

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 20 April 2018

Case No.: 2018-TLN-105

ETA Case No. H-400-17357-099889

In the Matter of:

JCS CAROLINA CHIPPING SERVICES, LLC

Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Robert Kershaw
The Kershaw Law Firm, P.C.
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For the Employer

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United States Department of Labor
Washington, DC
For the Certifying Officer

Before: **LEE J. ROMERO, JR.**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the H-2B temporary agricultural labor provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1), and the implementing regulations at 20 C.F.R. Part 655, Subpart A. 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 Department of Homeland Security. 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).

This proceeding is before the Board of Alien Labor Certification Appeals ("BALCA") pursuant to JCS Carolina Chipping Service, LLC's ("the Employer") request for administrative review of the Certifying Officer's ("CO") denial of the temporary labor certification under the H-2B program. For the following reasons, the Board affirms the CO's denial of certification.

STATEMENT OF THE CASE

I. Procedural History, Contentions of the Parties, and Jurisdiction

On January 1, 2018, Employer filed an H-2B Application for Temporary Employment Certification ("Application") with the CO at the Chicago National Processing Center for 14 temporary "Construction Laborers" to perform work from April 1, 2018 through December 1, 2018 based on Employer's claimed peakload need for temporary workers. (AF 41-62).

On February 2, 2018, the CO issued a Notice of Deficiency ("NOD") on three grounds. The CO explained the application contained three deficiencies based on Employer's failure to: 1) establish the job opportunity as temporary in nature, as required by 20 C.F.R. § 655.6(a)-(b); 2) establish temporary need for the number of workers requested, as required by 20 C.F.R. § 655.11(e)(3)-(4); and 3) submit an acceptable job order, as required by 20 C.F.R. §§ 655.16, 655.18. (AF 76-84)

The CO received Employer's response to the NOD on February 15, 2018. Employer stated it is "a peak-load roofing company providing concrete services according to specific needs and design specifications for several custom builders in Lago Vista, Texas." Employer's primary services include concrete pouring, laying, and slab construction during the peak season months of April 1st through December 1st. According to Employer, "[e]ven in Texas, construction slows substantially from December 1st to March 31st of each year..." It explained, new home financing is obtained early in the year and new home construction usually begins in early April. Moreover, Employer expressed that the ready-mix industry also slows during the winter months due to the cold and wet weather. In cold weather, concrete will not set or "finish" correctly and hot water or chemicals must be added to the mix to cause the concrete to harden. Thus, Employer explains, its services are not required as often in the winter. (AF 30-31).

Employer also alleged the difficulty in finding peak-season U.S. workers has been exacerbated by an improved U.S. economy, in which the unemployment rate is at historic lows (so that everyone who wants to work is already working); higher paying disaster relief jobs in Houston and the gulf coast, and high paying oilfield jobs returning to central and west Texas. According to Employer, this economic boom creates a temporary labor shortage for as long as it continues. As such, Employer asserts a present temporary need for peak-season laborers, but does not anticipate needing the workers in the future when the economy changes. Thus, Employer alleges that the workers are not part of its regular operations. (AF 30-31).

On March 9, 2018, the CO issued a non-acceptance letter and denied certification. First, the CO denied certification based on Employer's failure to establish the job opportunity as temporary in nature. Specifically, the CO explained that Employer did not provide sufficient explanation for how weather conditions in Texas limit its work during winter months, and it is unclear whether it experiences a true peakload based on weather conditions or contractual demands. The CO found Employer did not provide any documentation supporting its claim or connecting the climate restrictions to the employer's area of intended employment in response to the CO's NOD. (AF 15-22). Thus, the CO denied Employer's application on the grounds that Employer failed to establish the job opportunity as temporary in nature.

Second, the CO denied Employer's Application on the grounds that Employer failed to establish temporary need for the number of workers requested. In response to the NOD, Employer provided a chart listing "2017 Sales," "2017 Man Hours," "2018 Sales," "2018 Man Hours," and "Temporary Man Hours Needed in 2018. Apart from this chart, the CO found Employer's documentation lacking. Employer failed to submit explanation or documentation, requested by the CO, to indicate how it quantitatively determined it has a need for 14 workers. Moreover, the CO noted, Employer's originally submitted 2017 payroll report also did not support a need for 14 full-time workers. Thus, the CO denied Employer's Application on the grounds that Employer failed to establish a temporary need for the number of workers requested. (AF 15-22)

Finally, the CO denied certification based on Employer's failure to submit an acceptable job order. In the NOD, the CO indicated Employer should submit amended job order language which included the following required information: "[s]tate

that the employer will make all deductions from the worker's paycheck required by law. Specify any deductions the employer intends to make from the worker's paycheck which are not required by law, including, if applicable, any deductions for reasonable cost of board, lodging, or other facilities." In response to the NOD, employer did not provide any explanation or documentation addressing this deficiency. The Employer did not submit an amended job order including the required language. Accordingly, the CO denied Employer's Application on this ground. (AF 15-22)

On March 23, 2018, Employer requested administrative review of the CO's denial of certification pursuant to 20 C.F.R. § 655.61. (AF 1)

On March 23, 2018, the Board of Alien Labor Certification Appeals (BALCA) docketed this appeal. On March 28, 2018, the undersigned issued a Notice of Docketing acknowledging receipt of the appeal and setting the briefing deadline. The CO transmitted the Appeal File to BALCA on April 4, 2018. Neither Employer nor the CO filed an appeal brief.

DISCUSSION

The H-2B program permits employers to hire foreign workers on a temporary basis to "perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States]." 8 U.S.C. § 1101(a)(H)(ii)(b). Employers who desire to hire foreign workers through the H-2B program must apply for and receive a "labor certification" from the United States Department of Labor ("DOL" or the "Department"), Employment and Training Administration ("ETA"). 8 C.F.R. § 214.2(h)(6)(iii); 20 C.F.R. § 655.20. To apply for this certification, an employer must file an *Application for Temporary Employment Certification* ("Application") with the National Processing Center ("NPC") designated by the Administrator. 20 C.F.R. § 655.15. The Employer must also submit a job order to the SWA serving the area of employment at the same time it submits the Application for Temporary Employment Certification and a copy of the job order to the NPC in accordance with § 655.15. 20 C.F.R. § 655.16(a). After an employer's application and job order have been received, the CO will review the H-2B application and its accompanying documentation for completeness and make a determination based on the following: whether 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).

In the event the CO determines the Employer's *Application for Temporary Employment Certification* and/or job order is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in the regulations, the CO will issue a Notice of Deficiency ("NOD"). 20 C.F.R. § 655.31(a). The NOD states the reason(s) why the *Application for Temporary Employment Certification* or job order fails to meet the criteria for acceptance and states the modification needed for the CO to issue a Notice of Acceptance. The NOD also provides that (1) the employer may modify its *Application for Temporary Employment Certification*, (2) the employer may request administrative review of the NOD, or (3) if the employer does not submit a modified application or request administrative review, the CO will deny the *Application for Temporary Employment Certification*. 20 C.F.R. § 655.31(b).

In the event of a denial, 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). A CO's decision must be upheld unless shown by the employer to be arbitrary or capricious or otherwise not in accordance with law. See *Three Seasons Landscaping*, 2016-TLN-00045, at 19 (June 15, 2016) (noting that BALCA, "has adopted the position that review of the [CO's] determination of H-2B applications is governed by the arbitrary and capricious standard"); *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).

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). "[I]t is the Employer'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). 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).

a. *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). An employer's need is temporary if it is: 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).

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." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). Furthermore, "the determination of temporary need rests on the nature of the underlying need for the duties of the position" and not "the nature of the job duties." 80 Fed. Reg. 24042, 24005. In order to establish a seasonal need, Employer must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. In addition, Employer must specify the period of time during each year which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees. 8 C.F.R. § 214.2(i)(F)(2)(ii)(B)(2).

In this case, Employer claimed a temporary peakload need for fourteen (14) "Construction Laborers" from April 1, 2018 through December 1, 2018. In its Statement of Temporary Need, Employer asserted a temporary peakload need because Employer's busiest seasons are traditionally tied to the spring, summer and fall months. As the cold and wet weather of Texas winters is not conducive to construction, and construction in general slows down, the need for laborers is substantially reduced. Employer

also provided four letters of intent from contractors to support its dates of need, its sales reports for 2015 and 2016, and a monthly payroll report for 2017. (AF 51).

Ultimately, the CO issued a Notice of Deficiency on the grounds that Employer failed to establish the job opportunity was temporary in nature. In the NOD, the CO requested, among other things, that the Employer submit evidence and documentation justifying the chosen standard of temporary need, including explanation and documentation substantiating the employer's statements that concrete construction work and construction in general slows down during the winter months. Apart from its general assertions regarding construction and ready-mix work during the winter, Employer provided no additional information or documentation to substantiate the employer's statements regarding seasonal need. Employer provided no charts, surveys, articles, studies, or any other evidence to support its assertion regarding the effect of Texas weather on the construction industry. As the CO is not required to rely upon the bare assertions of the Employer and Employer simply failed to support its assertions, I find no fault with the CO's conclusion. See Alter and Son General Engineering, 2013-TLN-3 (Nov. 9, 2012) (affirming denial of certification where the employer failed to produce any documentation proving weather conditions and contract patterns contribute to a temporary seasonal need).

Moreover, in the NOD the CO reasonably requested monthly payroll reports for a minimum of two previous calendar years. As noted above, Employer included in its Application a monthly payroll report for 2017, but not 2016. The 2017 monthly payroll report is divided into two sections, one for "Permanent Employment" and one for "Temporary Employment." For the Permanent Employees, the Employer listed the "Total Workers," "Total Hours Worked," and "Total Earnings Received." For Temporary Employees, Employer listed "Number Subcontractor," "Estimated Hours Worked," and "Total Earnings Received." Employer did not, however, provide a monthly payroll report for 2016 either in its original Application or in response to the NOD. (AF 52).

Rather, Employer responded to the NOD with a small chart indicating "2017 sales," "2017 man hours," "2018 sales," "2018 man hours," and "temporary man hours needed in 2018." A comparison of the chart submitted in response to the NOD with the Payroll Report submitted with the original application shows no correlation between hours worked. (AF 52, AF 31). The

undersigned cannot reconcile the apparent discrepancies between the "2017 Man Hours" claimed in the response chart and the "Total Hours Worked/Estimated Hours Worked" found in the 2017 monthly payroll report. For example, the chart provided in Employer's response to the Notice of Deficiency shows 2080 man hours for the month of January. However, the 2017 monthly payroll report submitted with Employer's original application shows only a combined total of "total hours" and "estimated hours" worked to be 1,436.

Employer simply failed to comply with the CO's NOD by producing the requested monthly payroll report for 2016. The documentation Employer did provide cast doubt on Employer's prior documentation rather than supported it. I find no fault with the CO's request for monthly payroll reports for 2017 and 2016 or the CO's decision to deny Employer's Application for failure to establish the job opportunity as temporary in nature.

Lastly, in its NOD, the CO also noted Employer failed to establish the job opportunity as temporary in nature because the letters of intent submitted by employer did not clearly show "if the dates of service are a request of the contractors or the contractor's use of the employer's services during this time due to the employer's availability of a temporary workforce." Accordingly, the CO sought additional documents and explanation to substantiate the employer's claims. Specifically, the CO sought a summary of projects that have contributed to the employer's need for temporary workers which included the anticipated start and end dates and the location of such projects. Employer provided no additional documentation regarding the projects contributing to its temporary need. As indicated by the CO, it is unclear - based upon employer's evidence - whether the contractors only require work during this time and thus creating a peakload need. Or, in the alternative, whether the contractor uses the employer's services during this time period because Employer's availability of a temporary work force. Moreover, the letters of intent do not include production schedules or other evidence as to how much work will be performed during the requested period of need. See Erickson Constr. d/b/a Erickson Framing CA LLC, 2013-TLN 00036 (May 6, 2016) (denial upheld where Employer failed "to provide any contracts specifying actual dates when work would commence and end" or "furnish any information about the scope of work to be done in relation to the amount of time needed to perform the work or the number of workers required.")

Ultimately, the burden of proof lies with the petitioning employer and bare assertions, without supporting evidence, are insufficient to carry the employer's burden of proof. The evidence of record fails to establish that the job opportunity is temporary in nature. Accordingly, I find the CO's denial of certification on this basis was not arbitrary and capricious or otherwise not in accordance with law in this regard.

b. Failure to establish temporary need for the number of workers requested

The employer must also demonstrate that the number of positions is justified and that the request represents a *bona fide* job opportunity. 20 C.F.R. § 655.11(e)(3) and (4). 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).

Herein, Employer asserted a need for fourteen (14) "Construction Laborers" for the period of April 1, 2018 through December 1, 2018. In its Application, Employer attempted to support its need for 14 Laborers by submitting a payroll report for 2017. As discussed above, the 2017 monthly payroll report is divided into two sections, one for "Permanent Employment" and one for "Temporary Employment." For the Permanent Employees, the Employer listed the "Total Workers," "Total Hours Worked," and "Total Earnings Received." For Temporary Employees, Employer listed "Number Subcontractor," "Estimated Hours Worked," and "Total Earnings Received." As observed by the CO, the number of "Estimated Hours Worked" does not support 14 full-time laborers. For example, in April, Employer estimated 1319.50 hours worked by fourteen (14) temporary workers. This equates to only 94.25 hours per month per worker. By contrast, in April, Employer's four (4) permanent workers worked a total of 783.75 hours or approximately 195.75 hours per worker. Employer offered no explanation for this discrepancy.

Moreover, as noted above, the chart submitted by Employer in its response to the NOD conflicted with Employer's 2017 payroll report. The chart itself fails to establish why Employer requires exactly fourteen (14) temporary full-time workers. Employer provided no explanation how it quantitatively determined its need for fourteen (14) workers, despite the CO's request for such information. Employer did not explain why fourteen (14) workers were required as opposed to seven (7) or some other number. On a whole, Employer's evidence simply

failed to explain why it needed no fewer than fourteen (14) full-time workers. As such, I find Employer failed to meet its burden of establishing it has a need for fourteen (14) "Construction Laborers."

Based on the evidence of record, I find Employer failed to demonstrate it has an actual seasonal peakload need for fourteen (14) "Construction Laborers." Employer had the burden of establishing the nature of the temporary need and that the request for fourteen (14) laborers was justified and it failed to meet this burden. Therefore, the CO's denial of Employer's Application is affirmed.

ORDER

In light of the foregoing discussion, it is hereby **ORDERED** that the Certifying Officer's denial determination is **AFFIRMED**.

ORDERED this 20th day of April, 2018, in Covington, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge