



Issue Date: 03 May 2019

BALCA Case No.: 2019-TLN-00099

ETA Case Nos.: H-400-18354-284043

In the Matter of:

**CENTEX HOUSE LEVELING-AUSTIN, LLC,
d/b/a CENTEX FOUNDATION REPAIR,
*Employer***

**DECISION AND ORDER AFFIRMING DENIAL OF
TEMPORARY LABOR CERTIFICATION**

This case arises from a request for review of a Certifying Officer's ("CO") decision to deny an 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 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);¹ 20 C.F.R. § 655.6(b).² Following a 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).

On March 20, 2019, BALCA received a Notice of Appeal, stamped March 15, 2019, from the above Employer requesting administrative review of a Certifying Officer's March 4, 2019 denial of certification in the above-captioned H-2B temporary labor certification matter. On March 22, 2019, the Certifying Officer transmitted the appeal file to BALCA,³ the Employer,

¹ The definition of "peakload" temporary need is now governed by 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113), § 113 (Dec. 18, 2015).

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). As the application in this case meets these conditions, the IFR applies to this case. All citations to 20 C.F.R. Part 655 in this order are to the IFR.

³ Appeal File pages 1 through 290 were transmitted to BALCA. Pages 291 through 381 were not transmitted. However, I find that it was unnecessary to view pages 291-381, which, according to the Appeal File's index,

and the Associate Solicitor for Employment and Training Legal Services (“the Solicitor”) in accordance with 20 C.F.R. § 655.61(b).

On March 26, 2019, I issued a *Notice of Docketing and Order Establishing Briefing Schedule*. Because H-2B appeals are expedited, and in accordance with 20 C.F.R. § 655.33, the parties were given seven business days of receipt of the appeal file to submit briefs. Employer submitted a brief on April 3, 2019.⁴

Background

On January 7, 2019, Centex House Leveling-Austin, LLC (“Employer”) applied for temporary employment certification through the H-2B program to fill 25 positions for Construction Laborers for the period of April 1, 2019 to December 15, 2019. (AF 250-381).⁵

On February 11 2019, the CO issued a Notice of Deficiency (“NOD”) identifying two deficiencies. (AF 242-249).⁶ The CO requested that the following additional information be submitted to establish temporary need under 20 C.F.R. § 655.6(a) and (b):

1. A statement describing the employer’s (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year
2. A detailed explanation as to the activities of the employer’s permanent workers in this same occupation during the stated non-peak period;
3. An explanation and supporting documents that substantiate that employer’s type of work cannot be performed during the winter months, from January through March, when there is cold and wet weather in Austin, Texas, as well as documentation to show that such weather conditions exist in the area of intended employment;
4. A summary listing of all projects in the area of intended employment for the previous two calendar years. The list should include start and end dates of each project and worksite addresses;

contained the Employer’s Texas Secretary of State Articles of Organization (included also in Employer’s later filing); a DHS Form G-28 (notice of attorney appearance); a job order; and a prevailing wage determination.

⁴ From March 27, 2019 through April 17, 2019, the Office of Administrative Law Judges was closed due to inaccessibility of the office space. In my capacity as Chief Administrative Law Judge, I issued an Administrative Order regarding *Suspension and Extension of Filing Due Dates During Temporary Closure of Washington, DC Office*, 2019-MIS-00005 (ALJ Apr. 18, 2019). That order provided that deadlines for filings required to be made with OALJ Headquarters or with a presiding ALJ assigned to the Washington DC District Office for the period from March 27, 2019 through April 17, 2019 were suspended. The order also added seven business days to the due date for any papers that were to be filed during the closure.

⁵ In this decision, AF is an abbreviation for “Appeal File.”

⁶ Deficiency 1 was a failure to establish the job opportunity as temporary in nature, under 20 C.F.R. 655.6(a) and (b). Deficiency 2 was a failure to establish temporary need for the number of workers requested, under 20 C.F.R. 655.11(e)(3) and (4).

5. Summarized monthly payroll reports for the 2017 and 2018 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Construction Laborer, 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

(AF 35). The CO requested the following additional information to establish that the number of workers requested was justified pursuant to 20 C.F.R. § 655.11(e)(3) and (4):

1. A statement indicating the total number of workers the employer is requesting for this occupation and worksite;
2. An explanation with supporting documentation of why the employer is requesting 25 Construction Laborers for its worksite in Austin, Texas during the dates of need requested;
3. If applicable, documentation supporting the employer's need for 25 Construction Laborers such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
4. Summarized monthly payroll reports for a minimum of one 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

(AF 36).

Employer responded to the NOD on February 22, 2019. (AF 30-241). Employer explained that it is a foundation repair company and that the seasonality of its business is a result of rain, daylight hours, and temperature. Employer stated that it is not able to install roofing in the rain or when the temperature is below 40 degrees Fahrenheit; and that daylight hours impact work time. (AF 37). The laborers requested would be required to "load and unload materials, equipment and tools; clean & prepare sites; dig trenches; erect & disassemble braces; build, position, & dismantle forms; use hand & power tools & equipment; clean up area & related laborer tasks."

Employer further explained that "[b]uilding also follows the same peak-load cycle due to cyclical financing and beginning-of-the-year bidding for March and April contracting. As a result, our peak-load months follow closely the peak-load needs of these businesses." (AF 38). Employer stated:

We have already been awarded contracts for 1705 Crossing Place, Bldg A, 78741 (Team Group Meadow Condo's) for \$4,185.00, and 3841 FM 3061, 76577 (Brandy Eves) for \$5,271.00 and 557 Twisted Oaks, 78610 (Milestone Builders)

for \$41,100.00 for 6903 Deatonhill, Bldg Three, 78745 (Flagstone Condos) for \$4,138.00 for 200 Boxwood Path, 78644 (Kelly Finn) for \$12,423.00 and for 1903 Oxford Blvd, 78663 (Juan Gallegos) for \$7,399.00, all of which are scheduled to begin in the April/May time frame, and are being asked to do work on multiple other projects that we cannot yet commit to because we cannot confirm our manpower levels, which is why we are requesting workers for that time period

(AF 38). Employer stated that it has “been allocated fifty six (56) total contracts so far in 2019 and we kept them working a full 40-hour work week during the duration of their stay, and our current and future workload is no less than it was in 2018.” (AF 39).

Employer averred that, “[a]t present, we have a temporary need for these peak-season laborers, but cannot anticipate needing them in the future when the economy changes. As such, these workers are not a part of our regular operations.” (AF 39). Employer asserted that it was requesting 25 H-2B workers based on its expectation that it will “grow about 15% in 2019 over 2018 . . . largely due to the improved economy and growth we are experiencing in Texas.” Employer estimated that it needs “one construction laborer for every \$100,000.00 in gross sales. With over \$4,000,000.00 in gross sales per year, we have more than enough work for twenty-five . . . peak-season H2B workers.” (AF 40).

Employer submitted a 2018 monthly payroll report (AF 41-42); a letter describing clay soils in Texas (AF 43); a map of Texas showing the frequency of expansive soil (AF 44); federal and state tax returns for 2016 through 2018 (AF 45-144); a copy of its State of Texas Articles of Organization (AF 145-150); and the Austin Board of Realtors monthly local market report and newsletter (AF 151-241).

The CO determined Employer’s explanations and documentation were insufficient and, on March 4, 2019, issued a Final Determination maintaining both deficiencies as separate bases to deny certification of Employer’s application. (AF 16-29). The CO concluded that the documentation did not establish that the job opportunity was temporary in nature, in part, because the employer did not provide documentation to support its stated business pattern of peakload from April 1 to December 15 based upon weather or soil issues. Additionally, although the employer submitted a report on clay soil, it “did not explain how the [report] . . . corresponds to its peakload need,” and the other documentation provided “did not offer any specific information in determining the employer’s need” Moreover, “[t]he employer did not provide any precipitation or temperature reports for Austin,” and the CO stated that, “according to rssWeather.com . . . the driest month in Austin is January” and the wettest month is May, which “indicate[s] that rain would not hinder workers in January, but would cause the employer to be unable to install roofing in May, which is during the employer’s peakload”; and, although Austin’s coldest month is January, its average of 40 degrees overnight “would enable workers to install roofing in January.” The CO also observed that “the average time of sunset in Austin, Texas in 2018 was no earlier than 5:41 p.m. in January, 6:07 p.m. in February, 6:29 p.m. in March and 5:30 p.m. in December,” which would allow the employer “sufficient daylight to install roofing during the months of December through March,” given the employer’s work hours of 7:00 a.m. to 4:00 p.m. The CO also pointed out that “[t]he employer’s 2018 payroll report . . .

indicates that it utilized temporary workers year-round,” which “is indicative of a permanent need, and not a peakload need.” The CO explained that “[t]he employer is indicating that it has not had any success in satisfying its peakload labor needs due to unprecedented growth and an improved economy. However, the employer is reminded that a labor shortage, no matter how severe, does not justify a temporary need for workers.”

The CO also concluded that the employer did not establish a temporary need for the number of workers requested. The CO stated that “there does not appear to be a peak as it appears that the employer utilizes permanent workers all throughout the year, with no significant increase in hours worked from April through December 15th, and no significant decrease from December 16th through March;” and the employer used temporary employees year-round. During the non-peak season, “it utilized 8 to 21 temporary workers with less than full-time hours. During the employer’s peak season, it never utilized more than 20 workers, and the only months the workers worked a full 40-hour or more workweek was August and November. Finally, the CO observed that it was “unclear how the employer determined the need for 25 Construction Laborers.” (AF 21-29).

Applicable Law

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary services 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)(15)(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, Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(5). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* with ETA’s Chicago National Processing Center. 20 C.F.R. § 655.20. After an employer’s application has been accepted for processing, it is reviewed by a 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). The scope of the Board’s review is limited to the appeal file prepared by the CO, any 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. §§ 655.61(a), (e). The employer bears the burden of proof concerning its entitlement to a certification. 8 U.S.C. § 1361; *Cajun Contractors*, 2011-TLN-00004 (Jan. 10, 2011); *BMGR Harvesting*, 2017-TLN-00015 (Jan. 23, 2017). BALCA reviews the CO’s determinations under an arbitrary and capricious standard. *Brook Ledge*, 2016-TLN-00003 (May 10, 2016); *Three Season Landscape Contracting Services*, 2016-TLN-00045 (June 15, 2016).

After considering all the evidence, BALCA may take one of the following actions:

1. Affirm the CO’s denial of temporary labor certification,
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).

DISCUSSION

To qualify as a peakload need, the employer “must establish 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).

A review of the record in this case compels the conclusion that the Employer failed to establish that the job is temporary in nature or that the number of workers and period of need are justified. Employer’s submissions do not indicate a discernible peakload period, but rather a permanent, year-round need. Accordingly, I find that the CO’s denial of temporary labor certification was not arbitrary or capricious.⁷

ORDER

Accordingly, the CO’s denial of temporary labor certification in the above-captioned matter is **AFFIRMED**.

SO ORDERED.

For the Board:

STEPHEN R. HENLEY
Chief Administrative Law Judge

⁷ Although Employer submits in its brief that the CO should have certified its application on the basis of the Form ETA-9142B and its history of prior certifications, Employer states in its Statement of Temporary Need that “[t]his is a new application. Since no previous supporting documentation exists to refer to from prior applications, the additional documentation is attached.” (emphasis in original) (AF 259). Additionally, it appears that there was a slight change in dates of need from a previous application.