



Issue Date: 06 February 2018

BALCA CASE NO.: 2018-TLN-00057

ETA CASE NO.: H-400-17306-673162

In the Matter of:

S & R DRYWALL, LLC,
Employer.

DECISION AND ORDER

This matter is before the Board of Alien Labor Certification Appeals on Employer S&R Drywall, LLC.'s application for a certification under the H-2B nonimmigrant alien worker program.¹ The certifying officer at the Department of Labor's Employment and Training Administration denied the application on January 1, 2018. Employer timely requested BALCA review.

This Decision and Order is based on a written record, which consists of the Appeals File and Employer's request for review.² The Administrator (ETA) did not file a brief. Having considered the full record, I affirm the certifying officer's denial of the labor certification.

Findings of Fact

Until now, Employer's business has been to subcontract drywall installation in new construction (residential and commercial); Employer has had no employees of its own. AF at 45.³ Employer states, however, that this year there has been a "severe" shortage of subcontractors, and Employer has decided to hire its own workers to install drywall. AF at 39.

The current application is one of three Employer submitted to certify eight H-2B temporary drywall installers to work around Boise, Idaho and the county to its west. The three applications differ in the months during which Employer asserts a need for the workers; the time periods on

¹ See Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, and certain of its implementing regulations at 20 C.F.R. Part 655, subpart A.; *see also* 8 C.F.R. § 214.2(h)(6)(ii)(B) (defining temporary need in H-2B cases), which overrides 20 C.F.R. § 655.6(b) per Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015), and Further Continuing Appropriations Act, 2018, Pub. L. No. 115-90, Division A, § 101 (2017).

² Employer also offered new evidence with his request for review: namely, a contract that Employer had not submitted to the certifying officer at ETA. An employer's request for review may contain "only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued." I therefore exclude from the evidence I will consider the contract that Employer newly submitted with its request for review.

³ "AF" refers to the Appeals File.

the three applications overlap between April 2017 and October 2018. The current application is for February 1, 2018 through October 31, 2018; Employer states that this is based on seasonal need. AF at 69. Of the two earlier applications, the first was for April 29, 2017 through November 30, 2017; Employer withdrew that application. AF 95, 97. The second was for October 1, 2017 through August 30, 2018. AF 106. When the certifying officer issued a Notice of Deficiency on this application, Employer abandoned it and submitted the current one. AF 105, 106.

On November 13, 2017, the certifying officer issued a Notice of Deficiency on the current application and required Employer to submit further information and evidence. The Notice also informed Employer that its application failed to meet several regulatory requirements, including (among others) that it must: (1) establish that the job opportunity is temporary, and (2) establish the number of temporary workers needed. AF at 61. Ultimately, on January 1, 2018, the certifying officer denied the application on these two grounds. AF at 18.

Employer explained the seasonal need as follows:

During the holiday season (roughly Thanksgiving through February) most construction jobs are limited in their hours and therefore do not require drywall contractors as much as during the rest of the year. Additionally, many government agencies and inspectors integral to the construction permit process are on vacation or reduced hours, and this similarly causes a palpable slowdown or complete stoppage in many construction and drywall operations. Most construction/drywall demand does not pick back up until February or early March . . . [¶] It is simply the case that the Drywall season is February/March to October/November

AF at 45.

In support of the application, Employer submitted a one-paragraph “work agreement contract” that it has for drywall installation during the time for which it seeks the H-2B workers. The contract is with Dobson Drywall & Construction. Dobson represents in the contract that it has work for the remainder of the year [apparently 2017] and will have work on 20 to 30 houses per month from February through October 2018. AF at 47. The “contract” provides nothing else. No prices are set, nor is there a framework for pricing. There is no indication of how much work will be needed on each house. Dobson never states that it will assign all of the drywall installation work for these houses to S&R Drywall. At best, this appears to be an attempt at some kind of requirements contract that might well be too vague to be enforceable. I am unable to draw any inferences from it. Even if I assume that Dobson will give all of this work to S&R Drywall in 2018, the contract does nothing to show that S&R Drywall will not have other work (either from Dobson or from other sources) to occupy his workers in November 2018 and continuing after that. Nor does this contract establish a seasonal need.

Employer also submitted a list of subcontractors it paid from February 1, 2016 through October 31, 2016. AF at 48. The list shows that, during this period, Employer paid a

total of four subcontractors a total of \$24,137.56.⁴ The list establishes that two years before the time period for which Employer is now applying, it hired subcontractors to perform presumably drywall installation in the months indicated. But, again, it does not show how much work Employer had in those months not in the chart's reporting period. There is no basis to infer the work available to Employer in November 2016 through the end of January 2017, and thus no support for Employer's contention that there is a seasonal decline in work during those three months. Nor does the chart show how many workers the subcontractors employed to perform the work that Employer gave them.

As to that last point, the number of temporary workers needed, Employer's only evidence was its assertion that the number must be eight because eight workers are "generally considered a full drywall crew." AF 46.

Discussion

Standard of review. The regulations are silent about the deference that the Board of Alien Labor Certification Appeals should accord to a certifying officer's determination. When the certifying officer's determination turns on the Employment and Training Administration's long-established, policy-based interpretation of a regulation, it would seem that considerable deference is owed ETA. Compare deference courts give administrative agencies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In such instances, BALCA likely should not overturn a certifying officer's policy-based determination unless it is arbitrary, capricious, or inconsistent with the ETA's established policy interpretation. Absent ETA's long-standing, policy-based interpretation of a regulation, it would appear that BALCA should review the certifying officer's denial de novo. On the present record, I need not determine the deference owed the certifying officer, for I would affirm her denial of the application on de novo review.

H-2B program requirements. An employer seeking certification under the H-2B program must establish that its "need for duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary."⁵ An employer's need is temporary if it is: a one-time occurrence; a seasonal need; a peakload need; or an intermittent need.⁶ An employer establishes a "seasonal need" if it establishes that "the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature."⁷ The employer must also demonstrate that the number of positions is justified and that the request represents a *bona fide* job opportunity.⁸

⁴ The first actual payment was on February 18, 2016; the last was on October 21, 2016. AF at 48. Payments occurred only in the months of February, March, June, September, and October 2016. *Id.*

⁵ 8 C.F.R. § 214.2(h)(6)(ii)(A).

⁶ 8 C.F.R. § 214.2(h)(6)(ii)(B)

⁷ 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

⁸ 20 C.F.R. § 655.11(e)(3) and (4).

Seasonal need. As Employer has not previously performed the drywall installation work for which it seeks H-2B temporary workers, it cannot establish a predictable seasonal variation based on existing payroll records covering the past two or three years. The chart Employer submitted to show amounts it has paid subcontractors⁹ does not show the number of workers that the subcontractors needed. And it does not show the winter holiday season data, which is necessary to establish Employer's contention that there is a seasonal reduction in need for workers at that time.

Employer offers only an *argument* that it would be reasonable to expect that its need for workers would decline from Thanksgiving through the end of January or February each year. The argument fails because it explains reduced need for workers during the month of February, yet Employer's application requests certification of workers to begin work on February 1, 2018. It also fails because an argument is not evidence; Employer must document or otherwise support its contention.

Even were I to accept Employer's argument, however, Employer misconstrues the H-2B program. The program is intended to permit employers who experience a seasonal temporary need (and cannot find U.S. workers) to *hire* nonimmigrant alien workers to meet that need.

Employer does not assert or even suggest a seasonal need to *hire* workers. What he asserts is a constant, continuing, non-seasonal nine- or ten-month need for an eight-person crew, together with a seasonal need to *lay off* some or all of those workers around the Thanksgiving, Christmas, and New Year's holidays.

At the outset, it is not entirely clear that this holiday period is "seasonal" within the meaning of the regulations. The great majority of H-2B cases asserting a seasonal need focus on the climatic variations that occur with the passing seasons, not with holidays.¹⁰ A few cases have considered extending this to months of the year during which a professional sports league is active.¹¹ But, for this purpose, I am persuaded that the recurring, annual time of these winter holidays meets the regulatory definition of what is seasonal (*viz.*, "traditionally tied to a season of the year by an event or pattern and is of a recurring nature").

But what Employer's theory fails to meet is that the seasonal event must be tied to a temporary need for additional workers, not a temporary need to lay off regular workers. Employer's asserted nine or ten active work months of the year are not "seasonal"; they are not "traditionally tied to a season of the year by an event or pattern and is of a recurring nature." They are simply an ongoing, non-seasonal period covering the vast majority of the year. The H-2B program does

⁹ Records showing actual payments might have been more persuasive, but for this purpose I accept Employer's summary.

¹⁰ See, e.g., *Alter & Son General Engineering*, 2013-TLN-00003 (Nov. 9, 2012) (Carlson, ALJ) (holding that the employer did not establish a need that was seasonal due to weather conditions); *Nature's Way Landscaping, Inc.*, 2012-TLN-00019 (Feb. 28, 2012) (ALJ, Colwell) (Employer asserts that, "The jobs are seasonal because they take place [during a] specific period of time every year, where weather plays a big role.")

¹¹ See, e.g., *Stadium Club, LLC*, 2012-TLN-00002 (Colwell, ALJ) (Employer argued that it needed additional workers during the National Football League and National Hockey League seasons, but the evidence did not support this).

not extend to accommodate employers with seasonal needs to *reduce* temporarily the number of employees; the program is to assist employers who have a need to *hire* additional temporary workers to address a condition “traditionally tied to a season of the year.”

Based on the foregoing, I find that Employer has not established a seasonal need for drywall workers for the time period sought or at all.¹²

Number of workers needed. Employer also did not establish the number of workers it needs to hire. The record of what Employer paid subcontractors does not show how many workers the subcontractors needed. Even if it did, Employer might be under greater or lesser time constraints and thus might be able to perform the work with fewer workers (or need more workers) than his subcontractors needed.

Instead, Employer states only that a “full crew” is “generally considered” to consist of eight workers. Employer did not explain how it concluded that a full crew generally requires eight workers, and it does not state that the work cannot be done with less than a full crew or explain why not. Moreover, as Employer has been subcontracting its drywall installation work, I cannot assume – without more – that Employer knows what is “generally considered” a “full crew” or how many drywall installation companies operate with crews larger or smaller than eight in the area of Idaho where Employer operates.¹³

Conclusion and Order

Employer has failed to establish a need for temporary nonimmigrant alien workers under the H-2B program and has failed to establish how many temporary workers it needs. The certifying officer’s denial of Employer’s application therefore is AFFIRMED.

For the Board of Alien Labor Certification Appeals

STEVEN B. BERLIN
Administrative Law Judge

¹² Employer did not assert a one-time occurrence, peakload, or intermittent need, and I find none. See 8 C.F.R. § 214.2(h)(6)(ii)(B).

¹³ See *BMC West Corporation*, 2016-TLN-00039, slip op. at 5 (May 18, 2016) (Timlin, ALJ) (“A bare assertion without supporting evidence is insufficient to carry the employer’s burden of proof.”).