



Issue Date: 30 January 2018

BALCA CASE NO.: 2018-TLN-00045

ETA CASE NO.: H-400-17308-957755

In the Matter of:

TITUS WORKS, LLC,
Employer.

**DECISION AND ORDER AFFIRMING
DENIAL OF CERTIFICATION**

This matter arises under the labor certification process for temporary non-agricultural employment in the U.S. under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart A.¹ 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 Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(ii)(B).²

On December 25, 2017, the Certifying Officer for the Office of Foreign Labor Certification denied the H-2B Application for Temporary Employment Certification (“Application”) of Titus Works, LLC (“Employer”) because the job request failed to justify the dates of need requested. Employer timely filed a request for administrative review on December 28, 2017, and the Appeal File (“AF”) was provided on January 11, 2018. On January 18, 2018, the U.S. Department of Labor, Office of the Solicitor, on behalf of the CO, filed a notice stating that it would not file a brief in this matter but requested that the denial be affirmed for the reasons set out in the CO’s final determination letter. Employer filed a brief on January 24, 2018.³

¹ On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security (“DHS”) jointly published an Interim Final Rule amending the regulations at 20 C.F.R. Part 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) (“2015 IFR”). The H-2B program currently operates under the 2015 IFR.

² An appropriations rider passed in 2015 overrode the DOL’s definition of temporary need for the H-2B program (20 § C.F.R. 655.6(b)) in favor of DHS’s definition (8 C.F.R. § 214.2(h)(6)(ii)(B)). *See* 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).

³ The parties were given until January 23, 2018, to file appellate briefs. However, due to a lapse in government funding, this Office’s normal business operations were disrupted, and Employer was allowed an additional day to file its brief. The lapse in government funding is also the reason for the slight delay in the issuance of this decision.

This proceeding is before the Board of Alien Labor Certification Appeals (“the Board”) pursuant to § 655.61(a).⁴ As explained below, this Decision and Order affirms the denials of certification and denies Employer’s request for relief.

Background

Employer is a commercial underground utility construction business located in Austin, Texas. AF at 150. On November 4, 2017, Employer filed its Application seeking certification to hire 5 construction laborers from January 23, 2018, to November 23, 2018. AF at 139. In its Application, Employer stated that its need was based on a “seasonal peak load need for the additional construction laborers because of the construction market and customer demand for construction related work.” AF at 150. Employer explained its peak-load need thusly:

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 recurrent/seasonal peak load need.

Due to a natural seasonal slow down 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. But, this peak load seasonal period is recurrent each year, based on the Company’s past history of customer demand and work load.

AF at 149. In 2017, Employer’s projected peak load need was from mid-February through mid-November based on projections from its customers, market demand, and pending bids and proposals. AF at 150. However, for the current Application, Employer anticipated a need from mid-January through mid-November 2018, based on “previous experience, pending bids and proposals, signed contracts, and projections from customer and market demands.” *Id.* Employer also listed three clients for whom it expected to provide services in 2018, and stated it was including copies of signed contracts and/or work agreements for future jobs to be completed during its peak load period in 2018, as well as copies of contracts and invoices for work performed in 2017. AF at 148. However, no contracts for 2018 were included, only “letters of intent” from the four clients,

⁴ The Chief ALJ may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.61(d).

stating that each had a “peak load seasonal” need for Employer from “mid-January to mid-November,” and that each would need Employer “to complete about 2 projects in 2018.”⁵ AF 155-158.

On November 14, 2017, the CO issued a Notice of Deficiency (“NOD”), stating that Employer failed to justify the date of need requested per 20 C.F.R. § 655.6(a) and (b). AF at 134-138. Specifically, the CO contended that Employer did not submit sufficient information to support the dates of need requested. AF at 137. The CO noted that Employer stated construction work is reduced or halted due to seasonal fluctuations, yet its date of need begins on January 23rd, “a winter month.” AF at 138. The CO also asserted that Employer did not provide any information or supporting documentation as to how it determined its start date of need.⁶ *Id.* The CO requested additional information, including a revised, detailed statement of temporary need containing the following:

1. A description of the employer’s business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. An explanation of why the employer’s statement of need indicates that construction work is slowed down or halted due to the seasonal nature [of] the work, but has requested a start date of need of January 23, 2018; and
3. An explanation of how the employer determined its requested dates of need.

AF at 138. The CO also requested “supporting evidence and documentation that justifies the dates of need requested” which was to include the following:

1. Summarized monthly payroll reports for a minimum of three previous calendar years 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. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system; and
2. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification, if any.

Id.

Employer responded to the NOD on November 29, 2017, and provided various documents, including invoices for work completed during its peakload period in 2017, a number of unsigned proposals for jobs, which Employer contended were to be completed in 2018, projected 2018 billing based on average sales 2015-2017, Texas unemployment insurance quarterly contributions reports worksheets and a chart showing Employer’s total workers by month for 2017, and Employer’s

⁵ These four letters employ nearly identical language. *See* AF at 155-158.

⁶ In the NOD, the CO mistakenly stated the dates of need were from January 23, 2018, to November 30, 2018, when in fact the Application stated the end date of need was November 23, 2018. *See* AF at 138, 139.

quarterly tax liability and social security wages for 2017. AF at 80-133. Employer also included additional letters of intent from four different clients, each of which stated its need for Employer “is peak load seasonal from mid-January to mid-November,” and that each specific project was “scheduled to break ground in mid-January 2018.” See AF at 70, 73, 76, 79. Employer’s revised statement of need stated, in part, the following:

During the time period from December through mid-January, general contractors, land developers and builders slow their work on projects due to customer and market demand, as well as inclement seasonal-weather conditions and less daylight during the day. Adverse weather conditions include rain and cold temperatures which impede certain work (*construction and utility installation, cement and concrete curing, and hard-scape*), which affects all construction trades. In our region, most construction companies follow the same peak cycle for this type of work. For the combined reasons listed above, our company’s need for this type of labor is peak load.

Towards mid to late January, the construction related work resumes and continues through the spring and summer and through **mid-November**, when the peak load need is reduced prior to the holidays, about the time market and customer demand is reduced. As a consequence, there is a reduction in our workload, and therefore, a reduction in our workforce. Based on our yearly invoices, bidding, contracts signed and customer demand, we have seen that this pattern of need is common in our business. We rely on general contractors who plan a construction project and hire our company to perform excavation and underground utility installation at the front end of the construction projects, which means that we must have an adequate workforce to meet our workload obligations to keep the overall construction project from falling behind schedule.

Over the course of many years, we have seen that very few general contractors break ground or start a project in late November or December, due to holiday schedules, shorter daylight hours, weather conditions, permitting issues and customer demand.

AF at 54 (emphasis in original). Employer also stated that it had been hired to start two specific projects in mid-January, so it was important to have an adequate workforce to avoid delays. AF at 56. Employer stated that “[s]ome information that the DOL NOD requests does not exist in the normal course of business for the employer; therefore, [Employer] is submitting available responsive information.” AF at 42. Finally, Employer also included copies of five previously granted certifications for prior Applications for Temporary Employment Certification. AF at 46-52.

On December 18, 2017, Employer submitted a request to amend the dates of need to February 6, 2018, to November 9, 2018, due to changes in upcoming plans and project start dates. AF at 37.

On December 25, 2017, the CO issued a Non Acceptance Denial Letter because Employer did not submit sufficient information to support the dates of need requested. AF at 21-26. The CO stated that in its response to the NOD, Employer submitted “a number of letters of intent which specify no dates of performance, invoices from the prior year which correlate to the employer’s

previous dates of need, and contracts which likewise specify no dates of performance.” AF at 25. The CO noted that Employer submitted much of the same documentation in response to the NOD as it did with its initial Application, and stated that this documentation “remains inadequate to establish the employer’s requested dates of need.” *Id.* The CO went on to state:

The employer did submit numerous pages of additional documentation which did not contain sufficient detail to adequately establish the employer’s requested newly requested date of need for the current filing season. Instead they submitted dozens of pages of tax returns, unsummarized invoices, unexplained technical work documents, and letters of intent which reference an unspecified ‘mid- January’ start date.

Id. In addition, the CO acknowledged that Employer submitted a “single-page staffing graph,” but the CO also noted this was not the requested summarized payroll and staffing data requested in the NOD, and that the staffing and payroll documentation submitted was not sufficient to establish Employer’s need for workers on the date requested. *Id.* The CO also stated that Employer “attempted to establish its peakload need based solely on past certifications; however, the employer did not provide the documents specifically requested in its NOD.” *Id.* The CO then noted that “prior participation in the program alone does not establish the employer’s temporary need for workers.” *Id.* Finally, the CO stated that the change in Employer’s beginning and ending dates of need totaled 31 days, or an expansion of over 10 percent, and that Employer did not provide adequate documentation to justify the shift in dates of need. AF at 26.

On appeal, Employer submitted a lengthy brief. Employer argued that the CO made factual errors in and failed to consider “extensive favorable evidence”; that the CO should have issued another NOD pursuant to 20 C.F.R. § 655.32(a-b) instead of denying the Application; that the CO applied the inappropriate definition of “temporary”⁷; and that the CO failed to consider the Employer’s request to modify its dates of need before issuing its denial. Employer’s Brief at 1-2. Employer argued that if it had been issued a second NOD, it would have had adequate time to prepare the requested summarized monthly payroll reports, which did not exist in the normal course of business and which it was unable to produce in only 10 days. *Id.* at 3, 9. Employer stated that it has lost several of the contracts that commenced in mid-January 2018, and therefore, Employer requested the Application be remanded to the CO to allow Employer to provide the requested summarized payroll reports and to revise the dates of need. *Id.* at 2. Employer argues it will suffer “irreparable harm” and its U.S. permanent workers will suffer if the CO’s decision is affirmed. *Id.*

Scope and Standard of Review

The scope of the Board’s review in the H-2B program is limited. When an employer requests a review by the Board under section 655.61(a), the Board may consider only “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5).

⁷ See FN 2, *infra*. Employer argues that the CO relied on the DOL’s definition of temporary need (20 § C.F.R. 655.6(b)) instead of definition (8 C.F.R. § 214.2(h)(6)(ii)(B)).

The proper standard of review of the CO's denial of certification is less than clear. Neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, but the Board has fairly consistently applied the arbitrary and capricious standard in reviewing the CO's determinations. *Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016)⁸; *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017). However, some opinions have not discussed a standard of review, and others issued by the Board have suggested that the CO's determinations should be reviewed, at least at times, *de novo*. See, e.g., *Roadrunner Drywall Corp.*, 2017-TLN-00035, slip op. at 3, n.11 (May 4, 2017) (citing *Albert Einstein Medical Center*, 2009-PER-00379 (Nov. 21, 2011) (*en banc*)); *Sands Drywall, Inc.*, 2018-TLN-00007, slip op. at 3. (Nov. 28, 2017), *Zeta Worldforce, Inc.*, 2018-TLN-00015, slip op. at 4 (Dec. 15, 2017) (suggesting a hybrid approach where a CO's policy-based determinations would not be overturned unless arbitrary, capricious, or inconsistent with the established policy interpretation, but absent such an established policy-based interpretation of the regulations, reviewing the CO's denials *de novo*).

Because in this case I would affirm the CO's decision whether I afforded it deference or not, I need not resolve the issue of what level of deference should be applied in reviewing the CO's determinations.

Discussion

An employer seeking certification must show that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by DHS.⁹ 8 C.F.R. § 214.2(h)(6)(ii)(B); 20 C.F.R. § 655.6(a), (b). 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); 20 C.F.R. § 655.6(a). The DHS 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). The employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. *Alter and Son Gen. Eng'g*, 2013-TLN-00003, slip op. at 4 (Nov. 9, 2012); *BMGR Harvesting*, 2017-TLN-00015, slip op. at 4 (Jan. 23, 2017).

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

⁸ A three-judge panel of the Board adopted the “arbitrary and capricious” standard in *Brook Ledge* after referencing *J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2015), a case reviewing the denial of labor certification under the H-2A program. *Brook Ledge Inc.*, slip op. at 5-6. After noting that the CO argued that the Board should defer to the OFLC’s interpretation of a regulation unless it is arbitrary, capricious, an abuse of discretion or not in accordance with law, the panel stated, “Generally speaking we do not disagree with the CO’s characterization of its role vis a vis OFLC. We have previously acknowledged that BALCA reviews decisions under an arbitrary and capricious standard. See *J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2015). We take no issue with the assertion that BALCA should defer to OFLC’s rational and reasonable interpretation of an ambiguous regulatory term.” *Id.* at 5.

⁹ 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.

Certification.”); *Saigon Restaurant*, 2016-TLNL-00053, slip op. at 5-6 (July 8, 2016); *Munoz Enterprises*, 2017-TLNL-00016, slip op. at 6 (Jan. 19, 2017). However, where an employer explains why it cannot produce the requested documentation and provides alternative evidence, it is an abuse of discretion for the CO to deny certification without considering whether such alternative evidence is sufficient to carry the employer’s burden. *International Plant Services, LLC*, 2013-TLNL-00014, slip op at 6 (Dec. 21, 2012).

Here, the CO noted that Employer failed to supply the requested summarized payroll data for the previous three years and concluded that the staffing and payroll documentation submitted was not sufficient to establish Employer’s need for workers on the date requested. Employer stated in its response to the NOD that “[s]ome information that the DOL NOD requests does not exist in the normal course of business for the employer; therefore, [Employer] is submitting available responsive information.” AF at 42. This statement does not specify to which information Employer is referring; however, even interpreting this as an adequate explanation of why Employer could not produce the requested summarized payroll records, after reviewing the record, I find that the CO properly considered the alternative evidence submitted by Employer and found it insufficient to establish Employer’s temporary need for the requested dates. Therefore, because Employer failed to meet its burden to establish the dates of its temporary need, the CO properly denied the Application.

Employer’s arguments in favor of remand or certification of its Application are unconvincing. First, the CO did not make any significant factual errors and properly considered the evidence submitted by Employer. Employer may have justified its general peak load need, but it did not submit sufficient evidence justifying the specific dates of its current Application. Further, the CO is under no obligation to issue another NOD under 20 C.F.R. § 655.32(a-b); it is within the CO’s discretion whether or not to issue a second NOD, and there was no indication that a second NOD would have cured the deficiency. Employer’s contention on appeal that a second NOD would have allowed it time to compile the requested payroll reports is an argument that should have been conveyed to the CO in its response to the NOD. In addition, that the CO apparently did not consider Employer’s request to modify its dates of need before issuing its denial does not mandate a remand. The regulations provide that “[i]n considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified....” 20 C.F.R. § 655.35(a). There is no indication that the requested amended dates of need would alter the CO’s denial.

Next, despite Employer’s contention that the CO applied the inappropriate definition of “temporary,” the record does not reflect that the CO applied the wrong standard or definition. Employer contends that the “real issue” is that it sought approval for a temporary peak load of 10 months instead of nine months, *see* Employer’s Brief at 3, however nowhere does the CO allude to the number of months as a reason for the denial.

Employer’s repeated citation to the fact that previous Applications were approved is irrelevant.¹⁰ The fact that the CO may have approved similar applications in the past is not ground for reversal of the denial. *Rollings Sprinkler & Landscape*, 2017-TLNL-00020 (Feb. 23, 2017).

¹⁰ Employer stated that is not arguing that past certifications should assure future certification, Employer’s Brief at 11, but also suggests its prior history of showing a peak load is “precedent” and cites to the concept of *stare decisis* when referring to its “track record of prior DOL ‘Certifications.’” Employer’s Brief at 10, 19. While it may be frustrating for Employer that its previous applications were approved and this one was not, and it is unfortunate that Employer “has

Based on the foregoing discussion, the CO's denial of certification is affirmed.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

lost several contracts which commenced in mid-January," the outcome in this matter underscores the importance of carefully and fully responding to the CO's requests in a NOD.