



Issue Date: 15 December 2017

BALCA CASE NO.: 2018-TLN-00015
2018-TLN-00016
2018-TLN-00017

ETA CASE NO.: H-400-17283-844783
H-400-17226-894736
H-400-17267-739535

In the Matter of:

ZETA WORLDFORCE, INC.,
Employer.

DECISION AND ORDER

This matter is before the Board of Alien Labor Certification Appeals on three applications Employer Zeta Workforce Inc. filed for certifications under the H-2B nonimmigrant alien worker program. A certifying officer at The Department of Labor's Employment and Training Administration denied all three applications on November 6, 2017. Employer timely requested administrative review on November 15, 2017, and the matters were assigned to the undersigned on behalf of BALCA. *See* 20 C.F.R. § 655.61(a). Given the similarity of the parties and issues, I consolidated the three cases for all purposes.

This Decision and Order is based on a written record, which consists of the Appeals Files and Zeta's briefs. 20 C.F.R. § 655.61(e).¹ The Administrator elected not to file a brief. I will affirm the certifying officer's denials of the three labor certification applications.

Findings of Fact

The parties agree, and I accept, that Zeta is a job contractor under the regulations. AP 15 at 3, 37; AP 16 at 1, 32; AP 17 at 5, 50.² A "job contractor" is an employer that "contracts services or labor on a temporary basis to one or more employers [unaffiliated with it and where it] will not exercise substantial, direct day-to-day supervision and control in the performance of the services

¹ When an H-2B employer requests BALCA review, 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 certifying officer prior to issuance of the final determination; no new evidence is permitted. *See* 20 C.F.R. § 655.61(a)(5).

² "AF 15" refers to the Appeals File for BALCA No. 2018-TLN-00015; "AF 16" refers to the Appeals File for BALCA No. 2018-TLN-00016; "AF 17" refers to the Appeals File for BALCA No. 2018-TLN-00017.

or labor to be performed other than hiring, paying and firing the workers.” 20 C.F.R. § 655.5. Consistent with this, Zeta describes itself as an “HR Consulting firm that provides customized Workforces Solutions, including international Recruitment and Staffing for temporary and permanent hard to recruit, and/or hard to retain positions in agriculture, manufacturing, landscaping and other industries.”

The work for which Zeta seeks the certifications would be performed at its employer-clients, respectively: Norsan Meats, Mar-Jac, and Vital Foods. The parties agree, and I accept, that under the regulations, this makes Zeta and the three employer-clients joint employers for purposes of these applications. *See* AP 15 at 5, 37; AP 16 at 4, 32; AP 17 at 5, 50.

The relevant facts in the three cases are largely the same. For Norsan Meats,³ the application is for 60 workers classified as slaughterers/meat packers to work in Duluth and Tucker, Georgia in the 17 months from December 24, 2017 through May 23, 2019. For Mar-Jac,⁴ the application is for 150 meat, poultry, and fish cutters and trimmers to work in Gainesville, Georgia in the 15 months from December 8, 2017 through March 7, 2019. For Vital Foods,⁵ the application is for 600 meat, poultry, and fish cutters and trimmers also to work in Gainesville, Georgia in the 17 months from November 15, 2017 through April 15, 2019.⁶ The three locations are in a rural area northeast of Atlanta, less than an hour’s drive from one-another.

Zeta characterizes all three applications as one-time occurrences due to a recent labor shortage. It attributes the labor shortage to the strong local economy (reflected in a low unemployment rate and in the number of new businesses starting) that is diverting workers to other jobs.

In each application, Zeta states that it has not previously employed similar (*i.e.*, meat processing) workers in these locations and will not need them in the future because the employer-clients each will be securing permanent workers. It admits, however, that the meat processing plants in this part of Georgia⁷ have brought in nonimmigrant alien workers from Asian countries “for years, but [their] efforts have not yielded enough workers.”

Despite this experience among meat processing plants and despite the difficult local labor market conditions, Zeta expects that sufficiently numerous permanent workers will become available through immigration under the Employment-Based Immigration (EB-3) and Permanent Certification program (PERM).⁸ It concedes, however, that the minimum time for the relevant government agencies to process immigration applications under these programs is 20 months, and that “delays within the process were not allowing [the local meat processing plants] to bring enough workers on time for their operations” when they were looking for workers from Asia.

³ BALCA No. 2018-TLN-00015.

⁴ BALCA No. 2018-TLN-00016.

⁵ BALCA No. 2018-TLN-00017.

⁶ Zeta’s initial application with its client Vital Foods’ predecessor was for 400 employees; the application was modified to substitute Vital Foods and increase the number of employees to 600.

⁷ This includes one of the employer-clients involved here.

⁸ “PERM” is an acronym for the “Program Electronic Review Management” system.

The certifying officers issued a notice of deficiency in each case. She opined that a labor shortage is insufficient to establish that the need is temporary, and thus Zeta and its clients had failed to show that their need for the workers' services was temporary. She required Zeta and its clients to submit additional information in each case. This included, among other things, an explanation for why the need was temporary and a summary of monthly payroll data for the past two years either for the client [in the case of Norsan Meats] or for Zeta [in the Mar-Jac case] or at least for one of them (in the case of Vital Foods).

Zeta responded that its need for the employees was temporary because, once the contract period with each employer-client ended, there would no longer be a need for the employees. It explained that the employer-clients' needs were temporary because they would replace these workers with the permanent employees once permanent workers were available; indeed, according to Zeta, the employer-clients have job contractors searching for permanent workers already, and the clients might also test out some of the H-2B temporary workers under these applications for the permanent jobs. Finally, Zeta argued that only it – and not its employer clients – needed to establish that its need was temporary, not the needs of its clients as well.

But Zeta did not supply the requested summary of payroll data either for itself or for its employer-clients in any of the cases.

In all three cases, the certifying officer concluded that the applicants had failed to establish that the nature of the employer's need is temporary. On that basis, she denied the applications, citing 20 C.F.R. §§ 655.11, 655.6(c) (or one of these two regulations). She stated the Zeta and its employer-clients were joint employers, and thus both Zeta and the employer-client on each application had to establish respectively that the need for the workers was temporary. The certifying officer held that a labor shortage alone does not change an occupation that is inherently permanent to one that is temporary, and that need for the workers at each of the three employer-clients was permanent, not temporary.

The applicants' contentions. Zeta argues here, as it did to the certifying officer, that the regulations do not require each employer establish a temporary need; that Zeta's need is temporary because it ends with the termination dates of its contracts; and that, in any event, its clients' needs also are temporary because they will end when they are supplied with permanent employees under the EB-3/PERM program.

Zeta also asserts that it "does not have an ongoing business of supplying workers to other entities." Brief at 3. Rather, it defines its work more narrowly, stating that its

Mission is to provide workers on a temporary basis to American employers (employer-clients) that are facing labor shortages and plan to use or had started the permanent worker certification process to hire their own permanent workers, until their employer-clients can hire their own permanent workers, due to the length of the employment base permanent process.

Id. (sic). This contention is not entirely consistent with Zeta’s earlier self-description as a company that provides “customized Workforces Solutions, including international Recruitment and Staffing for temporary and *permanent* hard to recruit, and/or hard to retain positions in agriculture, manufacturing, landscaping and other industries” (emphasis added). In the earlier description, Zeta acknowledges that it also obtains *permanent* workers from international sources.

Discussion

Standard of review of certifying officer’s decisions. The regulations are silent about the deference the Board of Alien Labor Certification Appeals should accord to a certifying officer’s determination. Where 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 cases, BALCA likely should not overturn a certifying officer’s determination unless it is arbitrary, capricious, or inconsistent with the ETA’s established policy interpretation. But, absent an established policy-based interpretation of the regulations, 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 decisions even were I to accord them no deference (*i.e.*, apply *de novo* review).

Merits on administrative review: in general. It is for an employer seeking certification under the H-2B program “to establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” 20 C.F.R. § 655.6(a); 8 C.F.R. § 214.2(h)(6)(ii)(B).

I. The Applicants Failed To Supply Required Information.

“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.”⁹ On each of the three applications, the certifying officer issued a notice of deficiency that demanded, among other information and documentation, certain payroll records. The applicants failed to comply. I affirm the certifying officer’s decisions on this ground. Nonetheless, and in the alternative, I will consider the parties’ remaining arguments, resolving those in favor of the certifying officer as well.

II. No Application Established A Temporary Need.

“The employer’s need is considered temporary if justified to the [certifying officer] as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as

⁹ 20 C.F.R. § 655.32(a); *see Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017) (Romero, ALJ); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016) (King, ALJ).

defined by DHS regulations.” 20 C.F.R. § 655.6(b); 8 C.F.R. § 214.2(h)(6)(ii)(B).¹⁰ “A job contractor will only be permitted to file applications based on a seasonal need or a one-time occurrence. 20 C.F.R. § 655.6(c).

The parties dispute whether Zeta can satisfy its burden by establishing that its need is temporary even if its clients’ needs are not. The parties agree that Zeta and each respective employer-client form a joint employer relationship. It makes sense that, if either Zeta or its client has a permanent need for the workers, the H-2B program is unavailable to them. But, on this record, I need not and do not reach the issue, as I will find that neither the employer-clients nor Zeta has carried its burden of establishing a temporary need.

A. The Employer-Clients Have Not Established a Temporary Need.

Scrutinizing the employer-clients, their needs are not one-time occurrences. It is a recurring problem that the local meat processing plants have been unable to address sufficiently in the past through the use of alien workers from Asia. As the employer-clients do not argue that this is a seasonal need, a peakload need, or an intermittent need, and as it is not a one-time occurrence, it is not a temporary need.¹¹ See 20 C.F.R. § 655.6(b); 8 C.F.R. § 214.2(h)(6)(ii)(B).

Moreover, the employer-clients fail to show that their need for additional workers to address the labor market shortage is, as the regulations require, a temporary need “that will end in the near, definable future.” See 8 C.F.R. § 214.2(h)(6)(ii)(B). For Zeta and the employer-clients’ plan to succeed, 810 new permanent workers must become available in this area of Georgia within 15 or 17 months, depending on which employer-client – or 20 months at the most, given Zeta’s stated contract period.

The applicants concede that the *minimum* time to process an application for a permanent worker is 20 months. Even if, as they say, the employer-clients have begun the process as to some of the hoped-for permanent workers, we do not know when they did that or for how many workers the process has begun. With a 20-month minimum, there is no basis for an inference that the 810 permanent employees will be available and thus end the need for workers in 15, 17, or 20 months.¹²

¹⁰ The DHS regulations add that “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). “Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years.” 8 C.F.R. § 214.2(h)(6)(ii)(B).

¹¹ To establish an “intermittent need,” “the petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(4). No employer-client offered evidence that it has no permanent or full-time workers to perform the services or labor.

¹² In addition, the employer-clients admit that they also might well find some of the would-be permanent workers from among the new H-2B employers, after the employer-clients have an opportunity to observe their work habits. As that could not begin until the H-2B workers arrive and begin work, this amounts to a concession that the employer-clients have not begun to execute a plan they expect to produce 810 new permanent employees within at most 20 months.

Of greater concern is that neither Zeta nor the employer-clients have any real idea of how many permanent workers might become available in their local area of Georgia within what time period and with a willingness to perform the needed meat processing work. Their efforts before with Asian workers failed. For the present effort, none of these applicants knows how long the EB-3/PERM immigration process will take. They fail to address the fact that this process can take a very long time and that is no guarantee that any application will be successful.

To describe the EB-3/PERM program briefly, it involves the following:

- The employer must meet the requirements to obtain a labor certificate. This requires a showing that there are not “sufficient workers who are able, willing, qualified . . . and available at the time of the application and the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.” 8 U.S.C.A. § 1182.
- The employer must meet certain advertising requirements, file with the state workforce agency, give notice to its employees, and only file the PERM application after 30 additional days if no qualified, able, willing U.S. workers apply.
- If U.S. workers apply, the employer must evaluate them and may not reject them if they are minimally qualified. The employer must submit a report that describes its recruitment steps and the results, including the number of U.S. workers rejected and detailed reasons for the rejections.
- If the employer successfully completes this process, it may file the application (Form 9089). If the employer does not properly complete the form, the application will be denied; it cannot be modified.
- The certifying officer reviews the application. She may deny certification, require a more stringent recruitment process, or audit the application, which can delay the process several months. In an audit, the certifying officer may require documentation (as the certifying officer did in the present cases). If the employer fails to supply the required documentation, that constitutes a substantial failure in the application.
- If the certifying officer denies the application, the employer may seek reconsideration or may request BALCA review. BALCA review might require a hearing and then the time needed for the panel’s decision. It could also result in a remand to the certifying officer with instructions for further development.
- If the employer’s application is approved at the Department of Labor, the employer must proceed to the U.S. Citizenship and Immigration Services. It files a petition to approve the alien worker (Form I-140).

- If that is successful (which it might not be), the next step is an application for adjustment to permanent residence in the United States (Form I-485).¹³ Form I-485 requires submission of extensive evidence, including more forms, civil documents, and evidence of a medical examination and vaccinations. USCIS may reject or deny the application if the applicant fails to submit the requested evidence or supporting documents.

This process thus is complex and is completed on a case-by-case basis. It is not a single application for all 810 workers. No one can predict just how long the process will take, how successful these employer-clients or Zeta will be, or whether these applicants ultimately can recruit enough interested alien permanent workers. The success of the project, if it is successful, will take an indeterminate amount of time. That is inconsistent with the required showing of a need that is temporary and “that will end in the near, definable future.” See 8 C.F.R. § 214.2(h)(6)(ii)(B). The employer-clients’ applications therefore fail for this additional reason.

B. Zeta Did Not Establish a Temporary Need.

Scrutinizing Zeta’s need separately leads to the same result for different reasons. Zeta argues that this is a one-time need because it has no history of hiring meat processing plant workers in this area and the contracts with the three clients are each for a limited time (20 months), which is less than the applicable 3-year limit in the H-2B regulations.

This argument is based on a mischaracterization of Zeta’s need to hire the workers. Zeta does not operate a meat processing plant. It is a job contractor that hires both temporary and permanent workers to meet its clients’ needs. It argues that, in the case of temporary work, it only does this when its clients have a short-term need and intend to fill the jobs later with permanent workers. But this does not address the fact that Zeta routinely, as part of his ongoing business, hires alien temporary workers to meet the demands of the clients with whom it contracts. This is not a one-time event; it is the bread and butter of Zeta’s business.

Even if Zeta’s history of never before supplying meat processing plant workers is somehow relevant, Zeta neglects that, on their face, the three applications it has filed refute any contention of a one-time need. When Zeta files three separate applications for temporary nonimmigrant meat processing workers in a local area of Georgia, it demonstrates three separate needs, not a one-time need.

Finally, the definition of a “one-time” need requires the applicant to show that it will not need workers to perform the work in the future. Given Zeta’s particular history, the fact that it has not in the past hired temporary workers to fulfill contracts with meat processing plant clients suggests nothing about its likely future operations. Zeta was only incorporated on May 15, 2017. With its less than one-year history, Zeta can accurately assert that it has never requested authorization to bring aliens into the country under any program in any industry. Nothing on this record is persuasive that, if Zeta’s employer-clients are unable to hire enough permanent workers by the end of their present contracts with Zeta, Zeta won’t need more temporary workers to meet these same employer-clients’ needs 15, 17, or 20 months from now. And, as discussed above,

¹³ The filing fees for the two forms totals \$1,840. For the 810 workers here, that would be nearly \$1.5 million.

the failure of efforts to obtain sufficient number of workers in this industry in this part of Georgia is entirely possible, if not likely (given past failures).

Accordingly, Zeta has not met its burden of showing that it is entitled to a temporary labor certification. Were I to rely on the certifying officer's conclusion that Zeta is a joint employer with each of its employer-clients, the failure of the clients' applications would defeat Zeta's application as well. But I need not do that here because Zeta's application fails for its own reasons.

Order

The Certifying Officer's denial of Employer's application is AFFIRMED.

For the Board of Alien Labor Certification Appeals

STEVEN B. BERLIN
Administrative Law Judge