



Issue Date: 27 February 2019

BALCA Case No.: 2019-TLN-00033
ETA Case No.: H-400-18350-746330

In the Matter of:

PALMISANO CONTRACTORS, LLC.,

Employer

Certifying Officer: Chicago National Processing Center

Appearances: Kristen Stachowiak, Director, People Operations
Self represented
For the Employer

Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Drew A. Swank
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from Palmisano Contractor's, LLC.'s ("Employer") request for review of the Certifying Officer's ("CO") decision to deny its applications 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

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 have 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.

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 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).

BACKGROUND

On December 20, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for five construction laborers for the period of March 15, 2019 to November 30, 2019. (AF 276-310).³ Employer indicated that the nature of its temporary need was “seasonal.” On Employer’s application (Form 9142B), in response to its statement of temporary need, Employer stated:

Palmisano Contractors is a licensed commercial general contractor operating in Louisiana. We are responsible for the new build, restoration, renovation construction of commercial buildings. Palmisano manages the active construction projects and subcontractor labor activities, provides in house, general, rough and trim carpentry labor on projects.

This letter of needs serves for two separate applications for a combined total of ten workers, five construction labor workers and five carpentry workers.

Palmisano Contractors operates year-round but we experience an increased need for seasonal labor during the construction season between March 15th and November 30th. Our seasonal need is directly tied to the weather patterns. Our season is recurrent annually and we do not require these additional temporary workers during the months from December to March due to colder weather and regular slowing down of our industry during the colder months...

(AF 276).

In support of its application and in particular its seasonal need, Employer attached letters of intent regarding the “Kimpton” hotel, as well as an 80 unit condominium project. Employer stated that these were only two of many similar contracts that supported its need for additional seasonal staff in addition to its permanent staff. Employer also attached a full project schedule showing all projects on which seasonal workers would be used in order to alleviate its increased need during this period. Employer also noted that it had been using subcontractors for the past several years to supply its required labor force and therefore it was unable to provide their payroll data to support its application. Employer further asserted that “[t]hese temporary positions are not attractive to US workers regardless of our incentive initiatives and have become very hard to fill with our booming economy. We will continue to exhaust all methods to attract

³ References to the appeal file will be abbreviated with an “AF” followed by the page number.

and recruit locally.” Accordingly, Employer expressed its desire to use the H-2B program to meet its recurring temporary seasonal need. (AF 282).

The CO issued a Notice of Deficiency (“NOD”) on December 31, 2018, in the current case, listing five deficiencies in the Employer’s application. (AF 207-217). As Deficiencies three through five were cured by the Employer through its subsequent responses and submissions to the CO, this decision will only address the first two deficiencies which were the basis for the CO’s final denial in this matter. (See January 17, 2019 Final Determination – Denial at AF 108-117).

The CO noted the first deficiency as “[f]ailure to establish temporary need for the number of workers requested.” The CO cited 20 C.F.R. §655.6(a) and (b) for the requirement that “an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” (AF 212). The CO cited the regulatory language which states that an “employer’s need is considered temporary if justified to the CO as one of the following: 1) a one-time occurrence; 2) a seasonal need; 3) a peakload need; or 4) an intermittent need as defined by DHS regulations.” 20 C.F.R. § 655.6(b). *Id.*

The CO stated that the Employer did not demonstrate the requested standard of need which in this case was seasonal. The CO noted that in order to establish a seasonal need, the employer must show that the service or labor for which it seeks workers is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. Employment is not seasonal if the period during which the service or labor is needed is unpredictable, subject to change or considered a vacation period for the employer's permanent employees. *Id.*

The CO observed that Employer had cited weather as a determining factor for its seasonal need, however the letters of intent supplied in support of its seasonal need did not support the dates of need requested. Further the CO pointed out that the 2018-2019 project schedules did not indicate the worksite addresses and the 2016-2017 payroll report was not summarized for each month, and broken down separately, for fulltime permanent and temporary employment, for the type of worker requested in this application, which was “construction laborers.” (AF 212-213).

Therefore the CO determined that further explanation and documentation were necessary. Specific documentation requested included the following:

- 1) documentation concerning the weather in the area of intended employment supporting employer’s statements that weather is a controlling factor on its ability to do work;
- 2) supporting documentation showing an increased demand for services during the warmer weather months;
- 3) a list summarizing all projects for the previous year with start and end dates and worksite addresses;

4) a summarized monthly payroll for a minimum of one previous year, broken down separately for full-time permanent and temporary employment in the requested occupation of “construction laborer;” and

5) other evidence and documentation that similarly justifies the dates of need requested.

(AF 213).

In regard to the second deficiency – Failure to establish temporary need for the number of workers requested, the CO cited 20 C.F.R. §655.11(e)(3) and (4). The CO determined that employer had not adequately justified its need for five construction laborers for the period of need requested or that the job request represents a bona fide job opportunity. (AF 213). The CO observed that the letters of intent provided did not provide support for the dates of need requested, nor did they indicate the number of workers required to complete the projects. Similarly the payroll report submitted was not broken down for the position of construction laborer. (AF 213-214).

Again the CO requested further explanation and specific documentation including summarized monthly payroll reports for a minimum of one year that identify full time permanent and temporary employment in the requested occupation, as well as the total number of workers, total hours worked and total earnings received, as well as other documentation supporting and justifying the number of construction laborers requested. (AF 214).

On January 15, 2019 Employer filed a response to the Notice of Deficiency providing additional information and further explanation of the submitted documentation, which it asserted supported its temporary need for the number of construction workers requested. (AF 118-206).

Employer amended its standard of need to indicate a peakload need rather than a seasonal need. (AF 124). Employer submitted weather data which it alleged showed warmer temperatures and less rain in the months corresponding to its requested need between 3/15/19 and 11/30/19. (AF 125-131). Employer included copies of H-2B applications for other employers (Saba Stucco, LLC, Bart Keller Co, CAP Services and Creative Edge, LLC), doing business in the same area of intended employment which had been certified in 2018 for similar dates of need, and which also alleged a peakload or seasonal need for similar reasons involving the construction industry in Louisiana. (AF 132-160). Employer submitted monthly payroll records from the previous year broken down for the occupations of construction laborer and carpenter for fulltime regular (permanent) employees. (AF 167-172).

In regard to the weather data submitted, Employer asserted that the data shows the average low temperatures in December, January, and February to be in the 40s with highs in 50s/60s. Employer alleged that productivity in these months is 25% to 50% of the normal workload in the summer months. Employer stated that structures aren’t enclosed or heated exposing workers to the elements. Employer also represented that Louisiana experiences its rainy season during the winter months which further impacts the construction industry. Employer stated that new construction starts are affected because foundations aren’t poured when temperatures dip consistently below 50 degrees or when it is wet. (AF 118).

Employer also contends that the weather in the intended area of employment heavily influences tourism rates and therefore hotel occupancy rates. Employer stated that tourism in New Orleans peaks during Mardi Gras season which ends in February/early March annually. Employer also maintains that tourism is the lowest in the later summer months (July – September) due to the extreme heat and humidity, and in the hurricane season (June- November), due to the possible threat of hurricanes for the South Louisiana region. Employer therefore argues that the relationship between weather patterns and tourism/hotel occupancy rates determine the season in which renovations of hotels are scheduled for construction. (AF 119).

In regard to the payroll information submitted by the Employer, Employer noted that the records reflect the regularly employed workers in the occupations of trim carpenter and construction laborer. Employer explained that during its busy season of March to November it has historically acquired labor through subcontractors to perform this work, however, the payroll records of the subcontractors were not available to Employer and therefore could not be submitted. (AF 120).

On January 17, 2019 the CO issued a Non-Acceptance Denial to the Employer, stating that the deficiencies regarding Employer’s failure to establish temporary need for the number of workers requested, still remained and therefore the application was denied. (AF 108-117). The CO acknowledged the information submitted by the Employer and its request to amend its standard of need from seasonal to peakload. The CO determined that the information submitted by the Employer did not overcome the deficiencies regarding its failure to establish its temporary need and a bona fide need for the number of workers requested.

Regarding the climate data for New Orleans which Employer submitted, the CO observed that although January may be the coldest month with an average low temperature of 43.4 degrees, the “average low of any day will occur in the middle of the night when workers are not performing their duties.” (AF 114). The CO also commented that certification in the current case was not mandated on the basis of the information submitted regarding H-2B certifications of other contractors in its industry, or by prior certifications, because the Department reviews each individual H-2B application submitted independently for compliance with program requirements. The CO also noted that the Employer’s 2018 listing of projects did not support a peak in the employer’s operations during the requested dates of need. Regarding the 2018 payroll information submitted by the Employer, CO determined that the “report shows relatively consistent hours worked throughout the majority of the year with no peak in hours during the employer’s requested period, March 15, 2019 to November 30, 2019.” *Id.*

In regard to Employer’s failure to establish its bona fide need for the specific number of construction laborers requested, the CO noted that the “[Employer’s] 2018 listing of projects did not support a peakload need during the requested dates of need nor indicate the number of workers required to complete the projects,” nor did the submitted payroll information submitted support a need for temporary workers during the dates requested. (AF 116-117).

By letter dated February 4, 2019, which was received on February 5, 2019, Employer submitted a request for administrative review to the Chief Administrative Law Judge regarding

the CO's January 18, 2019 denial.⁴ Employer states in its request for review that it had submitted a detailed response addressing all deficiencies. (AF 1-107). Employer resubmitted some of the documentation previously submitted in its response to the CO. Employer argues that the certified applications of its competitors which it had previously submitted, demonstrate the underlying seasonal need in the construction industry in Employer's geographical area of Louisiana. Therefore, the previous certifications of these other contractors in its geographical area should be given precedential weight in determining the seasonal need for the requested workers in the Employer's current application.

By Order dated February 14, 2019 the CO and the Employer were given the opportunity to file briefs in support of their positions on or before February 25, 2019.

Neither the Employer, nor the CO, filed a brief in this matter.

SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer's request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO's determination; or
- (2) Reverse or modify the CO's determination; or
- (3) Remand to the CO for further action.

(20 C.F.R. § 655.61(e)).

ISSUES

Whether the Certifying Officer properly denied the Employer's H-2B application due to:

- 1) Employer's failure to establish that its request for five construction laborers for the period of March 15, 2019 to November 30, 2019 was based upon a "temporary" employment need, according to the Employer's stated standard of "peakload" need; and
- 2) Employer's failure to establish a bona fide need for the number of workers requested.

⁴ Employer also filed an appeal on February 5, 2019, of the Certifying Officer's January 18, 2019 Final Determination Denial in Case No. 2019TLN00032, ETA Case No. H-400-18351-356991, a related case involving Employer's application for temporary labor certification for 5 "trim carpenters." This case was also assigned to the undersigned Administrative Law Judge and involves essentially the same issues. A separate Decision is issued on today's date addressing this matter.

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is “temporary.” Temporary need is defined by the DHS regulation at 8 C.F.R. §214.2(h)(6)(ii)(A). This regulation states:

(A) Definition. Temporary services or labor under the H-2B classification 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)).

The DHS regulation further states in regard to the nature of petitioner’s need:

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. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner’s need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

(8 C.F.R. §214.2(h)(6)(ii)(B)).

The DOL regulation addressing temporary need in H2-B cases also states:

The employer’s need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.

(20 C.F.R. §655.6).

In the current case, the Employer originally applied for temporary labor certification for five construction laborers for the period of March 15, 2019 to November 30, 2019, on the basis of a “seasonal” need. (AF 276). Employer amended its standard of need to “peakload” in its January 15, 2019 response to the Notice of Deficiency. (AF 124). In regard to peakload need the DHS regulation states, “[t]he petitioner 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.”

The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflects a temporary need within the meaning of the H-2B program.

See, e.g., Alter and Son General Engineering, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

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) and (4). *See Roadrunner Drywall*, 2017-TLN-00035, slip op. at 9-10 (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);

In this case the Employer submitted weather data relevant to its geographical area of intended employment in the state of Louisiana which provides some support for its requested period of need between March 15, 2019 and November 30, 2019. (AF125-131). Employer points out the data submitted shows that the average low temperatures in the months of December, January and February are in the 40s as opposed to the months in its requested period of need during which the average lows range between approximately 54 degrees and 74 degrees.⁵ Employer argues that the productivity is reduced in the winter months as structures aren't enclosed or heated which exposes workers to the elements. Employer also notes that foundations cannot be poured when temperatures dip consistently below 50 degrees or conditions are wet. (AF 118-123).

In the final denial the CO acknowledged that Employer's submitted weather data, showed an average low temperature in January (the coldest month of the year) of 43.4 degrees. In response the CO remarked, "However, it should be noted that the average lows of any day will occur in the middle of the night when workers are not performing their duties." (AF 114). The CO's comment would appear to be somewhat cavalier and unreasonably dismissive of the value of this weather data in establishing the peak season for construction in Louisiana.

However, the CO reasonably requested documentation to support the Employer's specific need for the requested labor and period of need, which the Employer failed to provide. The information provided by the Employer shows a year round need for construction labor but does not establish the peakload need during the requested period of need (March 15, 2019 –November 30, 2019), which is required to support its application for temporary labor.

The letters of intent submitted by the Employer do not provide any specific information which correlates with the requested period of need. Likewise, the project schedule provided by the Employer shows project work which appears to be year round. (AF 181-200). A review of the project schedule shows over 25 projects (or portions of projects) beginning in December, January and February. There does not appear to be any clear way to interpret the project schedule which would provide the necessary support for the Employer's alleged peakload need between March 15, 2019 and November 30, 2019. If there is an interpretation which would support Employer's claim of peakload need between March 15, 2019 and November 30, 2019, Employer, has failed to provide it. The regulations are clear that the burden is on the Employer

⁵ Employer also asserts that the winter months are the "rainy season" in Louisiana which it argues negatively impacts the construction industry. However, Employer's assertion is not supported by the data provided which reflects that the highest average precipitation in Louisiana is in the summer months of June, July and August.

to establish its temporary need on the basis of the chosen standard. *See Empire Roofing*, 2016-TLN-00065 (Sept. 15, 2016) (“An employer cannot just toss hundreds of puzzle pieces--or hundreds of pages of document—on the table and expect a CO to see if he or she can fit them together. The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers.”).

In addition, the payroll information provided by the Employer shows it employed workers in the position of construction laborer, in a fairly consistent fashion in the months of January through December. Employer claims that it has historically used subcontracted labor to address its increased need during the requested period of March 15th through November 30th. However, Employer failed to provide any documentation to support this claim. Employer argues that since it does not have access to the payroll records of its subcontractors, it cannot supply this information. Although Employer would not have access to payroll records of subcontractors, it should be able to supply some financial information or copies of contracts made with subcontractors, which would support an increased use of subcontracted labor during the period requested, March 15th through November 30th in prior years. None of the documentation submitted to the CO supports this claim.⁶

The CO is not required to accept the claims of an Employer who does not supply supporting documentation. *See AB Controls & Technology*, 2013-TLN-00022 (Jan. 17, 2013) (bare assertions without supporting evidence are insufficient). *See also Progressio, LLC, d/b/a La Michoacana Meat*, 2013-TLN-00007 (Nov. 27, 2012) (affirming denial where the employer’s payroll records did not demonstrate a consistent need for increased labor during the entire alleged period of temporary need).

Accordingly, based on the information submitted to the CO, and for the reasons stated above, the undersigned finds the CO reasonably determined that the Employer failed to meet its burden of proving its temporary need for five construction laborers for the period of March 15, 2019 to November 30, 2019, based on Employer’s stated “peakload” standard, as defined by the applicable regulation at 8 C.F.R. §214.2(h)(6)(ii), or that the request represents a bona fide job opportunity for the number of workers requested

ORDER

⁶ Employer also submitted copies of H-2B applications of other contractors in the Louisiana area in support of its application for temporary labor certification. (AF 132-166). These applications have no bearing on whether the Employer in this case has met its burden of establishing its temporary peakload need for workers during the requested period of need. There is no reasonable way to compare the relative merits of these applications, nor is it clear what information was submitted with the other, allegedly certified, applications. As noted by the CO, “the Department reviews each individual H-2B application submitted for compliance with program requirements.” (AF 114). Accordingly, each application has to stand on its own merits and a prior certification of an application does not mandate a certification in a subsequent application, whether pertaining to the same, or a different Employer. *See Rollings Sprinkler & Landscape*, 2017-TLN-00020 (Feb. 23, 2017).

Employer has failed to meet its burden of showing its temporary employment need for five construction laborers between March 15, 2019 and November 30, 2019, and has also failed to demonstrate a bona fide need for the number of workers requested.

Accordingly, it is hereby ORDERED that the Certifying Officer's denial of Employer's application for temporary labor certification is AFFIRMED.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

DREW A. SWANK
Administrative Law Judge