U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 22 December 2017

BALCA Case No.: 2018-TLN-00029
ETA Case Nos.: H-400-17025-394339

In the Matter of:

T & D CONCRETE, INC.,
Employer.

Before: **WILLIAM T. BARTO**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the labor certification process for temporary non-agricultural employment in the United States 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. Commonly referred to as the H-2B Nonimmigrant Visa Program, the H-2B visa classification applies to an individual coming to the United States as a temporary worker in a non-agricultural job with no plans to stay permanently. An employer who wants an H-2B visa must first obtain a "temporary labor certification" from the Department of Labor ("DOL").

As explained below, I affirm the Certifying Officer's (CO) decision to deny Employer's application for temporary employment certification.

FINDINGS OF FACT

T & D Concrete [hereinafter Employer] provides construction services at various worksites in the state of Florida. On September 12, 2017, Employer submitted an *Application for Temporary Employment Certification* to hire 25 nonimmigrant workers as construction laborers to meet a period of need between December 3, 2017, and August 3, 2018.[1] Employer stated, in sum, that the period of need is "due to a Peakload demand which increases every month as you can see on our payroll breakdown, the

[1] Appeal File (AF) at 52-89.

last four months of the year (September, October, November and December) have an increased number that we still can't satisfy because of our workload and [t]he community does not have the employee base, as the area is mainly retirees and one time a farming community, the opportunity to find workers is virtually impossible."[2] In support of this assertion, Employer included, *inter alia*, a payroll summary for 2016 (AF at 75), a monthly payroll breakout for the same period (AF at 76), and a description of its business (AF at 77-79). The monthly payroll breakout for 2016 read as follows:

Month	Number of Workers	Total Hours Worked	Total Payroll
January	235	47,194	965,287
February	226	40,346	824,910
March	238	43,729	887,024
April	245	56,663	1,204,247
May	271	47,716	1,023,614
June	247	45,965	987,052
July	268	63,666	1,343,337
August	262	52,869	1,138,911
September	281	69,672	1,457,329
October	277	52,381	1,093,314
November	282	46,442	967,583
December	321	61,266	1,618,384
Average[3]	263	52,326	1,125,916

In response to a Notice of Deficiency issued by the CO that observed Employer had not established a temporary need for more workers during the period specified,[4] Employer provided additional materials, including annual payroll summaries for the period January 2015-September 2017.[5] Review of the summaries indicates that Employer's payroll hours grew from an average of 49,586/month in 2015 to 63,871/month in 2017.

The CO determined that Employer had still not demonstrated that the need for more workers was temporary in nature, and articulated a number of bases for this

[2] AF at 52 & 58. In support of this assertion, Employer included, *inter alia*, a payroll summary for 2016 (AF at 75), a monthly payroll breakout for the same period (AF at 76), and a description of its business (AF at

[3] Not calculated by Employer.

[4] AF at 45. In light of my disposition of this matter, it is unnecessary to discuss the other deficiencies noted by the Certifying Officer in Employer's application at this stage or the remedial measures undertaken by Employer which largely cured them.

[5] AF at 32-40.

conclusion.[6] The CO observed that Employer had not demonstrated either a peakload need in its business or an event that could give rise to such a peak.[7] Moreover, to the extent that Employer identified a "peakload need" from December through August, the payroll information provided by Employer did not support such a determination.[8] For these reasons, the CO denied Employer's application.[9]

ISSUE

I must determine whether the CO acted arbitrarily, capriciously, or unlawfully by denying Employer's application for temporary labor certification on the basis that Employer had failed to demonstrate that its need for nonimmigrant workers was "temporary," as that term is defined by 20 C.F.R. § 655.6(b).

DISCUSSION

The scope of review for a denial of a temporary labor certification is limited to the written record, which consists of the Appeal File, the request for review, and any legal briefs submitted by the parties. *See* 20 C.F.R. § 655.61(e). The standard of review is similarly constrained: this Board may reverse or modify the CO's determination or remand to the CO for further action only if the determination at issue is arbitrary, capricious, or otherwise not in accordance with applicable law.[10]

"The criteria for certification include whether the employer has a valid H-2B Registration to participate in the H-2B program and has complied with all of the requirements necessary to grant the labor certification." 20 C.F.R. § 655.51(a). "An employer seeking certification under this subpart must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary." *Id.* § 655.6(a). An employer need is "temporary" only if it is "one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations." *Id.* § 655.6(b). A need is not "temporary" if it lasts for more than nine months. *See id.* Departmental regulations also constrain the ability of the CO to grant temporary labor certifications. An employer bears the burden of demonstrating eligibility for the H-2B program,[11] and a CO may not grant

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[6] AF at 11.

[7] AF at 12.

[8] *Id.*

[9] AF at 9.

[10] *See, e.g., Brook Ledge Inc.*, 2016TLN00033, slip op. at 5 (May 10, 2016) (acknowledging that "BALCA reviews decisions under an arbitrary and capricious standard").

[11] *See D and R Supply*, 2013TLN00029, slip op. at 6 (February 22, 2013) (citing 8 U.S.C. § 1361).

a temporary labor certification unless the employer seeking the certification has complied with all the requirements of the labor certification process for H-2B workers. 20 C.F.R § 655.50(b).

Under the instant facts, Employer has provided insufficient evidence to establish that the need for nonimmigrant labor is temporary. To the contrary, the evidence submitted by Employer tends to establish that the need for additional workers is actually permanent. As a threshold matter, Employer's "Statement of Temporary Need" asserts that its shortage of workers is due to the fact that the surrounding community "does not have the employee base, as the area is mainly retirees and one time a farming community, [and] the opportunity to find workers is virtually impossible."[12] On its face, this does not appear to be a temporary situation, and Employer does not explain how it supports its application. The non-temporary nature of Employer's need is also demonstrated by its payroll summaries indicating steady growth in payroll since 2015.[13] While this growth may not continue indefinitely, it is certainly not "temporary" as that term in used in 20 C.F.R. § 655.6(b).

Employer's "Application for Temporary Employment Certification" is also internally inconsistent. Employer asserts a "Peakload" in its "Statement of Temporary Need" during the months of September through December, an assertion that is supported by the payroll breakdown for 2016. The only months during 2016 in which Employer employed an above average number of workers who worked an above average number of total hours were September through December.[14] However, the period of intended employment is specified as December 3, 2017, through August 3, 2017, a period marked by largely average or below average employment, hours, and payroll.[15] Even if such evidence were somehow interpreted as some evidence of "Peakload," it is counterintuitive that a "Peakload" would last two-thirds of the calendar year. As such, the weight of the evidence does not support Employer's assertion of "Peakload" during the period of intended employment.

CONCLUSION

For the reasons stated above, Employer has failed to meet its burden of showing that the CO acted arbitrarily, capriciously, or unlawfully by denying Employer's

[12] AF at 52 & 58.

[13] AF at 32-34.

[14] AF at 76.

[15] AF at 52. There were exceptional months, such as May (above average employment, below average hours and payroll) and July (above average employment, hours, and payroll). But this information, without more, does not establish the period from December to August as a "Peakload" need.

application for temporary labor certification on the basis that Employer had failed to demonstrate that its need for nonimmigrant workers was temporary. The evidence of record does not establish that Employer's need was temporary, and the CO cannot certify an application if Employer has not met all the requirements of Subpart A of Part 655. *See* 20 C.F.R. § 655.60(b). As such, Employer's request to reverse the CO's determination is **DENIED**.

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's determination is **AFFIRMED.**

SO ORDERED.

For The Board:

WILLIAM T. BARTO
Administrative Law Judge