



Issue Date: 28 September 2018

BALCA Case No: 2018-TLN-00173
ETA Case No.: H-400-18184-813396

In the Matter of:

NATURE'S WOOD PRODUCTS, LLC,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Mandi B. Bucceroni, *Esq.*
Law Office of Mandi B. Bucceroni, LLC
Ventnor, New Jersey
For the Employer

Before: John P. Sellers, III
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Nature’s Wood Products, LLC’s (the “Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”). 8 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer in the Office of Foreign Labor Certification of the

¹ On April 29, 2015, the Department of Labor (the “Department”) 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. 80 Fed. Reg. 24042 (Apr. 29, 2015). In this Decision and Order, all citations to 20 C.F.R. Part 655 pertain to the IFR.

² See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B), pursuant to the Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA. 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

On July 3, 2018, the Employer filed with the CO an Application for Temporary Employment Certification, Form ETA-9142B (“Application”). (AF 107-126.)³ The Employer requested certification for three recycling materials processors⁴ from October 1, 2018, until April 30, 2019, based on an alleged peakload need for workers during that period. (AF 107.)

On July 12, 2018, the CO issued a Notice of Deficiency (“NOD”), which outlined four deficiencies in the Employer’s Application. (AF 98-106.) The CO gave the Employer the opportunity to either submit a modified Application and supporting documentation within ten days of the date of the NOD, or request administrative review before BALCA. (AF 100.) On July 26, 2018, the Employer responded to the NOD. (AF 71-97.)

On August 28, 2018, the CO issued a Final Determination denying the Employer’s Application. (AF 58-70.) In support of its denial, the CO concluded that the Employer did not meet the requirements of 20 C.F.R. § 655.6(a) and (b) because the Employer failed to: (1) establish that it had a peakload need for workers; (2) show that its job opportunity was temporary in nature; and (3) submit sufficient information to justify the dates of need requested. (AF 60-62.) Moreover, the CO concluded that, pursuant to 20 C.F.R. § 655.11(e)(3) and (4), the Employer failed to demonstrate that it had a need for three temporary workers. (AF 63-64.) For all of these reasons, the CO denied the Employer’s Application.

By letter filed on September 17, 2018, the Employer requested administrative review of the CO’s Final Determination (“Employer’s Appeal”). (AF 1-57.) On September 17, 2018, the undersigned issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). On September 25, 2018, the undersigned received the Appeal File from the CO.

DISCUSSION AND APPLICABLE LAW

BALCA’s standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments and evidence that the

³ “AF” refers to the Appeal File.

⁴ SOC (O*Net/OES) occupation code 51-9199 and occupation title “Production Workers, All Other.” (AF 107.)

Employer actually submitted to the CO before the date of the CO's determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer's Application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

THE EMPLOYER FAILED TO ESTABLISH A PEAKLOAD NEED FOR THREE H-2B WORKERS

To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. § 655.6(b); 20 C.F.R. §655.11(a)(3). Pursuant to § 113 of the 2018 Consolidated Appropriations Act, "for the purpose of regulating admission of temporary workers under the H-2B program, the definition of temporary need shall be that provided in 8 CFR 214.2(h)(6)(ii)(B)." Accordingly, 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

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.

In this case, the Employer alleged a peakload need for three recycling materials processors from October 1, 2018, until April 30, 2019. In order to establish a peakload need for temporary workers, 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); *see also* *Masse Contracting*, 2015-TLN-00026 (April 2, 2015) (to utilize the peakload standard, the employer must have permanent workers in

the occupation); *Natron Wood Products LLC*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (affirming denial where the employer failed to sufficiently explain how its request for temporary labor certification met the regulatory criteria for a peakload, temporary need).

The Employer alleged a peakload need for three H-2B workers from the beginning of October through the end of April.⁵ (AF 107.) However, in its request for administrative review, the Employer stated that it did “not employ any permanent workers in this position.” (Employer’s Appeal at 1.) Before showing that it needs temporary workers to “supplement” its permanent workforce, the Employer must first establish that it has permanent workers at its place of employment for which it is requesting temporary workers. In other words, if the Employer does not employ permanent workers, temporary workers cannot possibly “supplement” its permanent workforce. Consequently, by its own admission, the Employer has failed to establish that it regularly employs permanent workers to perform services or labor at its place of employment and that it needs to supplement its permanent staff at its place of employment on a temporary basis, which is required by 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

Moreover, as the CO emphasized in its Final Determination, the Employer claimed a different period of temporary need in its withdrawn application (H-400-18002-524478). (AF 61.) Notably, in the instant Application, the Employer alleged a temporary need for workers from October 1, 2018, until April 30, 2019, based on an alleged peakload need for workers during that period. (AF 107.) However, the CO specified that in the Employer’s withdrawn application, the Employer alleged a temporary need for workers from April 1, 2018, until December 21, 2018. (AF 61.) Taking these two applications together, the Employer has claimed a need for H-2B workers from April 1, 2018, until April 30, 2019, which is a consecutive period of over a year. This suggests that the Employer may have a year-round or permanent, rather than a temporary, need for workers. Accordingly, I find that the Employer has not shown that its need for recycling materials processors “will end in the near, definable future,” as mandated by 8 C.F.R. § 214.2(h)(6)(ii)(B). *See Manuel Huerta Trucking*, 2016-TLN-00069 (Oct. 19, 2016) (since the employer’s need for workers, as noted in its two applications, covered a period of sixteen consecutive months, the employer failed to show that its need was for a limited period of time); *Michael Doak*, 2016-TLN-00059 (Aug. 15, 2016); *Hill’N’Dale Sales*, 2016-TLN-00031 (Apr. 14, 2016); *JSJ Hauling*, 2016-TLN-00054 (July 18, 2016).

Based on the evidence of record, and for the foregoing reasons, I find that the Employer has not carried its burden to show that it regularly employs permanent workers to work as

⁵ Although, in its request for administrative review, the Employer alleged that it only employed seasonal workers and the position for which it was seeking H-2B workers was somehow “misclassified as peakload,” the Employer’s Application clearly reflects that it requested temporary workers based on a peakload need. (AF 107.) Moreover, in its response to the CO’s Notice of Deficiency, the Employer clearly described its need for three recycling materials processors as “peak-load.” (AF 74.)

recycling materials processors and that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand. Therefore, I find that the CO properly denied the Employer's Application.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision denying the Employer's Application for Temporary Employment Certification be, and hereby is, **AFFIRMED**.

For the Board:

John P. Sellers, III
Administrative Law Judge