



Issue Date: 08 June 2018

BALCA CASE NO.: 2018-TLN-00125

ETA CASE NO.: H-400-17262-385279

In the Matter of:

BUILDING COMPONENT SUPPLY, INC.,
Employer.

DECISION AND ORDER AFFRIMING CERTIFYING OFFICER

This matter is before the Board of Alien Labor Certification Appeals on Employer Building Component Supply, Inc.'s application for a certification under the H-2B nonimmigrant alien worker program.¹ The Certifying Officer at the Department of Labor's Employment and Training Administration notified Employer of deficiencies in the application. Employer supplemented its submissions. Having considered all materials on file, the Certifying Officer denied the application on April 25, 2018. Employer timely requested BALCA review.

This Decision and Order is based on a written record, which consists of the Appeals File and Employer's request for review. 20 C.F.R. § 655.61(e). The time having run, no party filed a brief. I will affirm the Certifying Officer's denial of the labor certification.²

Findings of Fact

Employer performs carpentry work in the construction of residential and commercial buildings. AF 89.³ It applied for the H-2B Temporary Employment Certification based on an asserted peak load temporary need. *Id.* at 74. It sought to hire fifty-five carpenter's helpers to work in the Jacksonville, Florida metropolitan area from April 1, 2018 through December 31, 2018. *Id.* at 74, 77. The workers would, "help Carpenter[s] by performing duties requiring less skill like manual and physical duties, use, supply or hold materials and tools, and clean work areas,

¹ See Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, and certain of its implementing regulations at 20 C.F.R. Part 655, subpart A.

² The regulations are silent about the deference that the Board of Alien Labor Certification Appeals should accord to a certifying officer's determination. But in the present case, I need not reach the issue. I would affirm the Certifying Officer's denial of the application even were I to accord her decision no deference (*i.e.*, review the matter *de novo.*)

³ "AF" refers to the Appeals File.

machines, or equipment, to maintain a clean and safe job site in residential construction.” *Id.* at 76.

In a second Notice of Deficiency,⁴ the Certifying Officer found that Employer failed to establish that the job opportunity was temporary.⁵ In response, Employer submitted a letter from The Northeast Florida Builders Association, which is the largest homebuilding association in Florida and includes builders, developers, and subcontractors. *Id.* at 44. The letter states, in pertinent part:

Spring has always been known as the “home buying (selling) season,” and typically runs from mid-January through May. June through the beginning of school, while not as robust as the peak cycle, represents the second tier of new home sales. A home sold in Jacksonville in mid-January is typically permitted and ready for construction by April 1st or roughly 75 days after a sales contract is signed with a qualified buyer. The typical sales cycle correlates to peak construction demand for Carpentry contractors in April to mid-August followed by the second tier of sales which carries through October.

Id. at 27. (From this language, I infer that the Association is describing instances where the buyer enters into a contract to buy a new home which is to be built, not a home where the construction has been completed.)

But the Association explains that recent changes have lengthened the peak construction period. The Association states that there is a current “record low inventory of both resale properties and new construction homes available for sale in Northeast Florida.” Builders “are trying to take advantage of this limited inventory and strong demand by building more spec homes.” *Id.* The builders want the spec homes to be complete for the peak selling season. *Id.* (This apparently refers to the sale of new homes where the construction is complete.)

Given this increased demand, the Association states that there has been a “new phenomenon” for the past two years: the largest framing contractors have reported that their busiest month came at the end of the year.

Employer also offered documents to show it has had an increased demand for services to be performed from April 1 through December 31 of this year (2018). The documents include: a chart and graph that show the number of square feet it has contracts to frame and the number of workers needed per month in 2018 to construct that much square footage. Other documents

⁴ The Certifying Officer issued two Notices of Deficiency. In the text above, I refer to the second Notice, which the Certifying Officer issued on February 26, 2018. In the first (issued on January 31, 2018), the Certifying Officer found that Employer had failed to justify the number of workers it sought to hire. Employer responded with an explanation of its calculations. As the Certifying Officer stopped listing this deficiency at any of the remaining steps in her process, it appears that she found Employer’s explanation sufficient. As I will affirm the Certifying Officer based on the deficiency on which she finally denied the application, I do not reach the question whether Employer sufficiently showed that it needed the number of Carpenter’s helpers it sought.

⁵ See 20 C.F.R. § 655.6(a) and (b) (requiring an employer to establish that its need for labor is temporary based on a one-time occurrence; seasonal need; peakload need; or intermittent need).

show the number of permits authorized for Jacksonville, Florida by month in 2014 through 2017. There are also letters from four customers that say their “high-volume months” range from April or May to December and that they have an increased number of projects for Employer from April to December 2018.⁶ *Id.* at 46-49. Each of the customer letters contains two graphs: one showing how many “unit[s]” Employer would be constructing for the customer per month and the other showing how many square feet Employer would be completing for the customer per month. *Id.* at 46-49.

The graphs and the chart are limited to work in 2018. They show that Employer has more work with these customers each month from April through December than it had with them in January, February, or March. But the documents show nothing about anticipated work beginning in January 2019.

The Certifying Officer denied Employer’s application for failure to establish the job opportunity as temporary in nature. I will affirm.

Discussion

An employer seeking certification under the H-2B program must “establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.”⁷ An employer’s need is temporary if it is: a one-time occurrence; a seasonal need; a peak load need; or an intermittent need.⁸ An employer establishes a “peakload need” if it shows 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.”⁹

Here, Employer has not shown a peak load need which would require a need to supplement its regular workforce on a temporary basis. The difficulty is that Employer has not established that its need for the additional carpenter’s helpers will end on January 1, 2019. The chart showing issuance of permits by month is irrelevant because the dates and numbers of permits issued do not correlate to the months in a contractor will do wood framing on new residential construction. The permits are obtained before construction begins, and various subcontractors perform different work as the construction progresses over weeks and months. I cannot know from the

⁶ Employer also offered surveys from 2010 through 2017 of worker hires, job openings, and “total separations,” which isn’t defined. Employer supplied these surveys in response to the Certifying Officer’s request for documentation of the seasonality of the construction industry. The surveys are not relevant to show a temporary peak load for two reasons: first, they cover the entire construction industry, not just framing and trussing; different construction work is done at different times; and second, the surveys cover the entire United States, including many locations where the weather very different from Florida creates a different construction season.

⁷ 20 C.F.R. § 655.6(a); 8 C.F.R. § 214.2(h)(6)(ii)(B).

⁸ 20 C.F.R. § 655.6(b).

⁹ 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

chart when Employer's work will increase or decrease. I therefore cannot infer from this chart that the demand for carpentry will decline sharply or at all on January 1, 2019.

Nor does the Association's letter persuade me that carpentry work will subside at that time. The Association acknowledges a burgeoning level of demand that has drawn Northern Florida builders into an increased in the number and kind of projects they are undertaking. This "new phenomenon" has already increased the busy building season from six months to nine – a fifty percent increase in the length of the season. December, which wasn't previously a busy month, has become the busiest for the largest local contractors. Nothing about that change suggests that Employer's need for carpenter's helpers will disappear in January 2019. If the Association's letter is correct and December has become the busiest month, there is little reason to think that, by next year, January will suddenly see a significant slump in construction work.

It is Employer's burden to show that its need for additional workers is temporary. Employer has failed to carry that burden because it has not shown that the increased demand for its services will recede in January 2019 to the extent that it will no longer need any of the carpenter's helpers whom it seeks to hire under the H2-B program. To the contrary, having a pool of builders wishing to capitalize on a favorable housing market suggests that Employer's need for additional workers might not decline at all in January 2019.

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