



Issue Date: 26 March 2019

BALCA Case No.: 2019-TLN-00077
ETA Case No.: H-400-18364-368549

In the Matter of:

BARNHILL CONTRACTING COMPANY
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from Barnhill Contracting Company’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny its application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary non-agricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).²

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, Application for Temporary Employment Certification (“Form 9142B”). A CO in the Office of Foreign Labor Certification of the Department of Labor’s Employment and Training Administration (“ETA”) reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

BACKGROUND

On January 7, 2019, the ETA received an application for temporary labor certification from Employer. Employer requested certification for six “construction laborers” for an alleged period of temporary peakload need from April 1, 2019, through December 1, 2019. (AF 37.)³

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

² On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

³ Citations to the Appeal File will be abbreviated with an “AF” followed by the page number.

The requested employees would work primarily out of Kinston, North Carolina. (AF 40.) In addition to its Form 9142B, Employer also submitted a list of its construction laborer employees and the hours they worked in 2017, a signed DHS Form G-28 (attorney entry of appearance), an agreement with a recruiter, a job order, and a prevailing wage determination. (AF 37-76.)

Employer's Application

In its Form 9142B and attached documentation, Employer described its business operations. Employer is a road construction contractor in the southeast United States. (AF 37.) The nature of Employer's business involves building roads and paving road surfaces. (AF 37.) Employer explained that its temporary need for H-2B workers is based on the weather because, during the colder months, Employer cannot pave outdoor road surfaces with asphalt. (AF 37.)

Employer also attached a print out of a list of Employer's construction laborers. (AF 51.) This document covers 2017 and lists the name of each construction laborer, the hours worked, earnings figures, and the number of weeks worked. (AF 51.) In 2017, at its Kinston location, Employer employed sixteen permanent construction laborers who worked between forty-one and fifty-two weeks, as well as twelve temporary construction laborers who worked between one and forty weeks. (AF 51.)

Legal Standard

An employer seeking certification under the H-2B program must show that it has a temporary need for workers. Temporary service or labor "refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary." 8 C.F.R. § 214.2(h)(6)(ii)(A); 20 C.F.R. § 655.6(a). Employment "is of a temporary nature when the employer needs a worker for a limited period of time," and 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). An employer's need is temporary if it qualifies under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by DHS. 8 C.F.R. § 214.2(h)(6)(ii)(B); 20 C.F.R. § 655.6(a), (b).⁴ "Except where the employer's need is based on a one-time occurrence, the CO will deny a request for a [certification] where the employer has a need lasting more than 9 months." 20 C.F.R. § 655.6(b).

An employer can establish 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).

⁴ Because the definition of temporary need derives from DHS regulations that have not changed, 8 C.F.R. § 214.2(h)(6)(ii), pre-2015 decisions of the Board on this issue remain relevant. An appropriation rider currently in place requires the DOL to exclusively utilize the DHS regulatory definition of temporary need. *Consolidated Appropriations Act of 2017*, P.L.115-31, Division H.

An employer must also demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. §§ 655.11(e)(3)-(4); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017) (affirming denial where the employer's temporary and permanent employee payroll data did not support its claimed number of workers or period of need); *North Country Wreaths*, 2012-TLN-43 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that its current need for workers was greater than its need in a prior year).

An employer bears the burden of proof. *Alter and Son Gen. Eng'g*, 2013-TLN-00003 (Nov. 9, 2012); *BMGR Harvesting*, 2017-TLN-00015 (Jan. 23, 2017). Bare assertions without supporting evidence are insufficient to carry the employer's burden. *AB Controls & Tech.*, 2013-TLN-00022 (Jan. 17, 2013). In addition, the burden is on the employer both to provide the necessary information and to present it in such a way so that the CO can determine that the employer has established a legitimate temporary need for workers. *Empire Roofing*, 2016-TLN-00065 (Sep. 15, 2016).

Notice of Deficiency

On February 7, 2019, the CO issued a Notice of Deficiency ("NOD"), identifying two grounds for denial of Employer's application. (AF 30-36.) First, the CO concluded that Employer had failed to sufficiently demonstrate that the job opportunity was temporary in nature pursuant to 20 C.F.R. §§ 655.6(a)-(b). (AF 33.) The CO stated that the "climate data for the employer's area of intended employment shows average low temperatures in its nonpeak period are mostly above freezing" and pointed out that the average temperature in December and January ranges from thirty-four to fifty-seven degrees. (AF 33.)

The CO thus instructed Employer to submit: (1) a statement describing Employer's business history, business activities (*i.e.*, primary products or services), and schedule of operations throughout the year; (2) a detailed explanation of the activities performed by Employer's permanent construction laborers outside of the alleged period of need; (3) an explanation, with supporting documentation, substantiating Employer's claimed inability to perform its work outside of the requested period because of local weather conditions; (4) a summary listing all projects in the area for the last two years; (5) summarized monthly payroll reports for 2017 and 2018 identifying the total number of workers, total hours worked, and total earnings received separately for permanent full-time employees and for temporary employees in the construction laborer occupation; and (6) any other evidence or documentation that similarly serves to justify Employer's alleged peakload need. (AF 34-35.)

Second, the CO concluded that Employer had "not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities," as required by 20 C.F.R. §§ 655.11(e)(3)-(4). (AF 35-36.) The CO indicated that Employer had not explained how it determined that six H-2B construction laborers were needed. (AF 35.) Accordingly, the CO instructed Employer to submit: (1) an explanation, with supporting documentation, of why six workers are needed for Employer's Kinston location; (2) if applicable, documents supporting Employer's need for six construction laborers, such as contracts, letters of intent, etc.; (3) summarized monthly payroll records as described in the first

identified deficiency; and (4) any other evidence or documentation that serves to justify the request for six workers. (AF 35-36.)

Employer's Response

Employer responded to the NOD on February 11, 2019. (AF 24.) In its response, Employer explained that the North Carolina Department of Transportation forbids "hot mix" asphalt from being placed unless the ambient air temperature is above forty-five degrees Fahrenheit. (AF 25.) Employer then noted that the mean minimum temperature for the Kinston area is below forty-five degrees in December, January, and February. (AF 24.) Employer provided print outs and hyperlinks to substantiate these claims. (AF 25-26.)

Employer also attached summarized payroll reports from 2017⁵ and 2018. (AF 27-28.) These reports show that Employer employed sixteen permanent and twelve temporary construction laborers in 2017, and twenty-one permanent and twelve temporary construction laborers in 2018. (AF 27-28.) Permanent construction laborers worked between forty-one and fifty-two weeks in 2017 and between forty-seven and fifty-two weeks in 2018; temporary construction laborers worked between one and forty weeks in 2017 and between two and thirty-one weeks in 2018. (AF 27-28.)

Final Determination

On February 21, 2019, the CO issued its Final Determination denying Employer's application for temporary labor certification. (AF 19-23.) The CO denied the application because she determined Employer had not established the need for six construction laborers. (AF 21-23.)⁶

As in the NOD, the CO concluded that Employer failed to establish a temporary need for the number of workers requested under § 655.11(e)(3)-(4). (AF 21-23.) The CO first stated that Employer's explanation and documentation did not overcome the deficiency because Employer had not submitted "contracts, letters of intent, etc. that specify the number of workers and dates of need," as requested in the NOD. (AF 23.)

Additionally, the CO determined that the summarized payroll reports submitted by Employer were insufficient to overcome the deficiency. (AF 23.) These records provided the name of each construction laborer, along with the total number of weeks worked, and the number of hours worked annually. (AF 27-28.) The CO noted that the information provided "did not separate by month the hours worked by [Employer's] workers." (AF 23.) Without this breakdown, the CO reasoned "it cannot be determined when these hours were worked," and the information provided "was not summarized in a manner to determine the employer's need for a certain number of temporary workers." (AF 23.)

⁵ The 2017 report is the same report submitted with Employer's initial application. (AF 27, 51.)

⁶ In the Final Determination, the CO did not address the first deficiency identified in the NOD: failure to establish a temporary need under § 655.6(a)-(b). Because the CO did not discuss this deficiency in its Final Determination, I presume that the information Employer submitted in response to the NOD was sufficient to overcome it.

Based on the information included with Employer's Form 9142B and its response to the NOD, the CO concluded that Employer had not overcome the deficiency and had not established a need for the number of workers requested under § 655.11(e)(3)-(4). (AF 19-23.) Therefore, in accordance with § 655.51, the CO denied Employer application for temporary labor certification. (AF 23.)

Employer's Appeal

On March 6, 2019, Employer appealed the CO's Final Determination. (AF 1.) Employer argues that its summarized payroll records, in conjunction with its other evidence, "clearly establish" its need for at least six temporary workers. (AF 3-4.) Employer also contends that the NOD requested contracts and letters of intent only if applicable, and Employer determined that such documentation was not applicable because its contracts do not specify number of workers or dates of need. (AF 4.)

The Office of Administrative Law Judges received the appeal file on March 15, 2019. I issued a Notice of Assignment and Expedited Briefing Schedule on March 18, 2019. The CO did not submit a brief. This decision is issued within ten business days of receipt of the Appeal File, as required by 20 C.F.R. § 655.61(f).

STANDARD OF REVIEW

The scope and standard of review in the H-2B program are limited. When an employer requests review by the Board under § 655.61(a), the request for review may contain only legal arguments and evidence that were actually submitted to the CO prior to issuance of the final determination. § 655.61(a)(5). The Board "must review the CO's determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted." § 655.61(e). The Board must affirm the CO's determination, reverse or modify the CO's determination, or remand the case to the CO for further action. *Id.*

Although neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing a CO's determinations. *Brazen & Greer Masonry, Inc.*, 2019-TLN-00038 (Mar. 6, 2019); *The Yard Experts, Inc.*, 2017-TLN-00024 (Mar. 14, 2017); *Brooks Ledge, Inc.*, 2016-TLN-00033 (May 10, 2016).

Under the "arbitrary and capricious" standard of review, a reviewing body retains a role, and an important one, in ensuring reasoned decision making. *See Judulang v. Holder*, 565 U.S. 42, 53 (2011). Thus, the Board must be satisfied that the CO has examined "the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted). In reviewing the CO's explanation, the Board must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.*

A determination is considered arbitrary and capricious if the CO “entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence.” *Id.* Inquiry into factual issues “is to be searching and careful,” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), but the Board “may not supply a reasoned basis” that the CO has not provided. *State Farm*, 463 U.S. at 43; *see also FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 515 (2009) (noting the requirement that “an agency provide reasoned explanation for its action”).

DISCUSSION

As set forth above, the CO’s ultimate denial rested on Employer’s failure to justify its need for six construction laborers under §§ 655.11(e)(3) and (4). Employer argues that the evidence it submitted with its Form 9142B and in response to the NOD establishes its temporary need for the six H-2B workers it requested. (AF 3-43.) Specifically, Employer claims that the summarized payroll reports for 2017 and 2018, when considered in conjunction with its weather-related restrictions outside of the requested period, “clearly establish” its need for “at least six temporary construction laborers” in its Kinston location. (AF 4.)

Employer’s argument is unpersuasive. Employer carries the burden to provide information to the CO and to present the information in such a way that enables the CO to determine that Employer has established a legitimate temporary need for the number of workers requested. *Empire Roofing*, 2016-TLN-00065 (Sep. 15, 2016). Here, it was reasonable for the CO to conclude that Employer did meet this burden.

The payroll summaries submitted by Employer show that it employed twelve temporary and sixteen permanent construction laborers in 2017, and twelve temporary and twenty-one permanent construction laborers in 2018. The information, however, does not establish *when* these employees worked during the year. Many of the temporary construction laborers worked significantly less than the eight-month period of requested need (April through November). Some worked as few as two weeks in 2018 and one week in 2017, whereas others worked as much as forty weeks in 2017 and thirty-one weeks in 2018. The record reflects that Employer’s business likely decreases during the months of December, January, and February. However, Employer has not shown whether its temporary construction laborers work outside of the requested period or what percentage of their work is done during versus outside the requested period.

Nor did Employer offer any explanation on this point, or indeed any reasoning at all as to how its documentation justified its specific need for six construction laborers from April through November. Employer simply submitted the documents and identified the number of construction laborers it employed over the course of a two-year period. It did not explain why or how the fact that it formerly employed twelve temporary workers over the course of a calendar year supports its alleged need for six temporary workers from April through November. Thus, based on the information provided by Employer, the CO could have rationally determined that Employer did not establish a temporary need for six construction laborers during the requested period.

Employer also contends that the CO erroneously faulted it for not providing contracts and letters of intent for the coming year in response to the NOD. (AF 4.) Employer argues that the language of the NOD indicated that the information requested by the CO was necessary only if applicable. (AF 4.) Employer believed the information was not applicable to its case because its contracts and letters of intent do not list the number of employees or the dates of need. (AF 4.)

First, the CO requested “documentation supporting the employer’s need for six construction laborers.” (AF 35.) The request was not limited to contracts and letters of intent; the NOD simply listed those documents as examples of supporting documentation. In the Final Determination, the CO indicated that Employer failed to submit “contracts, letters of intent, etc. that specify the number of workers and dates of need.” (AF 23.) In other words, the CO determined that Employer failed to submit *any* documentation (including contracts and letters of intent) that specified the number of temporary workers and the dates on which those workers were required.

As discussed above, Employer bears the burden of proof. *See, e.g., BMGR Harvesting*, 2017-TLN-00015 (Jan. 23, 2017). The purported unsuitability of Employer’s contracts and letters of intent does not relieve Employer of its burden, upon the CO’s request, to supplement its application with information that sufficiently establishes its need. At the very least, if no such documentation was available, it would have been prudent for Employer to explain in its response to the NOD why it believed the requested documents were inapplicable.

In any case, for the reasons set forth above, the CO’s ultimate conclusion—that Employer failed to establish (through documentary evidence or otherwise) its need for six temporary workers—was reasonable. Thus, even assuming the CO did erroneously fault Employer for failure to submit contracts and letters of intent (and I do not believe she did), the CO still had a sufficient rational basis on which to deny Employer’s application.

Based on my review of the entire record and the foregoing analysis, I find that the CO considered the relevant evidence and rationally concluded that Employer failed to establish its need for six construction laborers under §§ 655.11(e)(3) and (4). Therefore, I conclude the CO’s Final Determination denying Employer’s application for temporary labor certification was not arbitrary and capricious.

CONCLUSION AND ORDER

The Certifying Officer did not act in an arbitrary and capricious manner in denying Employer's Application for Temporary Employment Certification (ETA Form 9142B). Accordingly, the Certifying Officer's denial of Employer's Application for Temporary Employment Certification is **AFFIRMED**.

For the Board:

LAUREN C. BOUCHER
Administrative Law Judge

Cherry Hill, New Jersey