



Issue Date: 09 May 2018

BALCA CASE NO.: 2018-TLN-00116

ETA CASE NO.: H-400-17361-169805

In the Matter of:

I CON CONSTRUCTION, INC.,
Employer.

**DECISION AND ORDER AFFIRMING
DENIAL OF CERTIFICATION**

I Con Construction, Inc. (“Employer”) requests 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 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.

The CO (acting for the Secretary of Labor, 20 C.F.R. §655.2, subsection (a)) can issue the labor certification only after determining (1) that there are not suffi-

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).

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.

cient U.S. workers who are qualified and available to perform the work in question and (2) that employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. §655.1, subsection (a). The burden of proof is on the employer to show it is entitled to the labor certification. 8 U.S.C. §1361.

If the CO denies the application under 20 C.F.R. § 655.53, the employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a). By designation of the Chief ALJ, I am BALCA for purposes of this appeal. 20 C.F.R. §655.61, subsection (d).

Neither party filed a brief within the time allowed under 20 C.F.R. §655.61. Accordingly, I decide the matter exclusively on the record before me.

Standard of Review

The regulations do not specify the extent to which BALCA should defer to the CO’s determination. When the CO’s determination turns on the Employment and Training Administration’s long-established, policy-based interpretation of a regulation, BALCA likely owes considerable deference to 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 CO’s policy-based determination unless it is arbitrary, capricious, or inconsistent with ETA’s established policy interpretation. But absent ETA’s long-standing, policy-based interpretation of a regulation, it would appear BALCA should review the CO’s denial *de novo*.

BACKGROUND

On or about January 1, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer, who sought to hire thirty foreign General Laborers from April 1, 2018, through November 30, 2018 (AF p. 82; pp. 82-150).³ These thirty employees would work in St. Charles, Kane County, Illinois, and at other worksites in the Kane-Elgin, IL, Metropolitan Division (AF, p. 85). As is customary, the CO responded with a Notice of Deficiency (AF, pp. 75-81), to which Employer responded (AF, pp. 61-74). On April 9, 2018, the CO issued a Non Acceptance Denial (AF, pp. 42-57). At the time of the Non Acceptance Denial, the parties disagreed on two points. First, in the CO’s view, Employer had failed to demonstrate temporary need (AF, p. 44). Second, the CO concluded Employer had failed to establish “that the number of workers requested on the application is true and accurate and represents bona fide job opportunities” (AF, p. 47). Employer disagreed (AF, pp. 3-4), and this appeal followed.

³ I abbreviate references to the appeal file, as here, with “AF” followed by the page number.

DISCUSSION

1. Temporary Nature of Need

Under 8 C.F.R. § 214.2, subsection (h)(6)(ii)(B):

(B) 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. . . . 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.

(1) One-time occurrence.

(2) Seasonal need.

(3) Peakload need. The petitioner 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.

(4) Intermittent need.

The CO analyzed Employer's request as a peakload need and concluded Employer had not made the requisite showing (AF, p. 29). The regulation sets forth three conditions for peakload need: 1) the Employer must regularly employ permanent workers, doing the same kind of work, at the work site; 2) the Employer, because of a seasonal or short-term demand, must temporarily supplement those permanent workers; and 3) the temporary additional workers will not become part of the Employer's regular operation.

To see if Employer met these three conditions, the CO, in the Notice of Default, asked Employer for an updated temporary need statement, and for "supporting evidence and documentation that justifies the chosen standard of temporary need," including, but not limited to, a statement of employer's business history and activities and schedule of operations through the year; a summary of all projects in the area of intended employment; contracts for all of the projects identified in the summary; and summarized monthly payroll records for a minimum of two previous calendar years (AF, p. 79). The CO contends Employer did not produce summarized monthly payroll records for 2017, and further contends "the employer's actual

worksites are located outside the area of intended employment,” even though “the employer’s prefabrication and support work take place in Lake Charles” (AF, p. 31). For these reasons, in the CO’s view, Employer “did not overcome the deficiency” (*Id.*).

Employer contends it “did in fact submit both its 2016 and 2017 payroll summaries with its initial application on January 1, 2018: (AF, pp. 3, 4). But so far as I can determine, only 2016 figures appear in the original application (AF, p. 118) – or, for that matter, anywhere else in the record. At AF p. 4, Employer refers to the court to “Exhibit F – Attorney Cover Letter Referencing 2017 Payroll Summary Submitted.” Unfortunately, the Appeal File has not preserved the designation of Exhibit “F” to the Employer’s Request for Administrative Review, but there are only two letters from Attorney Elizabeth Buckley attached to the Request. The first, at AF pp. 21-22, is dated February 2, 2018, and is addressed to the ETA in Chicago. It neither includes nor refers to payroll summaries for calendar year 2017. The second, at AF pp. 39-40, is dated December 28, 2017, and is likewise addressed to the ETA in Chicago. It refers generally to “[p]ayroll documentation” (AF, p. 40), but not specifically to a summary of 2017 payroll records, and it includes no such summary within it. I can find no summary of 2017 payroll records anywhere in the appeal file. Because I 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, subsection (e), I must conclude the 2017 payroll summaries are not in the record before me.

Of course, the mere fact that the CO asked for 2017 payroll records, and Employer did not provide them, is not necessarily determinative. Ultimately, the CO was *not* trying to determine whether Employer had payroll records from 2017. The question was whether Employer could show temporary need. Employer could have produced other evidence on that ultimate question, or could have tried to persuade the CO the 2017 payroll records were not necessary to her determination. But Employer did neither. Employer simply insists it *did* provide those records, although they are nowhere to be found in the appeal file. Given those facts, I conclude Employer has failed to demonstrate temporary need.

2. Number of Workers

The CO also relied on Employer’s failure to submit 2017 payroll information to conclude Employer had not shown its need for thirty foreign workers (AF, pp. 47-49). Again, Employer does not contend the information is not relevant, or unimportant; it claims to have submitted the requested information, although the information appears nowhere in the record. Under these circumstances, I conclude Employer has failed to demonstrate a need for thirty workers.

ORDER

The court affirms the CO's denial of certification.

SO ORDERED.

For the Board:

CHRISTOPHER LARSEN
Administrative Law Judge