

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 July 2018

BALCA Case Nos.: 2018-TLN-00147; 2018-TLN-00148
ETA Case Nos.: H-400-18088-380443; H-400-18088-890329

In the Matter of:

INDUSTRIAL EQUIPMENT SOLUTIONS, INC.,
Employer.

Appearances: Ronda Butler Harkey, Esq.
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For the Employer

Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, DC
For the Certifying Officer

Before: **JERRY R. DeMAIO**
Administrative Law Judge

DECISION AND ORDER
DIRECTING GRANT OF CERTIFICATION

This case arises from the Employer's request for review before the Board of Alien Labor Certification Appeals ("BALCA") of the denial by a Certifying Officer ("CO") for the Employment and Training Administration ("ETA") of its application for an H-2B temporary labor certification. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), 1184(a)(c); 8 C.F.R. § 214.2(h);

20 C.F.R. Part 655, Subpart A.¹ For the reasons set forth below, the CO's denial of temporary labor certification in this matter is reversed and the matter will be remanded for certification.

BACKGROUND

On March 29, 2018, the ETA received two applications ("ETA Form 9142") from Industrial Equipment Solutions, Inc., ("Employer") for H-2B temporary labor certification. The first sought employment of 80 Pipe Fitters from June 15, 2018 through March 15, 2019. (AF 569-623).² The second sought the employment of 90 welders for the same period. (2018-TLN-00148, AF 566-639). On April 9, 2018, the CO issued an essentially identical Notice of Deficiency ("NOD") in each case, under 20 C.F.R. § 655.31, notifying the Employer that its applications had failed to meet the criteria for certification (AF 560-568). In the NOD, the CO identified four deficiencies.

Deficiency 1 was cited as a failure of the Employer to establish the job opportunity as temporary in nature, under 20 CFR § 655.6(a) and (b). Specifically, the CO noted that the Employer's Statement of Temporary Need indicated that industry practice, as well as onshore and offshore oil & gas plant module, platform fabrication, and construction needs, drove a peak workload during the months of Mid-June through Mid-March; however, no documentation was provided to substantiate this as current industry practice. Furthermore, because the Employer's business practices appeared to be contingent on securing and fulfilling contracts for multiple successive projects, the CO found that the Employer could not establish a peakload need by focusing on specific contracts—that the contracts were part of the employer's normal business operations and not a temporary event. Finally, the Employer's Statement of Temporary Need indicated that the Employer expects an influx of new business in the Texas Gulf Coast region due to the damages caused by Hurricane Harvey; however, the Employer had not provided any supporting documentation. In sum, the CO concluded that the Employer had not substantiated

¹ On April 29, 2015, the Department of Labor ("DOL") and the Department of Homeland Security jointly published an Interim Final Rule ("2015 IFR") amending the standards and procedures for the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). This case will be heard under 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.

² Citations to the appeal file are abbreviated "AF" followed by the page number. For efficiency in this consolidated matter, all references to the appeal file will be to Case Number 2018-TLN-00147 unless specifically noted otherwise.

the events that caused the seasonal or short-term demand that led to its peakload need. To cure these problems, the CO requested a temporary need statement, along with a variety of documentation, including monthly invoices and payroll records for the prior two years, to justify the requested dates of need.

Deficiency 2 was cited as a failure to establish temporary need for the number of workers requested, under 20 C.F.R. § 655.11(e)(3) and (4). Specifically, the CO found that the Employer had not sufficiently demonstrated that the number of workers requested on the applications represented bona fide job opportunities. The CO requested supporting evidence and documentation, including payroll reports for at least one prior calendar year, to establish that the number of workers requested was true and accurate.

Deficiencies 3 and 4 were more administrative. Under Deficiency 3, the CO noted that the job order draft and Section F.b., Item 5, of the ETA Form 9142, both indicated that potential candidates must pass a drug test, but did not indicate whether the drug test would be pre-hire or post-hire. For Deficiency 4, the CO noted that the additional worksite locations listed in Section F.c., Item 7a. of the ETA Form 9142 were not consistent with the additional worksite location listed in the job order draft. In Section F.c., Item 7a of the ETA Form 9142, the employer indicated “Texas BLS Area Corpus Christi, TX MSA” as its additional worksite location, but this was inconsistent with the employer’s job order, which stated “Worksite may vary within Nueces County, Texas metropolitan statistical area.” The CO asked the Employer for clarification on each of these deficiencies. The Employer responded to the CO’s NOD by submitting a letter with a number of attached exhibits. (AF 334-559). On May 29, 2018, the CO issued a final determination (AF 312-321), denying the Employer’s request for certification.

In the Final Determination, the CO noted that Deficiencies 1 and 2 remained. With regard to Deficiency 1, the CO found that the Employer still had not sufficiently demonstrated the requested standard of temporary need. In addition to the reasons set forth in the NOD, the CO also noted that the further submissions by the Employer did not overcome the deficiency:

First, the employer has not illustrated the seasonal or short-term demand causing the reoccurring need for temporary staffing. In the revised Statement of Temporary Need (IES’ Business History, Activities, and Schedule of Operations) the employer stated the following:

See Exhibit B reflecting the majority of our projects during the peakload period. IES's current busy season, due to current industry practice and onshore and offshore oil & gas plant module, platform fabrication, and construction needs, is approximately mid-June through mid-March. During this period, IES's industrial clients require quick turnaround on fabrication projects for rigs, platforms, and plant modules as well as other equipment or system upgrades. Our non-peak times are from the latter half of March through the first half of June."

However, Exhibit B lists a schedule of projects from January all the way through the date of the letter, which illustrates 33 different projects that are proposed to be worked in Corona, CA, and does not show a clear view of majority of it projects being workers from mid-June through mid-March. It appears as if each project has no regard to a busy season.

The CO also noted that the Employer had provided documentation related to Hurricane Harvey, including a weather report for Corpus Christi, Texas, some weather effects of the hurricane, and news articles about plants being closed or their production rates reduced due to the hurricane. The CO concluded, however, that this also did not substantiate the Employer's peakload need.

Third, the Employer provided a copy of a draft subcontract between itself and Kiewit Offshore Services, Ltd. However the contract was only a draft and was not signed and dated by both parties implementing the contract agreement. And while the Employer provided work invoices dating from February 2016 through December 2017, the CO found that a showing of increased business activity from mid-June through mid-March could not be derived from the invoices.

Lastly, the Employer provided payroll monthly records for 2016 and 2017, but the CO likewise concluded that they did not illustrate a peakload in business operations during the months of June through March. The CO found that the Employer's business activities were consistent in 2016 with an average of 57 workers, and 51 workers in 2017. Also there was no major peakload in the number of hours worked or the number of workers during those years.

With regard to Deficiency 2, regarding the number of workers needed, the CO found the Employer's response lacking again as well. In its revised Statement of Temporary Need, the Employer stated that it was engaging with Kiewit Offshore Services (KOS) to provide at least 80 qualified pipe fitters to work on various fabrication projects in the Corpus Christi-Nueces

Metropolitan Statistical Area, and that the project size and need drove the number of workers sought for the contracted work. However, the CO found that the statement and contract did not demonstrate why the numbers sought would adequately suffice for the proposed projects. Moreover, the CO found that the prospective projects cited in the NOD response did not indicate the number of workers needed for each project. Additionally, the CO found that the Employer's payroll records for 2016 and 2017 likewise did not support the Employer's request for the number of workers sought (80 pipefitters, or 90 welders), noting that at its busiest periods, the Employer employed up to 66 workers in 2016 and 56 workers in 2017.

On June 5, 2018, the Employer requested administrative review of the denials before BALCA, and included a brief in support of its timely appeal. (AF 2-8). Given the similarity of the substantive issues and procedural positions of the two cases, the Court consolidated them, *sua sponte*, and on June 18, 2018, a Notice of Consolidation and Docketing was issued. The parties were allowed to file briefs, but neither party filed additional briefs beyond the one submitted with the Employer's request for review. The case is now set for review, and the CO's denial of certification will be reversed.

DISCUSSION

The questions before the Board are (1) Did the Employer sufficiently demonstrate that the need for the workers requested was, in fact, temporary? And (2) did the Employer sufficiently show need for the number of workers requested? The employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *Andy & Ed. Inc.*, 2014-TLN-00040, slip op. at 2 (Sep. 10, 2014).

Temporary Need

An employer seeking an H-2B temporary labor certification must establish that its need for services or labor is, in fact, temporary in nature—that is, that the need for the jobs to be performed by the requested workers will end in the near, definable future. 8 C.F.R. § 214.2(h)(6)(ii); 20 C.F.R. § 655.6(a). The employer's need is temporary if it shown to be one of the following: a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 20 C.F.R. § 655.6(b). The employer must show that the positions qualify under one of

these four standards. 8 C.F.R. § 214.2(h)(6)(ii)(B); *Alter & Son Gen. Eng'g*, 2013-TLN-00003 (Nov. 9, 2012), slip op. at 3. In the present case, the Employer and CO both looked at this as a peakload situation. To justify a peakload need, the Employer must show 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).

Here, although the CO raised some legitimate concerns about some pieces of evidence submitted by the Employer, the CO incorrectly limited the analysis on whether the Employer met the standards for a peakload need. First, there seems to be no disagreement that the Employer regularly employs permanent workers to perform the services or labor at the place of employment. The Employer notes that they regularly employ pipefitters and welders for jobs in the US and internationally, including the areas of Texas where the temporary workers are sought. (AF 406-409.) And with regard to the Texas jobsite, the Employer notes that the temporary workers will be supervised directly by the Employer. (AF 581). Likewise, the payroll records also confirm that the Employer has a permanent staff that will be supplemented by the temporary workers. (AF 539-540). *See, e.g., Workplace Solutions*, 2009-TLN-00049 (Apr. 22, 2009), slip op. at 5. So the first element of a peakload temporary need is met.

Moving to the third element, the Employer has shown that the temporary additions to staff will not become a part of the petitioner's regular operation. The temporary staff additions will not become part of the Employer's regular operations, and will not be subject to rehire, even in future peakload periods, nor will they be guaranteed year-round work. (AF 581.) The short-term demand is for the period from mid-June 2018 through mid-March 2019. This element does not appear to be contested by the CO.

The sticking point seems to be the second element: the Employer's need to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand. On this point, the Employer's position is straightforward: its permanent workers are maxed out working on other projects, primarily the ones in Corona, California, which are listed in the Employer's submissions. (AF 359-361.) The Employer has a pending contract in Texas with Kiewit Offshore Services (AF 412-426), and needs additional, temporary workers to fulfill

its obligations. While the CO was correct in suggesting that there was no periodic increase in demand apparent from the pay records or the list of projects, those items are of limited relevance to the peakload need cited by the Employer—the need for temporary workers for the pending Texas contract—which was not linked to either of those other lists. The CO’s analysis, in this case, seems to be fixed on evidence that would show a seasonal increase in demand for work, when that element of seasonality was not necessarily required by the regulations. To demonstrate a temporary peakload need, the basis can be, according to the regulation, seasonal or short term. So a lack of seasonal increase in past payroll records does not doom the application if the Employer is seeking a short-term peakload need. It is sufficient that an employer show a short-term demand, which the Employer did in this case.

With regard to the effect of the hurricane, it is clear (and the CO agrees) that the hurricane slowed the Employer’s work in that area of Texas, though it is not directly clear how that affects this particular period of peak demand. At a minimum, though, the delays do not weaken the Employer’s case, as it is not unreasonable to consider that the delays may have moved past work into the current period of peak demand. So in a review of the evidence as a whole, the Employer has sufficiently shown the temporary need for the foreign workers sought.

Number of Workers

In accordance with 20 C.F.R. § 655.11(e)(3) and (4), an employer must establish that the number of worker positions and period of need are justified, and that the request represents a bona fide job opportunity. The evidence provided by the Employer is sufficient. The Employer has shown evidence that its permanent workers are committed to other jobs, and that the Employer has a pending contract in Texas for which they need additional temporary workers. Pursuant to that, the companies with whom the Employer is contracting supplied statements of intent attesting to the need for 80 pipefitters and 90 welders at their Texas projects. (AF 412.) This is sufficient to show the need for the number of temporary workers requested. The CO suggested that past payroll records did not justify the need for the temporary workers; however, these payroll records were past records for permanent workers, and did not take into account the upcoming pending contract, so they naturally would not show a need for additional temporary workers.

Based on the above, the Employer has met its burden of proof to show that it has a legitimate, temporary need to hire the number of workers it seeks.

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's denial of the Employer's Application for Temporary Employment Certification is **REVERSED** and that this matter is **REMANDED** for certification.

For the Board:

JERRY R. DeMAIO
Administrative Law Judge