

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 19 March 2018

BALCA Case No.: 2018-TLN-00068
ETA Case Nos.: H-400-17362-740478

In the Matter of:

NELSON LEWIS, INC.,
Employer.

Appearance: Kevin Lashus, Esq.
FisherBroyles, LLP
Austin, Texas
For the Employer

Before: William T. Barto
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the labor certification process for temporary non-agricultural employment in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated implementing regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart A. Commonly referred to as the H-2B Nonimmigrant Visa Program, the H-2B visa classification applies to an individual coming to the United States as a temporary worker in a non-agricultural job with no plans to stay permanently. An employer who wants an H-2B visa must first obtain a "temporary labor certification" from the Department of Labor ("DOL").

As explained below, I affirm the Certifying Officer's (CO) decision to deny Employer's application for temporary employment certification.

BACKGROUND

Nelson Lewis, Inc. [hereinafter Employer] is a construction contractor in Marble Falls, Texas. On January 1, 2018, Employer submitted an *Application for Temporary Employment Certification* to hire 10 nonimmigrant workers as construction laborers to

meet a period of need between April 1, 2018, and December 31, 2018.¹ Employer stated, in sum, that the period of need is “because our busiest seasons are traditionally tied to the spring, summer and fall months, from approximately April 1st to December 31st, during which time we need to substantially supplement the number of workers for our labor force for these positions.”² In support of this assertion, Employer included, *inter alia*, payroll information for its permanent workforce during the years 2014-2016.³ The information established that the payroll hours for Employer’s permanent workforce steadily grew over the period from 106,436.75 hours in 2014 to 146,510.25 hours in 2016. Similarly, Employer’s payroll expenditures for its permanent workforce grew during the same period from \$1,696,181.32 in 2014 to \$2,515,665.74 in 2016. Also submitted without further explanation were a number of construction contracts to which Employer is a party that are putatively to be executed during the period of need.⁴

The CO issued a Notice of Deficiency on January 17, 2018, asserting, *inter alia*, that Employer had established neither a temporary need for more workers during the period specified, nor a specific need for the 10 workers requested.⁵ The CO directed Employer to provide a variety of information, including the following:

- Summarized monthly payroll reports for a minimum of two previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system;
- Signed work contracts and/or monthly invoices from two previous calendar years(s) clearly showing work will be performed for each month during the requested period of need; and
- Other evidence and documentation that justifies the requested dates of need and the specific need for 10 laborers.⁶

¹ Appeal File (AF) at 45-190.

² AF at 45 & 51.

³ AF at 53.

⁴ AF 57-162.

⁵ AF at 37-44. In light of my disposition of this matter, it is unnecessary to discuss other deficiencies noted by the Certifying Officer in Employer’s application at this stage or any remedial measures undertaken by Employer.

⁶ AF at 42-43.

Employer responded by electronic mail on January 31, 2018, and provided only an unsigned document styled “Current Contracts” that listed Employer’s current jobs for the period April through November 2018, including the job name, customer, city, contract value, and “Number of Add’l Workers Needed.”⁷ In relevant part, counsel for Employer explained the need for additional workers as follows:

The projected number of temporary workers assigned to each contract is entirely based upon similar projections of utilization of permanent, non-temporary workers that will require assistance. If permanent workers are assigned to the projects, we’re estimating how many additional, temporary workers should be utilized to compensate to limit overtime and overwork. The awards coincide with the release of federal transportation funds to the MUDs to pay the awards.⁸

The CO determined that Employer had not overcome the noted deficiencies. Specifically, the CO noted that the payroll documentation provided by Employer did not include all the required information and demonstrated a consistent need for employees throughout the year.⁹ Similarly, the CO observed that the Employer had not explained how it had come up with its stated need for 10 laborers, given that the documentation submitted indicated a need for up to 121 additional workers to complete the listed contracts.¹⁰ After reviewing the contract documentation submitted by Employer, the CO concluded that neither the table summarizing pending contracts nor the three contracts submitted for review were sufficient to establish the number of workers needed or the period of need.

- The contract submitted in connection with the Village of Windcrest project indicated that work had already begun on the contract and would continue only until November 2, 2018, almost two months before the end date of need requested.¹¹
- The contract submitted in connection with the City of Sonora project also indicated that work had already begun on the contract and would terminate before the stated period of need.¹²

⁷ AF at 35-36.

⁸ AF at 33.

⁹ AF at 15.

¹⁰ AF at 18-20.

¹¹ AF at 15.

¹² AF at 15-16.

- The contract submitted in connection with the Panther Hollow project was unsigned and contained no information as to when work would commence or terminate.¹³

Because the Employer failed to establish a temporary need for the number of workers requested, the CO denied Employer's application.¹⁴ In a letter received by the Board of Alien Labor Certification Appeals (BALCA) on February 21, 2018, counsel for Employer requested administrative review by BALCA of the determination by the CO.¹⁵ Neither the CO nor the Employer submitted briefs.

ISSUE

I must determine whether the CO acted arbitrarily, capriciously, or unlawfully by denying Employer's application for temporary labor certification on the basis that Employer had failed to demonstrate that its need for nonimmigrant workers was "temporary," as that term is defined by 20 C.F.R. § 655.6(b).

DISCUSSION

The scope of review for a denial of a temporary labor certification is limited to the written record, which consists of the Appeal File, the request for review, and any legal briefs submitted by the parties. See 20 C.F.R. § 655.61(e). The standard of review is similarly constrained: this Board may reverse or modify the CO's determination or remand to the CO for further action only if the determination at issue is arbitrary, capricious, or otherwise not in accordance with applicable law.¹⁶

"The criteria for certification include whether the employer has a valid H-2B Registration to participate in the H-2B program and has complied with all of the requirements necessary to grant the labor certification." 20 C.F.R. § 655.51(a). "An employer seeking certification under this subpart must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary." *Id.* § 655.6(a). An employer need is "temporary" only if it is "one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations." *Id.* § 655.6(b). A need is not "temporary" if it lasts for more than nine months. See *id.* A "peakload need" is

¹³ AF at 17.

¹⁴ AF at 12-20.

¹⁵ Counsel did not set forth the particular grounds for the request as required by 20 C.F.R. § 655.61(a)(3).

¹⁶ See, e.g., *Brook Ledge Inc.*, 2016TLN00033, slip op. at 5 (May 10, 2016) (acknowledging that "BALCA reviews decisions under an arbitrary and capricious standard").

established when the employer proves “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.” See 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

Departmental regulations also constrain the ability of the CO to grant temporary labor certifications. An employer bears the burden of demonstrating eligibility for the H-2B program,¹⁷ and a CO may not grant a temporary labor certification unless the employer seeking the certification has complied with all the requirements of the labor certification process for H-2B workers. 20 C.F.R § 655.50(b).

Based upon the written record, I conclude that the CO was neither arbitrary nor capricious in her determination that Employer failed to establish the job opportunity as temporary in nature. To the contrary, the evidence submitted by Employer tends to establish that the need for additional workers is actually permanent. As noted by the CO, payroll expenditures and hours worked by permanent employees of Employer have grown significantly and steadily over the last three years. Careful review of the payroll data submitted by Employer also tends to indicate that the period of April through December of 2018 will not be a period of peakload need for Employer. For example, only one month—October—exceeded the average number of payroll hours for permanent workers in all three of the proffered years. Payroll hours in July, August, and December each exceeded the average in two of the previous three years, but so did those in February and March, both months that are outside of the stated period of peakload need.¹⁸ As such, Employer’s steady growth and the relatively consistent need for workers in most months of the year undercut any assertion of *peakload* need from April through December of 2018.¹⁹

¹⁷ See *D and R Supply*, 2013TLN00029, slip op. at 6 (February 22, 2013) (citing 8 U.S.C. § 1361).

¹⁸ The basis for these observations can be found in the following information extracted from Employer’s payroll submissions:

Year	Average Payroll Hours	Months Exceeding Average Payroll Hours
2014	8,869/month	February, March, May, July, August, October, December
2015	10,236/month	February, April, July, August, October
2016	12,209/month	March, June, September, October, December

¹⁹ I note with no small concern that the same counsel for the same Employer made a very different assertion concerning Employer’s peakload need in a previous application recently submitted in August 2017. In support of an application for temporary construction laborers during a peakload period alleged to be November 1, 2017, to August 31, 2018, counsel stated the following:

I also conclude that the CO was neither arbitrary nor capricious in her determination that Employer failed to establish temporary need for the number of workers requested. As noted by the CO, none of the documentation provided by Employer was sufficiently specific to allow the CO or the undersigned to determine how Employer came up with a need for 10 temporary employees. Counsel for Employer avers that “we’re estimating how many additional, temporary workers should be utilized to compensate to limit overtime and overwork,” but provides no insight into the methodology used to estimate the stated need or why only 10 of the potential 121 additional needed workers should be “nonimmigrants.” Moreover, Employer declined to provide much of the information that the CO specified for submission in the Notice of Deficiency, such as historical data concerning temporary employment in the requested occupation, the total number of workers or staff employed, and other mandated information. Without such information, it is entirely reasonable to conclude that Employer does not know its actual need for additional workers and is speculating rather than doing the hard work of calculating how many man-hours of additional work can be anticipated in light of historical trends and current contracts.

CONCLUSION

For the reasons stated above, Employer has failed to meet its burden of showing that the CO acted arbitrarily, capriciously, or unlawfully by denying Employer’s application for temporary labor certification on the basis that Employer had failed to

Our company has a temporary peakload need for persons with these skills because our busiest seasons are traditionally tied to the winter, spring and summer months, from approximately November 1st to August 31st, during which time our clients begin to receive federal funds for construction projects because of the federal fiscal year.

Nelson Lewis, Inc., 2018-TLN-00013 (ALJ December 8, 2017), slip. op. at 2. It is informative to compare that statement with the declaration by counsel in this matter: “because our busiest seasons are traditionally tied to the spring, summer and fall months, from approximately April 1st to December 31st, during which time we need to substantially supplement the number of workers for our labor force for these positions.” AF at 45 & 51. I am well aware that the commercial circumstances of a business may change over time, but the instant application was submitted less than five months after the previous application was filed, and just 25 days after the denial of the previous application had been affirmed by an Administrative Law Judge. I am skeptical, at best, that a company’s “busiest seasons” change so dramatically. It is worth noting in situations like these that the Administrator, Office of Foreign Labor Certification, can debar an employer and/or its attorney for up to five years for willful misrepresentation of material facts in an *H-2B Registration*, *Application for Prevailing Wage Determination*, *Application for Temporary Employment Certification*, or *H-2B Petition*. 20 C.F.R. § 655.73(a) & (b). Likewise, the Chief Administrative Law Judge may disqualify representatives for knowingly making or presenting false or misleading statements, assertions or representations about a material fact or law related to an OALJ proceeding. 29 C.F.R. § 18.23(a). But if debarment and disqualification are not enough disincentives, the practice of rolling “peakload needs” in sequential applications (without adequate explanation) is simply ineffective advocacy in that it creates a picture of permanent, nonpeak need rather than its intended goal. As such, this practice should cease.

sufficiently demonstrate its need for 10 temporary nonimmigrant workers. The evidence of record does not establish that Employer's need was temporary, or that the number of foreign workers requested was anything but speculative. As the CO cannot certify an application if Employer has not met all the requirements of Subpart A of Part 655, see 20 C.F.R. § 655.60(b), Employer's request to reverse the CO's determination is therefore **DENIED**.

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's determination is **AFFIRMED**.

SO ORDERED.

For The Board:

WILLIAM T. BARTO
Administrative Law Judge

Washington, DC