



Issue Date: 01 April 2019

BALCA CASE NO.: 2019-TLN-00072
ETA CASE NO.: H-400-18361-639871

In the Matter of:

J.M. YANEZ CONSTRUCTION, INC.
Employer.

Appearance: Anique Watson
Wylie, TX
For the Employer

Before: Evan H. Nordby
Administrative Law Judge

DECISION AND ORDER
REVERSING IN PART AND REMANDING IN PART
FINAL DETERMINATION

This case arises from J.M. Yanez Construction, Inc.’s (“Employer”) request for review of the 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 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 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (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.

Training Administration 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).

I find that the Employer established a temporary peakload need, but I remand for further consideration of how many H-2A workers to certify.

BACKGROUND

On or about January 7, 2019, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from the Employer. AF 151-190.³ The Employer applied for temporary labor certification for twelve full-time (35 hours/week) Concrete Worker / Laborers to work on construction projects in the greater Sulphur Springs, TX, area. AF 162-63. The Employer asserted a peakload need for these twelve workers, *see* 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), lasting from April 1, 2019, through November 16, 2019. *Id.* The Employer explained that its peak load period actually begins in February each year due to customer demand for concrete services, and improving weather conditions for the pouring of concrete on road projects; and ends in mid-November, due to "heavy holiday traffic" and poorer weather. AF 162.

The Employer submitted a table of hours and earnings by its permanent and its temporary workforce for part of 2016; 2017; and much of 2018, showing increased hours worked from late spring into November. AF 165. Both the permanent workforce of about six workers, and the temporary workforce (ten in 2018) worked increased hours during the spring, summer, and early fall.

On February 4, 2019, the OFLC CO issued a Notice of Deficiency to the Employer, setting out two deficiencies in the Application and requesting additional information. AF 148-49. The CO found that the Employer's initial application did not sufficiently demonstrate that the job opportunity was temporary, or, that the number of workers requested was needed. The CO requested several categories of documentation. AF 148-150.

On February 8, 2019, the Employer submitted a response. AF 100-143. The Employer submitted payroll data for all of 2016, 2017, and 2018, which each were years in which it was approved for H-2B temporary concrete workers. The payroll data shows essentially steady work for permanent concrete workers each year, and substantial hours from March-November 2016, March-November 2017 (with a relative handful of hours in February); and April-November 2018. AF 113. In addition, the Employer broke down in more detail its initial filing, explaining *inter alia* why it was requesting twelve workers for 2019 instead of the ten in 2018: two new construction contracts. AF 105, 112. The Employer further explained that even though it rains more in the spring, summer and fall, the higher temperatures cause the soil to dry out and the rain water to evaporate, presenting fewer problems for road construction with concrete than the (relative) cold in the winter and early spring:

³ References to the appeal file are abbreviated with an "AF" followed by the page number.

“Our orders slow down the middle of November to mid-February as our busy season is effected [*sic*] by the weather but is primarily based on our clients demands for our services. Our typically cooler weather runs from mid-November to mid-February and this prevents our on-site work because weather affects the quality of our product, thus we only have our pre-cast business from mid-November to mid-February. The effect of weather on the concrete construction business is a combination of temperature and rain. During cooler temperatures the rain does not evaporate or soak into the ground as quickly to allow the surface to dry, but during the summer months the rain will dissipate much faster in the hotter temperatures. So even though the summer months tend to have more rainfall it does not have as much of an effect on our pre-cast business as the ground will dry much faster.

AF 103. The Employer further explained:

During our slowdown, our year round, full time Concrete Finishers can handle our workload. Generally by the middle of February each year, we are able to re-commence our “formed on site” services as well as our pre-cast products. Our orders slow down the end of November because most of our clients cease their non-emergency work during December due to a combination of heavy holiday traffic and increased risk of accidents along the roadways during this time and weather. Our clients are the primary contractors on jobs, some with TxDot, and our clients typically close or minimize projects around the middle of November and do not open them again until January for safety of their crews and equipment. Our peak season is heavily dependent upon the needs of our clients and when they request our services. Even though projects are still open during our slower months – conditions to work do not improve enough to allow full out production until February.”

AF 104.

The Employer’s Application for Temporary Employment Certification was denied on February 22, 2019, for essentially the same reasons that resulted in the Notice of Deficiency. AF 92-97. This request for administrative review followed.

DISCUSSION

BALCA’s review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO; any legal briefs submitted by the parties; and the Employer’s request for administrative review, which may only contain legal arguments and evidence that were actually submitted to the CO before the date the CO issued a Final Determination.⁴ After considering the

⁴ Under 20 C.F.R. § 655.61(a), within ten (10) business days of the CO’s adverse determination, an employer may request that BALCA review the CO’s denial. The Employer’s request for review must set forth “the grounds for the request” and is by regulation the Employer’s sole opportunity to make “legal argument.” 20 C.F.R. § 655.61(a)(3), (5). Within seven (7) business days of receipt of an employer’s appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO’s decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for

evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

Review of the CO's determination of H-2B applications is governed by the "arbitrary and capricious" standard. *Jose Uribe Concrete Const.* 2019-TLN-00025 (Feb. 21, 2019); *Three Seasons Landscape Contracting Service, Inc. DBA Three Seasons Landscape*, 2016-TLN-00045, *19 (Jun. 15, 2016); *Brook Ledge, Inc.*, 2016-TLN-00033, *4-5 (May 10, 2016); *see also J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016). Under the "arbitrary and capricious" standard, the reviewing judge or panel looks to see if the initial decision maker 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." *Three Seasons*, 2016-TLN-00045, *19 (quoting *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)). "If the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, then it is arbitrary and capricious." *Id.*⁵

The Employer bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, *7 (Jan. 10, 2011); *Andy and Ed, Inc., dba Great Chow*, 2014-TLN-00040, *2 (Sep. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, *5 (Jul. 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).

The Employer must establish why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. 20 C.F.R. § 655.6(a) and (b). *See, e.g., Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012) An Employer must also demonstrate a bona fide need for the number of workers and period of

the CO of its decision within seven (7) business days of the submission of the CO's brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

By order dated March 14, 2019, I set a briefing schedule, allowing both the CO and the Employer to submit additional briefing no later than March 25, 2019. Neither did so.

⁵ At least one judge has recently concluded that de novo, rather than arbitrary and capricious, is the correct standard to apply in an administrative review of an H-2B determination. *Best Solutions USA, LLC*, 2018-TLN-117, *3 n.2 (ALJ May 22, 2018). However, the weight of the case law, as well as a close reading of the H-2B regulations and the H-2A regulations next door in 20 C.F.R., favor arbitrary and capricious review. In the H-2A program, in which the rules predate the current H-2B rules, an employer may elect either an administrative review or a de novo hearing following a denial of certification by a CO. 20 C.F.R. § 655.171. In adopting the current H-2B rules, DHS and DOL stated that the new 20 C.F.R. § 655.61 "does not provide for de novo review." 80 Fed. Reg. 24042, 24081. Whether that was meant to either set a standard of review or simply to state the obvious, that the new rule did not allow for hearings as the H-2A rules do, is not clear. Therefore, I read the plain language and the case law to mean both: there are no de novo hearings, nor do CO determinations get reviewed de novo under administrative review.

need requested. 20 C.F.R. §655.11(e)(3) and (4); *see Titus Works, LLC*, 2019-TLN-00023 (Feb. 8, 2019); *Roadrunner Drywall*, 2017-TLN-00035, slip op. at 9-10 (May 4, 2017); *see also Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013).

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). Temporary need must “be limited to one year or less, but in the case of a one-time event could last up to 3 years.” 8 CFR 214.2(h)(6)(ii)(B), Interim Final Rule (IFR), Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24042, 24055 (April 29, 2015). The agencies categorize and define temporary need into the following four standards: one-time occurrence, seasonal, peakload, or intermittent. 8 C.F.R. § 214.2(h)(6)(ii)(B), 20 CFR 655.6.

For a peakload need, an 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).

The 2015 IFR, which was jointly issued by DHS and DOL, adopted by reference the DHS definition of “temporary need” at 8 C.F.R. § 214.2(h)(6)(ii)(B), but added an additional bright-line rule for CO’s to apply and codified it at 20 C.F.R. § 655.6. “Except where the employer’s need is based on a one-time occurrence, the CO will deny [a certification] where the employer has a need lasting more than 9 months.” 80 Fed. Reg. at 24113. As noted above, *supra* n. 1, an appropriations rider passed by Congress on December 18, 2015, and renewed with each appropriation since, requires that the DOL apply solely the DHS definition of “temporary need,” without the 9-month bright-line rule.

The preamble to the 2015 IFR identified considerations that are relevant to applying the DHS definition of “temporary need” in 8 C.F.R.; in particular, the twin commands that an employer must prove that it “needs to supplement its permanent staff . . . on a *temporary basis* due to a *seasonal or short-term demand*” and also, “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) (emphasis added).⁶ The DHS and DOL wrote:

Routinely allowing employers to file seasonal, peakload or intermittent need applications for periods approaching a year would be inconsistent with the statutory requirement that H-2B job opportunities need to be temporary. In our experience, the closer the period of employment is to one year in the H-2B program, the more the opportunity resembles a permanent position. . . . Where there are only a few days or even a month or two for which no work is required, the job becomes less distinguishable from a permanent position, particularly one that offers time off due to a slow-down in work activity.

⁶ Regulatory preambles provide some of the most probative interpretive guidance, though of course the plain language of the regulation ultimately controls. For a discussion of the utility of preambles, *see generally* Kevin M. Stack, Preambles as Guidance, 84 Geo.Wash. L. Rev. 1252 (2016).

80 Fed. Reg. at 24056. The agencies continued:

[S]ince temporary need on a peakload basis is not tied to a season, . . . an employer may be able to characterize a permanent need for the services or labor by filing consecutive applications for workers on a peakload basis.

Id.

On this record, I agree with the Employer that it has shown a permanent year-around workload and permanent staff, and that its need for workers is greater from April into November, as its need is driven by general contractors' demands for its services. Those demands are driven in turn by other forces, such as weather and the Texas Department of Transportation's desire to not inconvenience holiday travelers. The Employer controls neither the weather, nor the length of daylight, nor its employing general contractors' demands; these are factors driving the peaking of its peakload need.

Critically, this case differs from my recent decision in *Jose Uribe Concrete Construction*, 2019-TLN-00025, in that this Employer is asking for workers for only 7.5 months. As I wrote in *Jose Uribe*, where the Employer requested workers for nearly 11 months:

[O]n this record, in no meaningful way can the Employer's need be said to be "temporary," which is the *sine qua non* of employment of workers through the H-2B program. The best reading of the record is that year in and year out, since at least 2016, the Employer has shown a *permanent* need for up to 12 concrete finishers, with a relatively brief slowdown in work during the holiday period from Thanksgiving through Christmas and into the new year. This is exactly the scenario envisioned by the DHS in 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), which directs that an employer must prove its temporary peakload need is "seasonal or short-term" and "that the temporary additions to staff will *not become a part of the petitioner's regular operation.*" (emphasis added). It is also the scenario envisioned by DHS and DOL in the 2015 IFR preamble, cited above, in which an employer misuses a temporary worker program to fill a permanent need, with successive applications for periods of time approaching a year. Other immigration programs exist to fill permanent employment needs with non-U.S. workers. Or, the Employer could raise its wages and offer benefits to attract U.S. workers away from its local competition, or to attract workers to Texas from other parts of the country, or pay overtime to its existing permanent employees.

2019-TLN-00025 at *6.

The chief difference here is that even though the Employer's submissions discuss a peakload need stretching from February through November, the actual application before me is for April 1 to November 16.⁷ Since the regulations require CO's and BALCA ALJ's to distinguish between temporary need and permanent need, the length of time requested is significant. Nearly 11 months of a 12-month year is more like a permanent need with a

⁷ It appears that the Employer would have applied for certifications for H-2A workers for a similar February-November period as *Jose Uribe Concrete* did, but was precluded from doing so. Nevertheless, we are where we are.

Christmas break, *see* 80 Fed. Reg. at 24056; 7.5 months is, within the meaning of the regulations, sufficiently temporary.

However, as noted by the CO, there is no persuasive evidence-based explanation in the record as to why twelve H-2A workers are necessary. *See Titus Works, LLC*, 2019-TLN-00023, at *6 (affirming denial). The regulation requires *inter alia* that an employer prove “that it needs to *supplement its permanent staff* at the place of employment.” 8 C.F.R § 214.2(h)(6)(ii)(B)(3) (emphasis added); *see also* AF 96. In particular, what concerns me (and concerned the CO here) is that in both 2016 and 2017, the number of permanent workers employed by the Employer dwindled over the course of the year, as the H-2A workers continued to be employed. AF 113. In 2018, both permanent and temporary numbers got smaller, though in proportion. What the 2016 and 2017 numbers suggest is that the Employer, in those years, was effectively replacing rather than supplementing a permanent workforce. Furthermore, the effect of having those H-2A workers to do the work rather than permanent workers even if the permanent workers left on their own (perhaps due to a better offer elsewhere) was to effectively set the H-2A wage as a ceiling, rather than – applying Labor Economics 101 – forcing an employer to share profits with its permanent US workforce in the form of higher wages in order to retain them. This is, manifestly, not the intent of the H-2A program.

But it is not my role here to guess at the future. The Employer should be given further opportunity to present evidence to the CO on this issue as to its plans for 2019.

ORDER

For the foregoing reasons, the Certifying Officer’s final determination that the Employer failed to prove its need was temporary is REVERSED.

The Certifying Officer’s final determination that the Employer failed to establish a need for twelve workers, is REMANDED for further action.

For the Board:

EVAN H. NORDBY
Administrative Law Judge