. In 2017, Claimant’s

⁹ The CO had previously expressed skepticism regarding the effect that Arizona’s weather would have on Employer’s business: “the employer’s work is done in Arizona, which is relatively favorable to year-round outside work.” AF 32 (repeated at AF 14).

busiest peakload month, October, required 2292 more temporary employee hours than its busiest non-peakload month, March. Divided between fifteen H-2B workers, each worker would receive 152.8 hours of work in that month. This exceeds the Department-mandated full-time minimum of 35 hours per week, 147 hours per month.¹⁰ Accordingly, the Employer's payroll data support its request for fifteen workers, at least with regards to the maximum amount of additional work required during its peakload season. This Tribunal recognizes that Employer's temporary employment hours varied from month to month during its 2017 peakload season, but finds that Employer's request for the number of temporary workers to meet its greatest demonstrated peakload need is appropriate.

In addition, the undersigned notes that Employer's average increased peakload labor needs for 2017 exceeds § 655.20(f)'s "three-fourths guarantee" for fifteen full-time H-2B workers. Section 655.20(f) requires an employer to offer a minimum full-time H-2B contract of 35 hours per week and guarantee payment for three-fourths of that time. An H-2B worker under a minimum full-time contract of 35 hours per week could expect to work 147 hours per month, and the three-fourths guarantee would ensure payment for 26.25 hours of work per week or approximately 110 hours of work per month, regardless of the work Employer offered to the worker during that period. Employer's average increase in temporary employee hours during its 2017 peakload season was 1773 hours. Using these 2017 figures to project Employer's 2018 labor needs, each of the fifteen requested H-2B employees would work an average of 118 hours per month. That is, each temporary worker would receive, on average, eight hours more than the Department-required minimum of 110 guaranteed hours per month. Accordingly, the undersigned finds that Employer's requested number of workers comports with Department standards.

Lastly, this Tribunal notes that Employer's working hours have steadily increased from 2015 through 2017. AF 64-65. In light of Employer's increasing year-over-year workload, it was reasonable for Employer to forecast a need for approximately fifteen additional Plaster Helpers in 2018—the same number it requested and received in 2017. The Tribunal acknowledges that Employer's proposed job order specified a 40-hour work week, rather than the Department-minimum 35-hour work week. AF 47-48. Nevertheless, Employer's yearly business expansion trend justifies a slight increase in working hours advertised in its job order. As seen in its payroll data, Employer's monthly business is somewhat unpredictable, and requesting an amount of temporary workers that would reasonably meet its projected labor needs comports with the regulations.¹¹ For all these reasons, the Tribunal finds that Employer's documentation justifies its request for fifteen Plaster Helpers.

¹⁰ This calculation assumes that a month has 21 working days, or 4.2 weeks.

¹¹ An employer's selection of a 40-hour work week permits it to require its workers to work at least eight-hour days, which it could not do if it had offered the job at 35 hours per week. See § 655.22(f)(7) (stating that an employer can offer more hours to a worker than those specified in the contract, but may not require a worker to accept them). This boon is balanced by the cost of having to provide an increased three-fourths guarantee of 30 hours per week (rather than 26.25) to workers signed under this contract. The three-fourths guarantee protects H-2B worker expectations and disincentivizes employers from requesting more labor than needed.

The CO rejected Employer's request for fifteen workers on two erroneous grounds. First, the CO calculated Employer's April 2017 payroll data as showing that temporary employees only worked an average of 24.87 hours per week. AF 18. As explained in the above analysis of Employer's peakload need, this calculation errs by assuming that each temporary employee worked full-time for Employer for the entire month. The CO should have first determined the increased number of working hours required during Employer's peakload months, then determined whether Employer's increased peakload labor needs justified a request for fifteen workers. As detailed above, the data show that Employer does have a peakload need for fifteen full-time temporary workers.

Second, the CO found Employer's submitted documentation insufficient because its letters of intent did not include fully-executed contracts showing the extent of work that would require fifteen additional workers. This errs by assuming that Employer had fully executed contracts it could have submitted. Employer's submitted letters of intent from D.R. Horton and Lennar Construction seem to indicate that no such contracts exist, as both builders only referenced "projections" for the 2018 build season. AF 27-28. Such an inference is buttressed by the builders' assertions that the residential "build season" correlates with the residential "selling season," which seems to imply that houses are usually built around the time they are sold rather than months or years in advance. Since 2018 home sale contracts had likely not been finalized, the best documentation that Employer could offer is lists of communities for which builders planned to use Employer as a subcontractor. Accordingly, the CO erred by citing Employer's lack of fully executed contracts as a basis for determining that the evidence of record did not justify Employer's requested number of workers.

C. Conclusion and Order

For the reasons explained above, the CO's denial of Employer's application for fifteen Plaster Helpers was arbitrary and capricious. The CO's denial is therefore **REVERSED**, and this matter is **REMANDED** to the CO for acceptance and recruitment under § 655.40.

SO ORDERED.

For the Board:

Scott R. Morris
Administrative Law Judge