

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 31 May 2018

BALCA Case No.: 2018-TLN-00129

ETA Case No.: H-400-17320-196932

In the Matter of:

**SPILMAN HOLDING CO., INC.
(DBA COASTAL DECK & POOLS)**

Employer

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Lynn Spilman
Vero Beach, Florida
For the Employer

Before: **CLEMENT J. KENNINGTON**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

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) and 20 C.F.R. Part 655 Subpart A. This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Gordon Stone Company, LLC’s (“Employer”) request for administrative review of the Certifying Officer’s (“CO”) denial of temporary labor certification under the H-2B program. For the following reasons, the Board affirms the CO’s denial of certification.

BACKGROUND

On January 4, 2018, Employer applied for temporary employment certification through the H-2B program to fill ten positions for “Paver Installers” for the period of April 2, 2018 through December 3, 2018. (AF 191-210).¹

¹ In this decision, AF is an abbreviation for “Appeal File.”

On March 2, 2018, the CO issued a Notice of Deficiency citing deficiencies regarding 20 C.F.R. §§ 655.6(a) and (b), 655.11(e)(3) and (4), 655.10(a), 655.15(a), 655.16, and 655.18.² (AF 180-190). Specifically, the CO notified Employer that its H-2B application was deficient pursuant to Sections 655.6(a) and (b) because Employer did not demonstrate how its need meets the regulatory standard or sufficiently explain what events cause the seasonal need and the specific period of time in which the employer will not need the services or labor. The CO also noted Employer did not submit any contracts, payroll for previous years, nor any documentation to support such claim. Also, the CO noted Employer did not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities or how it determined that it needs 10 “Paver Installers” during the requested period of need. (AF 183-186).

Next, the CO stated Employer must amend the ETA Form 9142, Section G., Item 1 to indicate that it will pay the highest of the applicable wages, which is \$17.23 per hour. In addition, the CO found Employer failed to submit an acceptable job offer. Finally, the CO found Employer failed to submit a complete and accurate ETA Form 9142. (AF 186-190).

On March 13 and 15, 2018, Employer responded to the CO’s Notice of Deficiency and submitted emails, a response letter with explanation, a revised Statement of Need, 2016-2017 monthly project charts, 2016-2017 unsummarized monthly payroll reports, an amended job order, and current jobs list. (AF 103-179).

On April 18, 2018, the CO made its final determination regarding Employer’s H-2B application. The CO denied Employer’s application due to its failure to establish that the job opportunity is temporary in nature pursuant to 20 C.F.R. §§ 655.6(a) and (b) and due to its failure to establish its temporary need for the number of workers requested pursuant to 20 C.F.R. §§ 655.11(e)(3) and (4). (AF 90-102).

Specifically, the CO found that Employer did not submit sufficient information in its application to establish its requested standard of need or period of intended employment. In response to the documents submitted by Employer requested in the Notice of Deficiency, the CO noted Employer did not provide any support for its contention that April through December is its high season since the work being done outdoors, which is dependent on favorable weather conditions for the use of cement, mortar or other adhesives that cannot cure properly in cold air temperature conditions.³ In addition, the CO found the payroll documents submitted by Employer appeared to be for the entire staff and were not exclusive to the requested position, which Employer was specially directed to provide in its response. Since Employer did not submit a summary of these documents and did not make clear the occupation of these workers, which workers were permanent and which were temporary workers, the CO did not analyze these documents. (AF 92-95).

² On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. § 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015). These rules are effective and govern this case.

³ The CO also noted area of intended employment is in Vero Beach, Florida, where the average low temperatures do not fall below 51 degrees Fahrenheit during anytime of the year. (AF 94).

In addition, the CO also found Employer failed to establish a temporary need for the number of workers requested. Rather, the CO found the payroll documents submitted by Employer appeared to be for the entire staff and were not exclusive to the requested position, which Employer was specially directed to provide in its response. Since Employer did not submit a summary of these documents and did not make clear the occupation of these workers, which workers were permanent and which were temporary workers, the CO did not analyze these documents. Thus, the CO determined Employer failed to meet the regulatory requirements at 20 C.F.R. §§ 655.6(a) and (b) and 20 C.F.R. §§ 655.11(e)(3) and (4) and denied Employer's application. (AF 95-96).

On April 20, 2018, Employer submitted an inquiry regarding whether the April 18, 2010 Non-Acceptance Denial was a Final Determination or a Notice of Deficiency. On April 23, 2018, the CO responded that the Non-Acceptance Denial was considered a Final Determination. (AF 87-89).

On May 8, 2018, Employer submitted a request for administrative review to the Board of Alien Labor Certification Appeals ("BALCA") appealing the CO's Final Determination in the above-captioned H-2B matter. (AF 1-86). On May 14, 2018, BALCA docketed the appeal and issued a Notice of Case Assignment. Pursuant to the Notice of Case Assignment, the CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services ("the Solicitor") in accordance with 20 C.F.R. § 655.33(b). Because H-2B appeals are expedited, and in accordance with 20 C.F.R. § 655.33, the parties were given a brief due date of May 25, 2018. Thereafter, no briefs were received by the undersigned on behalf of either party.

APPLICABLE LAW

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 seek 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). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* ("ETA Form 9142") with ETA's Chicago National Processing Center ("CNPC"). 20 C.F.R. § 655.20. After an employer's application has been accepted for processing, it is reviewed by a Certifying Officer ("CO"), who will either request additional information or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

BALCA's review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-

00017, slip op. at 4-5 (Feb. 21, 2012), “[t]he scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application.” 20 C.F.R. § 655.33(a), (e).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer’s application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

After considering all evidence, BALCA must take one of the following actions in deciding the case:

1. Affirm the CO’s denial of temporary labor certification, or
2. Direct the CO to grant temporary labor certification, or
3. Remand to the CO for further action.

20 C.F.R. § 655.61(e)(1)-(3).

Applications are properly denied where the employer did not supply requested information in response to a Notice of Deficiency. 20 C.F.R. § 655.32(a) (“The employer’s failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification.”); *Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016).

DISCUSSION

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis. *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); 20 C.F.R. § 655.11(a)(3). Employer “must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” 20 C.F.R. § 655.6(a). The regulations provide that employment “is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). That period of time is usually limited to less than one year but may last up to three years in cases of a one-time event. (*Id.*) The employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); *see Tampa Ship*, 2009-TLN-44, slip op. at 5 (May 8, 2009).

Employer alleges it has a seasonal need for ten paver installers from April 2, 2018 through December 3, 2018. (AF 191). 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. 8 C.F.R. § 214.2(i)(F)(2)(ii)(B)(2). In addition, Employer must specify the period of time during each year in which it does not need the services or labor. *Id.* 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. *Id.*

The CO found Employer failed to provide any support for its position that April through December is its high season since the work being done outdoors, which is dependent on favorable weather conditions for the use of cement, mortar or other adhesives that cannot cure properly in cold air temperature conditions. In addition, the CO found the payroll documents submitted by Employer appeared to be for the employer's entire staff and are not exclusive to the requested position, which Employer was specially directed to provide in its response. Since Employer did not submit a summary of these documents and did not make clear the occupation of these workers, which workers were permanent and which were temporary workers, the CO did not analyze these documents.

After reviewing the record in this matter, I find that Employer submitted insufficient evidence to establish that it has a seasonal need for temporary workers. In its request for review, Employer resubmitted the materials submitted to the CO as well as submitted new itemized attachments and contracts to better explain its temporary need. However, as stated above, BALCA's review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012), "[t]he scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application." 20 C.F.R. § 655.33(a), (e). Since the itemized attachments were not contained in the record before the CO at the time of the final determination, it will not be considered on appeal.

Without the requested summarized monthly payroll reports identifying the monthly number of paver installers working as permanent employees and those working as temporary employees, as well as the number of hours worked by the paver installers in each category, it is not possible to determine the base-line production of permanent employee paver installers on a full-time basis, which is needed to establish if there are periods of demand that cannot be met by the Employer's paver installers. Consequently, Employer's claim of a seasonal period cannot be determined without the specifically requested employment data. Indeed, it is clear Employer failed to submit the specifically requested information as directed when it had the opportunity to make a timely submission. Consequently, when the credible evidence submitted to the CO prior to denial determination is considered as a whole, Employer has failed to meet its burden to

establish that it has a seasonal temporary need for paver installers for the requested period of need.

In addition, I find Employer failed to meet its burden to show that the requested ten paver installers are needed during its requested period of need. As noted above, Employer did not submit a summarized monthly payroll report as instructed by the Notice of Deficiency, or any other alternative evidence or documentation that would serve to justify the number of workers being requested for certification. Similar to the discussion above, it is not possible to determine the need for augmentation of the permanent paver installer work force with H-2B paver installers; if there is a period of increased need for the requested number of H-2B paver installers based on past monthly production; or if permanent full-time U.S. workers are being displaced by H-2B paver installers without the requested signed and attested summarized monthly payroll reports.

Therefore, for the reasons stated above, Employer has failed to meet its burden of showing how its employment need is temporary in nature based on a seasonal need or that the number of worker positions and period of need are justified. Therefore, I find the CO's determination is neither arbitrary nor capricious. Accordingly, the denial of Employer's H-2B certification must be affirmed.

ORDER

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

ORDERED this 31st day of May, 2018 at Covington, Louisiana.

CLEMENT J. KENNINGTON
Administrative Law Judge