



Issue Date: 09 February 2018

BALCA Case No.: 2018-TLN-00055
ETA Case No.: H-400-17317-859379

In the Matter of:

TOWERS COMPANY,
Employer.

Appearance: Kevin Lashus, Esquire
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For the Employer

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

Before: Scott R. Morris
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from Tower Company’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). 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 1, 2017, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer.³ AF 68.⁴ Employer requested certification of twenty “helper-carpenters” for its 2018 peakload season from February 1 to November 1, noting a “winter-related to slow down in residential building in Texas.” AF 58. Employer included in its application monthly sales reports from 2015 to 2017 and a monthly payroll chart from 2016. The 2016 payroll chart showed two full-time permanent employees, nine to fourteen full-time temporary workers in every 2016 month, and additional subcontract work generally ramping up throughout the 2016 year.

By letter dated November 21, 2017, the CO issued a Notice of Deficiency (“NOD”) detailing three reasons for nonacceptance. First, citing 20 C.F.R. § 655.6(a) and (b), the CO concluded that Employer had not sufficiently demonstrated a peakload need. The CO noted that because Employer’s 2016 payroll chart showed full-time temporary workers working 1920 hours during its nonpeak period, it appeared that Employer had a recruitment challenge—not a temporary need. Since Employer did not provide an explanation, the CO found unclear how its monthly sales charts—which demonstrated increasing sales from 2015 to 2017 but no clear seasonal patterns—supported a finding of temporary need. The CO also did not accept Employer’s assertion that a “winter-related slow down” supported a peakload need from February to November, as weather in Texas is relatively favorable to year-round outdoor work. AF 53. Second, citing 20 C.F.R. § 655.11(e)(3) and (4), the CO determined that Employer had not included adequate attestations to justify the specific need for twenty helper-carpenters. Acknowledging that Employer provided general information about its business, the CO found that Employer had not clearly articulated how it determined its need for twenty temporary helper-carpenters. AF 55. Finally, citing 20 C.F.R. §§ 655.5 and 655.15, the CO stated that it was unable to verify the existence of Employer’s business. AF 56-57. To remedy these deficiencies, the CO directed Employer to submit: a detailed statement of temporary need

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 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 The appeal file does not disclose when the Department received Employer’s application, but November 1, 2017 is the date Employer’s attorney signed the application.

⁴ References to the appeal file will be abbreviated with an “AF” followed by the page number.

concerning its alleged peakload need and number of request workers, summarized monthly payroll reports , a summary of monthly projects, a copy of Employer's signed contracts identified in its application, documentation showing that weather conditions cause a peakload between February and November, evidence proving Employer's business existence, and any other evidence tending to support Employer's application attestations. AF 53-57.

On December 6, 2017, Employer responded to the NOD. AF 28-49. It submitted a number of documents, including: a cover letter from Employer's owner; Perry Homes' San Antonio listings of available homes; a letter of support from Perry Homes' Division President Philip Weynand; 2015 and 2016 Schedule C Profit or Loss From Business forms; monthly sales reporting summaries for 2015, 2016, and 2017 (January through November); and 2012, 2015 and 2016 Miscellaneous Income 1099-MISC forms. AF 30-49.

In its cover letter, Employer stated its disagreement regarding the CO's request for payroll charts: "Past performance in the form of payroll charts summaries doesn't fully identify the temporary need. Accordingly, we've attached lost sales which clearly indicate the majority of the sales lost is from February through November." AF 28. Employer alleged that construction in Texas drops significantly from Halloween to Valentine's Day and pointed to its financial summaries to substantiate this allegation, though it did not know the reason for that seasonal decline. Employer also stated that it was unclear why the CO requested contracts for work in the upcoming year, as it was not aware of any circumstances in which contracts are executed 90-75 days in advance of initiation of the work. Employer referred the CO to the Perry Homes Letter of Intent, which indicated that contracting would occur in 2018 for its January through October work.

On January 2, 2018, the CO issued a Non-Acceptance Denial. AF 12-21. The CO determined that Employer's submissions did not cure two of the three deficiencies noted in the NOD. First, citing 20 C.F.R. § 655.6(a) and (b), the CO found that Employer failed to sufficiently demonstrate a 2018 peakload need from February 1 to November 1. The CO stated that Employer's payroll—which it refused to submit—would have been helpful in assessing whether this occupation has a peakload season. Perry Homes' San Antonio listings of available homes did not document Employer's peakload need because it included no information regarding if and when Employer worked on those homes. Employer's Schedule C and 1099-MISC forms did not support Employer's peakload attestation because the reports did not contain a monthly breakdown. Employer's cover letter did document its expanding relationship with Perry Homes, but the CO found the letter to only show that Employer builds most of its homes between February and October—not that the majority of Employer's work is done during its requested dates of need. The CO also found that Employer's sales reports, which contain calculations of "potential sales lost," (1) do not clearly connect to Employer's work in producing homes, (2) conflict with Employer's previously submitted payroll, and (3) contraindicate a February to November peakload by showing large sales volumes in November and December of 2016. AF 14-18.

Likewise, citing 20 C.F.R. § 655.11(e)(3) and (4), the CO found that Employer's submissions to fail to demonstrate that the number of workers requested on its application is true and accurate. For almost identical reasons as those described above, the CO found that none of

Employer's documents quantifiably evidenced a bona fide need for twenty helper-carpenters. AF 18-21. Because the Employer had failed to remedy these deficiencies with its submissions, the CO denied Employer's application. AF 21.

On January 16, 2018, Employer appealed the CO's denial of certification to BALCA. It argued that the CO "erroneously determined that Towers Company to establish that its peakload job opportunity is and will be temporary in nature," and purported to "reserve[] the right to fully articulate with legal authority in a brief in support of the appeal until after the Honorable Office of Foreign Labor Certification has the opportunity to deliver the administrative record to the court." The CO compiled the administrative record and electronically provided the Appeal File to this Tribunal on January 25, 2018.

By email dated February 1, 2018, Employer's filed a Motion to Extend Briefing Deadline, requesting until February 9, 2018 to complete its briefing. This Tribunal denied Employer's request by Order dated February 2, 2018, finding that the regulations do not countenance an employer's filing of a final brief separate from its initial appeal. However, as Employer may have relied upon this Tribunal's initial grant of permission to file a brief within seven days of Employer's receipt of the appeal file, the Tribunal permitted Employer to submit a brief within that timeframe.

On February 5, 2018, the CO informed this Tribunal that it would not be filing a brief. Employer's deadline for submitting a brief has passed, and none has been received.

DISCUSSION

Legal Standard

The standard of review in the H-2B program is 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 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).

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-00015, slip op. at 4 (Jan. 23, 2017); *Alter and Son Gen. Eng'g*, 2013- TLN-00003, 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.⁵ 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-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); *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013) (reversing denial where the employer sufficiently justified the number of workers requested in its application); *North Country Wreaths*, 2012-TLN-00043 (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).

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 Certification.”); *Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016).

Analysis

Upon review of the appeal file, including Employer’s request for review, the undersigned finds that the CO’s denial of certification is supported by the evidence of record. Specifically, the CO did not err in finding that Employer’s documentation failed to establish both a 2018 peakload need from February to November and a need for twenty helper-carpenters. For the reasons that follow, the Tribunal affirms the CO’s determination.

First, this Tribunal notes that Employer failed to submit the supporting documentation requested by the CO in the NOD, which in and of itself could constitute grounds for denial. The CO clearly instructed Employer in the NOD to submit “summarized monthly payroll reports for up-to-date 2017 at the employer’s worksite location in Bexar-San Antonio-New Braunfels, TX MSA.” AF 54-55. In response, Employer flatly refused, stating: “We disagree regarding the payroll charts. Past performance in the form of payroll summaries doesn’t fully identify the temporary need. Accordingly, we’ve attached lost sales which clearly indicate the majority of the sales lost is from February through November.” AF 28. Although Employer had already

⁵ 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.

submitted summary of its payroll data for the calendar year 2016 (AF 67), it declined to provide any payroll data for 2017. In the Non-Acceptance Denial, the CO rejected Employer's contention, stating that: "this occupation's payroll is helpful in assessing if there is a peak in the hours worked in this occupation." AF 17.⁶

The CO's assertion is supported by caselaw. Although an employer can substantiate its need for workers through alternative documentation, detailed payroll data plays a crucial role in determining an employer's need for temporary labor. *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046, slip op. at 6 (Apr. 23, 2013); *see also Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017) (affirming denial based on payroll data showing a lack of need for the employer's requested amount of temporary labor); *North Country Wreaths*, 2012-TLN-00043, slip op. at 5-6 (Aug. 9, 2012) (same). As noted above, an employer's noncompliance with a CO's request for supporting documentation could result in a denial on review. *See* 20 C.F.R. § 655.32(a); *Deboer Brothers Landscaping, Inc.*, 2009-TLN-00018, slip op. at 5 (Apr. 3, 2009). Here, Employer's only stated reason for failing to provide the CO with the requested payroll data is that Employer believed such data was irrelevant. AF 28. Employer's belief was mistaken, and such a flat refusal is sufficient to support the CO's Non-Acceptance Denial. Nevertheless, for the reasons that follow, this Tribunal also finds that Employer's other submitted documentation fails to substantiate its request for twenty workers from February to November.

Regarding Employer's alleged period of peakload need, the undersigned recognizes that the CO did not account for Employer's letter of support from Perry Homes' Division President Philip Weynand. Therein, Mr. Weynand states that Perry Homes intended to use the services of Tower's Company in 2018, with "peak month [of] services" needed from "January 15, 2018 to October 15, 2018." AF 42. Since it appears that Towers Company provides services almost exclusively for Perry Homes,⁷ such a statement supports a finding that Employer's peakload need for 2018 will occur between January 15 and October 15. This dovetails with Employer's assertion that Towers Company—a small framing company—builds most of its homes between February and October. AF 30. Thus, some of Employer's evidence generally supports its contention of a 2018 peakload need season from February to November.

However, other data seems to indicate that Employer's workers are employed year-round at nearly the same frequency. The 2016 payroll data Employer did submit (AF 67) shows that the total number of hours worked monthly by Employer's permanent and temporary workers in the aggregate ranged from 1760 to 2560 hours, with the supposed non-peakload months of January, November, and December each showing a total of 2240 employee hours. Taking the additional "subcontract work" category into account and assuming it indicates additional work performed by Employer,⁸ this only shows a generally increasing amount of business over the 2016 year (from \$26,600 in January to \$80,000 in December)—not a peakload from February to November with a drop during the winter months. This payroll data casts doubt on Employer's

⁶ With regard to the relevance of payroll data in assessing Employer's request for twenty workers, the CO similarly stated that "this occupation's payroll is helpful in assessing if there is a peak in the hours worked in this occupation and therefore a need for 20 temporary Helpers-Carpenters." AF 20.

⁷ Employer's income from Perry Homes for 2015 and 2016 constitutes nearly all the income it received for those years. *Compare* AF 32 & 34 *with* AF 39 & 40.

⁸ Employer did not explain the relevance of this category.

(and Perry Homes') assertion that Employer will experience a 2018 peakload between February and November.⁹

Similarly, Employer's sales data fails to demonstrate its alleged peakload need period. Employer's submissions include sales reporting forms from January 2015 to November 2017. AF 33, 35-36. Although this data shows generally increasing sales during this period, no clear sales-related peakload can be discerned. In fact, for 2017, this sales data show that Employer's lowest three months of sales occurred in April, May, and July—three months that Employer alleges will be part of its peakload period for 2018. And despite Employer's inclusion of an additional column showing "potential sales lost"—which does contain increasing values of "lost sales" during its alleged peakload season—Employer fails to explain how it arrived at these figures. Accordingly, the CO reasonably concluded that Employer's evidence did not establish a 2018 peakload season from February to November.

Moreover, to establish a "peakload need," Employer must show shows 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). With regard to this requirement, the CO correctly observed that the 2016 payroll data Employer did submit (AF 67) shows that the vast majority of its labor is currently being performed by temporary laborers. Specifically, Employer only employed two full-time permanent employees in 2016, while it employed between nine and fourteen full-time temporary employees through every month of 2016. Thus, the CO reasonably observed that it appears Employer "has a recruitment challenge and not a temporary need." AF 15. Since Employer's payroll data does not show that more temporary workers will not become part of its regular operations, it has not established a peakload need under the regulations.

With regard to substantiating a need for the number of workers requested, the CO also reasonably found Employer's documentation wanting. As explained above, payroll data plays a crucial role in supporting/disproving Employer's attestation regarding its level of need. *See Roadrunner Drywall*, 2017-TLN-00035, slip op. at 8-10 (May 4, 2017) (affirming denial based in part on payroll data showing an unexplained, significant decrease in permanent staff alongside Employer's request for a greater number of temporary workers); *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046, slip op. at 6-7 (Apr. 23, 2013) (reversing denial based on payroll records showing that eight permanent employees worked close to 7000 hours of overtime in the prior year). By failing to provide the most recent payroll data, including the monthly hours worked by its permanent and temporary employees, Employer has failed to demonstrate its need for twenty helper-carpenters. Even assuming that Employer had proved a 2018 peakload need season from February to November, there is simply no documentation that would allow this Tribunal to quantify Employer's labor needs. Employer fails to explain how it arrived at its "lost sales" figures and how they would translate into a need for twenty temporary workers. Accordingly,

⁹ The Tribunal recognizes that because this payroll data is from 2016, its applicability to forecasting Employer's 2018 peakload may be diminished; however, by refusing to submit 2017 payroll data, Employer has forced the CO and this Tribunal to consider its request on the basis of evidence that contradicts its peakload attestations.

Employer's evidence of some additional work for Perry Homes in 2018 does not satisfy its burden to demonstrate a need for twenty helper-carpenters.

In sum, Employer's documentation fails to sufficiently substantiate its attestations regarding its peakload season and its need for twenty helper-carpenters. Therefore, this Tribunal affirms the CO's denial of certification.

SO ORDERED.

For the Board:

Scott R. Morris
Administrative Law Judge