

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 10 October 2018

Case No.: 2018-TLN-00174
ETA Case No. H-400-18198-398951

In the Matter of:

DTM TRUCKING, INC.

Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Shelia A. Gray
Agent
Labor Made Easy
Kingston, OK
For the Employer

Nora Carroll
Office of the Solicitor
Division of Employment and Training Legal Services
United States Department of Labor
Washington, DC
For the Certifying Officer

Before: **TRACY A. DALY**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

1. Nature of Appeal. This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h)¹ and 20 C.F.R. Part 655 Subpart A. It involves Employer's Employment and Training Administration

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

(ETA) Form 9142B application for temporary labor certification for 18 temporary nonagricultural workers and an administrative review of the application's denial.²

2. Procedural History and Findings of Fact.

a. On September 22, 2016, DTM Trucking, Inc. (Employer) filed an ETA Form 9142B application for temporary labor certification with the Certifying Officer (CO) at the Chicago National Processing Center (CNPC) for 12 temporary "Construction Laborers" to perform work from November 21, 2016 to August 20, 2017 based on Employer's claimed peakload need for temporary workers. Employer requested these positions for "new employment" on its application. Employer stated it hauls construction materials and performs field construction at customer sites and needed temporary construction laborers to perform "field assembly" at various sites. On October 21, 2016, the CO granted certification for 12 temporary workers for the period ranging from November 21, 2016 to August 20, 2017. (AF 169-172)³

b. On July 24, 2017, Employer filed an ETA Form 9142-B application for temporary labor certification with the CO for 18 temporary "Construction Laborers" to perform work from December 1, 2017 to September 1, 2018 based on Employer's claimed peakload need for temporary workers. On September 7, 2017, the CO rejected Employer's application without review because it did not contain a valid prevailing wage determination as required by the regulations. (AF 159-168)

c. On October 10, 2017, Employer filed an ETA Form 9142-B application for temporary labor certification with the CO for 18 temporary "Construction Laborers" to perform work from December 26, 2017 to September 26, 2018 based on Employer's claimed peakload need for temporary workers. (AF 147, 151) On December 5, 2017, the CO denied certification on the grounds Employer did not establish the job opportunity was temporary in nature. (AF 144-147)

d. On July 17, 2018, Employer filed an ETA Form 9142-B application for temporary labor certification with the CO for 18 temporary "Construction Laborers" to perform work from October 1, 2018 to June 30, 2019 based on Employer's claimed peakload need for temporary workers. On July 26, 2018, the CO issued a Notice of Deficiency (NOD) because Employer: 1) did not establish the job opportunity as temporary in nature; and 2) did not establish a temporary need for the number of workers requested. The CO instructed Employer to file a response with additional supporting documentation to justify its application. (AF 110-117)

e. On August 2, 2018, the CO received Employer's reply to the NOD with additional supporting documentation. On August 29, 2018, the CO issued a Final Determination letter and denied certification.

² On April 29, 2015, the Department of Labor (DOL) and the Department of Homeland Security (DHS) jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A established by the "2008 Rule" found at 73 Fed. Reg. 78020. *See* 80 Fed. Reg. 24042, 24109 (2015 IFR). The procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR, and apply to this appeal.

³ References to the Appeal File are by the abbreviation AF and page numbers.

First, the CO denied certification because Employer failed to establish the job opportunity was temporary in nature pursuant to 20 C.F.R. § 655.6(a)-(b). In its reply to the CO's NOD, Employer stated it had a need for 18 temporary construction laborers to perform field assembly work at construction sites. According to Employer, by the end of June, "most construction deliveries have been made and construction is in full swing." However, at the beginning of October, Employer's "work picks up and [its] peakload period begins." Employer further averred that it has a sufficient number of full-time construction workers to handle its routine customers, but due to "tremendous construction activity" during its peakload period, it is "impossible for [Employer] to find an adequate number of workers for these construction jobs." The CO explained that, in considering Employer's instant application and past application requested periods of certification, Employer had a "continuous need to fill ongoing contracts." Moreover, the CO noted the three letters of intent from customers that Employer submitted did not include worksite locations and did not support the application's area of intended employment.

Second, the CO denied certification because Employer failed to establish a temporary need for the number of workers requested pursuant to 20 C.F.R. § 655.11(e)(3)-(4). The CO explained that in response to the NOD, Employer did not submit any additional information regarding the number of workers requested. In reviewing the letters of intent from three clients, the CO noted Employer would need 20 workers, which exceeded the number of workers requested in Employer's application. Further, the letters did not provide any explanation regarding how the workers would be used across different worksites, and two of the letters requested workers for less time than the requested period of need. Further, the payroll records submitted by Employer did not indicate that the positions were specifically for "Construction Laborers," and thus they did not substantiate the requested need for 18 construction laborers. (AF 76-84)

f. On September 17, 2018, Employer requested administrative review of the CO's denial of certification pursuant to 20 C.F.R. § 655.61. (AF 1-2)

g. On September 17, 2018 the Board of Alien Labor Certification Appeals (BALCA) docketed this appeal. On September 18, 2018, the undersigned issued a Notice of Case Assignment and Order Establishing Brief Filing Deadlines. The CO transmitted the Appeal File to BALCA on September 25, 2018. Neither party filed an appeal brief.

3. Applicable Law and Analysis.

a. *H-2B Program.* The H-2B nonimmigrant visa program enables United States nonagricultural employers to employ foreign workers on a temporary basis to perform nonagricultural labor or services if unemployed persons capable of performing such service or labor cannot be found in this country. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through this program must first apply for and receive a "labor certification" from the DOL. 20 C.F.R. § 655.20.

b. *Standard of Review.* BALCA's standard of review in H-2B cases is limited.

Specifically, 20 C.F.R. § 655.61 provides that 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 was actually submitted to the CO in support of the employer's application. After considering the evidence of record, BALCA must: (1) affirm the CO's decision to deny temporary labor certification; (2) direct the CO to grant certification; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e)(1)-(3). BALCA may overturn a CO's decision if it finds the decision is arbitrary or capricious. *See Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016); *J and V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016).

c. *Burden of Proof.* The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361; *Eagle Indus. Prof'l Servs.*, 2009-TLN-00073 (July 28, 2009); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (employer bears burden of proof to establish its eligibility to employ foreign workers under the H-2B program). A bare assertion without supporting evidence is insufficient to carry the employer's burden of proof. *AB Controls & Tech., Inc.*, 2013-TLN-00022 (Jan. 17, 2013).

d. *Temporary Peakload Need for Workers.* An employer seeking certification must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 20 C.F.R. § 655.6(a). 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 Department of Homeland Security (DHS) regulations. 20 C.F.R. § 655.6(b). An employer's need is temporary if the need is limited and will "end in the near, definable future." 8 C.F.R. § 214.2(h)(6)(ii)(B).

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). The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers. *Chippewa Retreat Spa*, 2016-TLN-00063 (Sept. 12, 2016).

In the instant application, Employer seeks certification to hire 18 temporary construction laborers to perform construction work from October 1, 2018 to June 30, 2019 based on a peakload need. However, a review of Employer's prior applications for temporary labor certification reveals that Employer has requested and is currently requesting certification for temporary workers for the entire 2018 calendar year. Consequently, the CO reasonably concluded that Employer's own applications established a continuing need to fill ongoing contracts. This evidence strongly suggests Employer's need for temporary workers is year-round, rather than a need based on a seasonal or short-term demand. *William Ashby Maltsberger d/b/a Maltsberger Ranch*, 2016-TLC-00078 (Sept. 28, 2016) (finding the 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); *JAJ Hauling, LLC*, 2016-TLN-00054 (July 18, 2016)(affirming denial of

certification where fluctuation in application timeframe suggested that the employer's need appeared to be "year-round need rather than seasonal"). Moreover, employers have failed to establish a temporary need where changing dates from prior applications suggested a permanent need. *Hill 'N' Dale Sales*, 2016-TLN-00031 (Apr. 14, 2016); *JSJ Hauling*, 2016-TLN-00054 (July 18, 2016); *Michael Doak*, 2016-TLN-00059 (Aug. 15, 2016).

Similarly, the payroll records submitted in support of Employer's application do not support its claim for temporary workers during the asserted peakload period. In all months ranging from January 2017 to August 2017, Employer employed between 13 and 15 temporary workers. Specifically, Employer employed 14 temporary workers in July 2017 and 15 temporary workers in August 2017. However, Employer's instant application attests its peakload need ranges from October 1 to June 30. Based on Employer's prior use of temporary workers during July and August 2017, which is outside Employer's claimed period of need, the CO reasonably concluded Employer failed to establish that it experiences a peakload need for temporary workers during the requested period of need. BALCA panels have held that an increase in need during an off-peak month severely undermines an employer's purported peakload dates of need. *See Top Flight Entertainment, Ltd.*, 2011-TLN-37, slip op. at 8 (Sept. 22, 2011) (affirming denial of certification where the employer had more employees during some of its purported non-peak months than it did in its claimed peak months). The Board has consistently affirmed denials of certification applications where an employer's own records belie its claimed peak load periods of need. *DDM Haulers LLC*, 2018-TLN-037, slip op. at 6 (Jan. 12, 2018); *Cody Builders Supply*, 2018-TLN-053, slip op. at 9 (Feb. 8, 2018).

e. *Temporary Need for Number of Workers Requested.* The CO will review the H-2B Registration and its accompanying documentation for completeness and make a determination based the following: the number of worker positions and period of need are justified and the request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3)-(4). "[I]t is the [e]mployer's burden to prove that the requested positions represent bona fide job opportunities, and the CO is not required to take the employer at its word." *N. Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012).

In support of the 18 requested temporary workers, Employer attached letters of intent from three clients. The three letters represent the following: 1) Thompson Materials, LLC noted a need for six temporary employees; 2) BFG Solutions noted a need for eight temporary employees; and 3) Danny's Asphalt Paving, Inc. noted a need for six temporary employees. In total, the documentation supporting a need for workers totals 20 temporary workers, while Employer's instant application only seeks 18 temporary workers. Additionally, the letter of intent for Danny's Asphalt Paving, Inc. indicated it only needed temporary workers for four and a half months, which is less than the claimed period of peakload need in this application. Similarly, the BFG Solutions letter indicated it only needed temporary workers on site for three months. As a result, the CO reasonably concluded that Employer failed to provide sufficient justification for the number of workers requested.

In addition, the CO specifically instructed Employer in the NOD to submit payroll reports that identified "for each month and separately for full-time permanent and temporary employment in the requested occupation of Construction Laborer, the total number of workers or

staff employed.” However, in response to the NOD, Employer only submitted payroll reports that detailed the yearly totals of “Permanent Laborer” and “Temporary Laborer” without specific notations of “Construction Laborer” in the reports. Employer’s failure to provide the requested documentation alone is grounds for finding the CO’s denial of certification was proper. Employer did not carry its burden to provide adequate documentation to the CO to support its request for 18 temporary workers. 20 C.F.R. § 655.32(a); *Saigon Restaurant*, 2016-TLN-00053 (July 8, 2016); *Munoz Enterprises*, 2017-TLN-00016 (Jan. 19, 2017); *Carolina Contracting and Management, LLC*, 2017-TLN-00026 (Apr. 4, 2017).

4. Ruling. Employer failed to carry its burden to establish its eligibility for H-2B labor certification. The CO’s denial of Employer’s Application for Temporary Employment Certification is AFFIRMED.

SO ORDERED.

TRACY A. DALY
Administrative Law Judge