

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 24 October 2017

BALCA Case No.: 2018-TLN-00003
ETA Case No.: H-400-17202-904293

In the Matter of:

ADVANCED WELDING SOLUTIONS, LLC,
Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Daniel M. Kowalski, Esq.
Ware Immigration
Centennial, Colorado
For the Employer

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

Before: Richard A. Morgan
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from Advanced Welding Solutions, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny its applications 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), pursuant to the Continuing Appropriations Act, 2018, Pub. L. No. 115-56, Division D, § 101(a)(8) (2017).

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

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 July 28, 2017, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 60 pipe fitter/fabricators for the period of October 16, 2017 to July 2, 2018. (AF 150-208).³ Employer indicated that the nature of its temporary need was intermittent. On Employer’s application (Form 9142B), in response to its statement of temporary need, Employer indicated “see attachment.” Attached to its application are multiple documents including general information from its website about its company. In a letter dated July 24, 2017, in support of its application, Employer states that it has been in business since April 2013 and that it “provide[s] specialized welding, other trades and engineering services to our clients, primarily in the Gulf Coast region of Texas & Louisiana. Our clients are oil/gas refineries, and specialty contractors serving these refineries and pipelines.” In regard to its “intermittent need” for the requested workers Employer indicates that it has a contract with “Zachry Industrial, Inc., for the Freeport LNG Liquefaction Project, [which] is a temporary event of short duration, and is one that does not occur frequently for our company. This type of intermittent project will create the need for 60 temporary pipe fitter/fabricators specialty welders from October 16, 2017 to July 2, 2018.” (AF 191). Employer also notes that,

AWS (Advanced Welding Solutions, LLC.) does not maintain a workforce on a permanent or year round basis. Employment opportunities are provided to U.S. workers on a temporary basis, based on the need of each project. Once the project has been completed, the workers are released. Each project, or series of projects are all finite and time specific. This particular opportunity is projected to last through August 2018. But, it is anticipated that the portion awarded to AWS will be completed by July 2, 2018. Once this project is complete, Advanced Welding Solutions, LLC will no longer have need for these pipe fitter/fabricators.

(AF 192).

The Employer’s application attachment also contains a June 29, 2017 “letter of intent” from the Senior Manager of Zachry Industrial, Inc. stating that Zachry “anticipates retaining Advanced Welding Solutions to provide specialized workers in order for Zachry to perform new

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

construction services at the Freeport LNG project in Freeport, Texas facility. The services would require Advanced Welding solutions to provide 60 specialized welders and 60 pipefitters/fabricators for Zachry’s project. We expect to utilize these workers for a duration of 9 months with a tentative start date of October 16, 2017.” (AF 208).

Employer also filed an application for temporary foreign labor certification under the H-2B program for the 60 welders on the same date, July 28, 2017. This “related” case has been assigned case number 2017-TLN-00074 and may be referred to in the current decision, but will be specifically addressed in a separate Decision and Order, also issued today. The two cases involve essentially the same issue, that is, the CO’s determination that Employer had failed to establish the temporary nature of its foreign labor request.

The CO issued a notice of deficiency in this case on August 11, 2017, listing seven deficiencies in the Employer’s application. (AF 115-126).⁴ The CO noted the first deficiency as the Employer’s “failure to establish the job opportunity as temporary in nature.” (As this is the deficiency which formed the basis for the CO’s ultimate denial of the Employer’s application, this is the only deficiency which will be addressed in this decision.) The CO cited 20 C.F.R. §655.6(a) and (b) for the requirement that “an Employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” The CO noted that an Employer’s need is considered temporary if it is justified to the CO as one of the following: 1) a one-time occurrence; 2) a seasonal need; 3) a peakload need; or 4) an intermittent need. The CO determined that the Employer, in this case had not sufficiently demonstrated the requested standard of temporary need, which as stated in the Employer’s application was “intermittent.”

⁴ A copy of the notice of deficiency issued in the related case, 2017-TLN-00074 on August 8, 2017 is also in the Appeal File at AF 139-149. In that case, the CO had determined that the Employer had failed to establish the job request for 60 welders as temporary. The CO observed that the Employer had a history of varying the type of temporary need for the same occupation at a worksite that is within the same area of intended employment, noting that Employer had requested certifications on multiple occasions within the last two years, as shown in the chart below, with the first request being made on a seasonal basis, the second on a peakload basis, the third as a one- time occurrence, and the fourth request, the current application, on an intermittent basis. (AF 85).

Case #	Workers	Occupation	Start Date of Need	End Date of need	Status
H-400-15175-040461	148/150	Welders	10/01/2015	06/30/2016	Partial Certification
H-400-16022-496493	130	Welders	04/11/2016	01/08/2017	Denied
H-400-16243-749893	85	Welders	11/21/2016	11/19/2017	Partial Certification
H-400-17202-904293	60	Welders	10/16/2017	07/02/2018	Pending

The CO determined that based on the documentation submitted, that the Employer had not proven an intermittent temporary need. The CO stated:

The goal of the Employer (as interpreted by the Chicago NPC) is to consistently win contracts to conduct pipe fitter work. This is contrary to the definition of an intermittent occurrence in that the constant bidding and winning of contracts is not an intermittent occurrence; rather, it is a recurring event that is the basis for the existence of the Employer's business and therefore represents a year round permanent need for workers.

(AF 118).

The CO requested additional information regarding the Employer's business history, schedule of operations and other information supporting how the number of foreign workers requested represented a temporary need, and in particular an intermittent need, including supporting documentation. Additionally, the CO requested an explanation for the changing standard of need in the Employer's requests and a detailed explanation as to why the Employer was certified for a one-time occurrence and now views its need as an intermittent need. Specific information requested included signed monthly invoices from previous calendar years showing that work will be performed for each month during the requested period and summarized monthly payroll reports for a minimum of one previous calendar year, that identify for each month, separately, full time permanent and temporary employment in the requested occupation of pipefitter.

Employer submitted a response dated August 24, 2017, providing some additional documentation. (AF 82-114). Employer also stated that it "acknowledges that it made an error in asking for an intermittent need, based upon a faulty reading of the applicable regulations, and should have asked for workers on a peak load basis, which is consistent with its earlier filings, and accurately describes the need for temporary workers for its business operation." (AF 83). Accordingly, Employer indicated it wished to amend its application to reflect a "peakload need."

In regard to its business operations Employer stated that its jobs are generally one to three weeks in duration and occur throughout the year. Employer stated, "In the previous two years, these regular jobs have required that the company employ between ten and twenty-five 'permanent workers.' In fact all of the Company's employees are hired on a job by job basis, but there is a pattern that can fairly be characterized a 'permanent work force' as it relates to the Company's ongoing need for these short term work projects." (AF 84).

Employer submitted a bar graph showing the number of pipefitters and other workers such as welders employed in each month between July 2015 and July 2017. Employer also supplied a list of workers employed for years ending 12/31/15, 12/31/16 and 12/31/17, and the amount each worker earned. Neither document specifies whether the workers were permanent or temporary employees.

By letter dated September 26, 2017, the CO issued its final determination, denial of certification, on the basis that Employer had failed to establish the job opportunity as temporary in

nature. The CO reiterated the reasons for denial on the basis, as stated in its previous Notice of Deficiency, that Employer had failed to establish its need as an intermittent temporary need. The CO also addressed Employer's request that it amend its need to a "peakload need." The CO stated,

[I]n order to establish a peakload standard of need, the Employer must demonstrate 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 Employer's regular operation.

(AF 72).

The CO noted that Employer had failed to provide specific information regarding permanent, as opposed to temporary, employees as requested. Further, the payroll reports did not demonstrate a peakload need for specialty welders during the requested dates of need. Accordingly, the CO denied certification citing 20 C.F.R. §655.51 regarding failure to establish Employer's temporary need.

Employer timely requested administrative review of the CO's determination. The CO and the Employer were given the opportunity to file briefs in support of their positions. On October 18, 2017 Employer filed a limited brief asserting that "AWS has a fluctuating need for specialty welder and pipefitters/fabricators, depending on available contracts, and that the certification at issue is for a specific, time-limited project supporting the construction of a Liquefied Natural Gas ("LNG) plant in Freeport, Texas, by Zachry Industrial Inc., scheduled for October 16, 2017 through July 2, 2018." Employer relied primarily on the response filed by the Employer in response to the Notice of Deficiency stating that it "clearly and definitively demonstrate[d] a temporary peakload need for specialty welders and fitters." Employer cited no cases or authority in support of its position. On October 19, 2017 Attorney Amanda L. Butler, of the U.S. Department of Labor Regional Solicitor's office ("Solicitor") gave notice that she would not be filing a brief on behalf of the CO in this matter.

SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer's request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO's determination; or
- (2) Reverse or modify the CO's determination; or
- (3) Remand to the CO for further action.

(20 C.F.R. § 655.61(e)).

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge's review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard⁵ to its review of the CO's determination in H-2B temporary labor certification cases. *See Brook Ledge Inc.*, 2016 TLN 00033 at 5 (May 10, 2016); *see also J and V Farms, LLC*, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).

ISSUE

Whether the Certifying Officer properly denied the Employer's H-2B application due to Employer's failure to meet its burden of establishing that its request for 60 pipefitters/fabricators for the period of October 16, 2017 to July 2, 2018, is based upon a "temporary" employment need, according to the Employer's stated standard of an "intermittent" need or its amended stated standard of "peakload" need?

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is "temporary." Temporary need is defined by the DHS regulation at 8 C.F.R. §214.2(h)(6)(ii).⁶ This regulation states:

(A) Definition. Temporary services or labor under the H-2B classification 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)).

The DHS regulation further states in regard to the nature of petitioner's need:

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. 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. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

⁵Similarly, judicial review under the Administrative Procedure Act provides that an agency's actions, findings and conclusions shall be set aside that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C § 706(2).

⁶ Pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (Dec. 18, 2015) the definition of temporary need is governed by Department of Homeland Security (DHS) regulation, 8 C.F.R. §214.2(h)(6)(ii). See also 20 C.F.R. §655.6(b).

(8 C.F.R. §214.2(h)(6)(ii)(B)).

The DOL regulation addressing temporary need in H2-B cases also states:

The Employer's need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.

(20 C.F.R. §655.6).

The DOL regulation also specifies that certification will be denied if the "employer has a need lasting more than 9 months" while the DHS regulation only indicates that the need will generally "be limited to one year or less" except in cases of a "one-time event" which "could last up to 3 years." See 20 C.F.R. § 655.6(b) and 8 C.F.R. §214.2(h)(6)(ii)(B).

In the current case, the Employer initially applied for temporary labor certification for 60 pipefitters/fabricators on an intermittent basis. (Employer also applied for temporary labor certification for 60 welders on an intermittent basis in the related case, 2017- TLN- 00074). In regard to intermittent need, the DHS regulation states, [t]he 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."

The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. *See, e.g. Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

After reviewing the Employer's supporting information the CO determined that based on the documentation submitted, that the Employer had not proven an intermittent temporary need. The CO concluded that the goal of the Employer was to consistently win contracts for welding/pipefitting work and that this type of recurring event which formed the basis for the Employer's business, represented a year round permanent need for workers, rather than a temporary need.

A review of the Employer's provided documentation supports the CO's determination that Employer had failed to document its temporary need.

The Employer explained its business operations as a company which supplies specialized welding, and similar trades and engineering services to its clients who are oil/gas refineries, and specialty contractors serving these refineries and pipelines. (AF 190). Employer states in regard to its business operations:

AWS (Advanced Welding Solutions, LLC) does not maintain a workforce on a permanent or year around basis. Employment opportunities are provided to US workers on temporary basis, based on the need of each project. Once the project

has been completed, the workers are released. Each project, or series of projects are all finite and time specific.

(AF 192).

This type of business operation is similar to a job contractor who provides services to clients on a contract by contract basis. In cases where a job contractor has applied for certification of temporary workers, the regulations are clear that a job contractor will only be permitted to seek certification if it can demonstrate through documentation its own temporary need not that of its employer-client. Advanced Welding Solutions LLC did not apply as a job contractor. Perhaps because it retained control over the work of its employees to a sufficient degree, it is able to distinguish itself from being defined as a job contractor under the regulations. However, a similar reasoning would apply to whether its request for certification of workers represents a temporary or permanent need. Under the regulations the Employer is required to prove its own temporary need, not merely that of its client. In this case the Employer's need for workers is not based on a temporary need, but rather its continuous need to fulfill the needs of its clients on a contract by contract basis, each of which represents a temporary need for a particular client. Regardless of whether an Employer is a contractor or not, the regulations require the employer to establish its own temporary need and not that of a client.

The regulations clearly state at 20 C.F.R. §655.6

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.

In the preamble to the current H-2B regulations the Department of Labor noted that job contractors would only be certified based on seasonal or one-time need "because it is extremely difficult if not impossible to identify appropriate peakload or intermittent need for job contractors with clients who have variable needs." 80 Fed. Reg. 24055 (April 29, 2015). Employer's business operations provide the same type of situation as a job contractor because it is providing workers to clients on a contract by contract basis with each client having variable needs. As the Department further noted, BALCA determined in *Matter of Cajun Constructors, Inc.* 2009-TLN-00096 (Oct. 9, 2009) "that an employer [which] by the nature of its business works on a project until completion and then moves on to another has a permanent rather than a temporary need." Because of this, the Department noted contractors have no temporary need apart from the underlying need of the employer/client on whose behalf they are filing. The Department goes on to state that [w]hen considering "any employer's H-2B registration," DOL will require that Employer to substantiate its temporary need by providing evidence required to support that temporary need.

The DHS and DOL jointly-issued preamble to the most recently passed H-2B regulations, applicable to this H-2B application, also known as the Interim Final Rule ("IFR"), makes it clear that the purpose of the H-2B program is to address temporary and not permanent employment needs.

Routinely allowing employers to file seasonal, peakload or intermittent need applications for periods approaching a year would be inconsistent with the statutory requirement that H-2B job opportunities need to be temporary. In our experience, the closer the period of employment is to one year in the H-2B program, the more the opportunity resembles a permanent position . . . Recurring temporary needs of more than 9 months are, as a practical matter, permanent positions for which H-2B labor certification is not appropriate.

(82 Fed. Reg. 24056 (April 29, 2015)).

The Employer also failed to establish its temporary need as “peakload.” (Employer’s response to the Notice of Deficiency requested that it be allowed to amend its standard of need from intermittent to “peakload” need.) To qualify as a peakload need, the Employer “must establish 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).

In this case Employer has stated that it does not maintain a workforce on a permanent or year around basis. Employer stated, “employment opportunities are provided to US workers on a temporary basis, based on the need of each project.” (AF 192). In its response to the Notice of Deficiency Employer also stated, somewhat inconsistently, in the previous two years, its regular jobs have required that the company employ between ten and twenty-five ‘permanent workers’ but went on to say, “[i]n fact all of the Company’s employees are hired on a job by job basis, but there is a pattern that can fairly be characterized a ‘permanent work force’ as it relates to the Company’s ongoing need for these short term work projects.” (AF 84). Even assuming the Employer has between 10 and 25 ‘permanent’ workers, adding an additional 120 workers (60 welders and 60 pipefitters), which is somewhere between 5 and 10 times its regular workforce, would exceed the implied scope of “supplementing a permanent staff,” as stated in the regulation pertaining to a peakload need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). *See Masse Contracting*, 2015-TLN-00026 (April 2, 2015) (to utilize the peakload standard, the Employer must have permanent workers in the occupation).

At any rate the CO accurately determined that the Employer failed to supply the CO with the requested documentation to support whether any of its employees were temporary or permanent.

The CO also reasonably determined that the Employer’s pattern of submitting H-2B applications provides additional support for the fact that its need for foreign workers is continuous and permanent, rather than temporary. Employer’s applications over the last two years have been summarized in the chart set out in footnote #4 above. If all of the applications listed in the chart, had been granted, the Employer would have had temporary foreign workers on a continuous basis beginning with the first application commencing October 1, 2015 through the end of the current application period which is July of 2018. Thus, Employer’s own applications, which show a continuous need to fill ongoing contracts demonstrate that its need has not been

temporary, as established by a seasonal, peakload, or intermittent need, but in fact has been continuous. *See Matter of Caballero Contracting & Consulting, LLC*, 2009-TLN-00015 (Apr. 9, 2009) (“a job contractor cannot use solely its clients’ needs to define the temporary nature of the job where focusing solely on the client’s needs would misrepresent the reality of the application”). *See also William Ashby Maltzberger d/b/a Maltzberger Ranch*, 2016-TLC-00078, 86 (Sept. 28, 2016)(finding Employer’s two labor certification applications, though separate, demonstrated a year-round need when combined, because of the overlapping nature of the dates of need and the similarities in job requirements and duties). *See also JAJ Hauling, LLC*, 2016-TLN-00054(ALJ July 18, 2016)(affirming denial of certification where fluctuation in application timeframe suggested that Employer’s need appeared to be “year-round need rather than seasonal”).

For the foregoing reasons, the CO properly determined that the Employer has failed to demonstrate that its need for 60 pipefitters/fabricators between October 16, 2017 and July 2, 2018 represents a temporary need on the basis of either an intermittent or peakload standard.

Employer has given some reasonable and valid reasons for its request to utilize foreign labor to fulfill its labor requirements, especially its asserted difficulty in finding U.S. workers with the skills necessary to perform this type of skilled labor involving specialized welding and pipefitting. Further, the need for this type of essential work on oil refineries and pipelines in the gulf coast region has been made even more apparent in the wake of the devastation left behind by the recent Hurricane Harvey.

However, it is clear that the Department of Labor did not contemplate an Employer utilizing this particular program, the H-2B temporary labor certification program, to address an Employer’s need to meet its ongoing and continuous need to supply skilled labor on a contract by contract basis. One might ask whether Congress and/or the Department of Labor has considered the utility of establishing a program to address this type of foreign labor need, or whether training programs should exist to train U.S. workers to perform this type of skilled labor, in light of the Employer’s assertion that qualified American workers are not available.

CONCLUSION

For the reasons stated above, Employer has failed to meet its burden of showing how its employment need for 60 pipefitters/fabricators, between October 16, 2017 and July 2, 2018, is temporary based on Employer’s stated standard of “intermittent” or “peakload” as defined by the applicable regulation at 8 C.F.R. §214.2(h)(6)(ii). The CO’s determination is neither arbitrary nor capricious. Accordingly, the CO’s denial of Employer’s application for temporary labor certification is affirmed.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

RICHARD A. MORGAN
Administrative Law Judge