



Issue Date: 09 April 2019

BALCA CASE NO.: 2019-TLN-00098

ETA CASE NO.: H-400-18351-249573

In the Matter of:

SPEEDY PAVING, LLC,
Employer.

DECISION AND ORDER
AFFIRMING CO'S DENIAL OF TEMPORARY LABOR CERTIFICATION

This matter arises under the labor certification process for temporary non-agricultural employment in the United States under the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor (“DOL”) at 20 C.F.R. Part 655, Subpart A. The H-2B program permits employers to hire foreign workers to perform temporary non-agricultural work within the United States. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(ii)(B). Employers wishing to hire foreign workers under this program must apply for a “labor certification”. 8 C.F.R. §214.2 (h)(6)(iii). A Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”) reviews the employer’s application. 20 C.F.R. § 655.50.

On March 1, 2019, the CO denied the H-2B application of Speedy Paving, LLC (“Employer”) to hire fourteen construction laborers.¹ On March 14, 2019, Employer timely requested review. On March 22, 2019, the Certifying Officer provided the Appeal File (“AF”), and, on April 2, 2019, filed a brief in support of her position. Employer did not file a brief within the time allowed under 20 C.F.R. section 655.61, subsection (c).

¹ The reference to “five Kitchen Helpers” in the first sentence of the CO’s Final Determination letter (AF p. 2) appears to be a clerical error. *See* Application for Prevailing Wage Determination (AF p. 153), section E.

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”), and by designation of the Chief ALJ, I am BALCA for purposes of this appeal. 20 C.F.R. § 655.61(d); 20 C.F.R. § 655.61(a).

I. STANDARD OF REVIEW

When an employer requests review of the denial of its application, BALCA’s scope of review is limited to the legal arguments and evidence submitted to the CO before issuance of the final determination. 20 C.F.R. § 655.61(a)(5). I must review the CO’s determination based solely only on the Appeal File, the request for review, and any legal briefs submitted. 20 C.F.R. § 655.61(e). I must either affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. *Id.*

Neither the Act nor the applicable regulations specify a standard of review. Inevitably, this has created some confusion, and regrettable inconsistency among Administrative Law Judges.² When the CO’s determination turns on a long-established, policy-based interpretation of a regulation, I likely owe considerable deference to the CO. *See Zeta Worldforce, Inc.*, 2018-TLN-00015, slip op. at 4 (Dec. 15, 2017). But absent a long-standing, policy-based interpretation of a regulation, it would appear I am to review the CO’s denial de novo. *Sands Drywall, Inc.*, 2018-TLN-00007, slip op. at 3. (Nov. 28, 2017).

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 demonstrates: (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).

II. BACKGROUND

Speedy Paving, LLC, is a construction business located in Cedar Creek, Texas (AF, p. 152). On or about December 8, 2018, it applied for a Temporary Employment Certification, seeking to employ fourteen workers “to perform manual labor

² The CO, for example, cites *Brook Ledge, Inc.*, 2016-TLN-00033 (May 10, 2016), for the proposition that the standard of review is the “arbitrary and capricious” standard in all cases, and that the Administrative Procedure Act requires it. CO’s Brief, p. 2. I disagree. I know of no binding authority which so provides, the question having never to my knowledge been appealed above the ALJ level, and in many cases the “arbitrary and capricious” standard would not give an aggrieved party any meaningful review.

associated with concrete construction” from April 1, 2019, to December 1, 2019 (AF, p. 139). In general, Speedy Paving averred “the cold and wet weather” from December 1 to April 1 each year “is not conducive to installation of pre-cast concrete such as digging carrying and placing concrete paving stone. Also, construction in general slows down and the need for laborers is substantially reduced.” It noted it had previously applied for, and received, permission to hire the same number of non-resident aliens in the previous year. (*Id.*)

The CO issued a Notice of Deficiency, concluding Employer had failed to establish the job opportunity as “temporary in nature” (AF, p. 127) and had failed to establish “temporary need for the number of workers requested.” (AF, p. 128.) To address the first issue, the CO asked Employer to submit

1. A statement describing the employer’s business history, activities (i.e. primary products or services), and schedule of operations throughout the year
2. An explanation and supporting documents that substantiate that the type of work cannot be performed under certain weather conditions experience typically by weather conditions in Texas during the time workers are not needed *[sic]*
3. A summary 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;
4. Summarized monthly payroll reports for the 2018 and 2017 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Construction Worker*, 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; and
5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents required above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and

documentation relation to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

Note: If the submitted document(s) and its relationship to the employer's need is not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) supports its requested dates of need.

(AF, pp. 127-128.)

To address the second issue, the CO asked Employer to submit ("to include, but . . . not limited to, the following:")

1. An explanation with supporting documentation of why the employer is requesting 14 Construction Laborers for Del Valle, Texas during the dates of need requested;
2. If applicable, documentation supporting the employer's need for 14 Construction Laborers such as contracts, letters of intent, etc., that specify the number of workers and dates of need;
3. Summarized monthly payroll reports for a minimum of two previous calendar year *[sic]* that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Construction Worker*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
4. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

. . .

Note: If the submitted document(s) and the relationship to the employer's need is not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) supports its requested number of workers.

(AF, pp. 128-129.)

In response to the Notice of Deficiency, Speedy Paving submitted the summary of monthly payroll records which the CO had requested with respect to both issues (AF, p. 100). It submitted a list of contracts and work orders for 2019 (AF, p. 101), copies of its quarterly Form 941 Federal tax returns for all four quarters of 2017 (AF, pp. 102-116), and a copy of the individual tax return of Gabriel Garcia Jiminez (AF, pp. 117-122), including Schedule C, showing the profit and loss for Speedy Paving, LLC (AF, pp. 120-121). It also submitted a lengthy report from the Austin Board of Realtors (AF, pp. 20-99) regarding home prices, and including graphs of sales trends in the Austin-Round Rock Metropolitan Statistical Area from 2015 to 2019 (AF, p. 28).

The CO denied the application on March 1, 2019 (AF, p. 11) for the same two reasons set forth in the Notice of Deficiency (AF, pp. 13-17).

III. DISCUSSION

I need not, and do not, consider the CO's first justification for denial³, because the second justification for denial is dispositive.

As the CO points out, Speedy Paving's payroll summaries do "not show fulltime work available for 14 temporary workers. There were 3 to 11 temporary workers employed from May through December 2017, and 3 to 9 temporary workers employed from March through December 2018. The employer did not employ more than 11 temporary workers during the past two years." (AF, p. 17.) Neither did the employer address in any way, in response to the Notice of Deficiency, the question of how it concluded it needed 14 temporary workers, as opposed to some other number, in 2019. The record accordingly offers no justification for the specific number of non-resident aliens Employer seeks to hire.

ORDER

³ The CO was satisfied Employer had not demonstrated a temporary need because 1) Employer had not demonstrated to the CO's satisfaction "that construction work in Del Valle, TX is affected by weather conditions;" 2) that the payroll summaries did not "clearly support" the employer's indicated peakload period; and 3) "the employer states that it is struggling to get laborers in its area. However, the employer is reminded that a labor shortage, no matter how severe, does not justify a temporary need." With respect to the first point, the CO appears to dismiss out of hand the Employer's own statements, even though the Employer in fact does business in Texas (while the CO is located in Chicago) and even though the record before me suggests Employer's past applications, as recently as last year, have been granted in part because of the climate in Texas. With respect to the second point, neither I nor Employer can tell what it would take to "clearly support" the Employer's contentions to the satisfaction of the CO. With respect to the third point, the statute itself specifies no H-2B visa may issue except "if unemployed persons capable of performing such service or labor cannot be found in this country," 8 U.S.C. § 1101(a)(15)(H)(i)(b), which presupposes an unavailability of laborers. The CO's blanket statement that "a labor shortage . . . does not justify a temporary need" is accordingly confusing, and the case on which she relies in her brief, *BMC West LLC*, 2018-TLN-00100, *10 (July 17, 2018), is neither convincing nor binding. But these are questions for another day.

The Certifying Officer's denial of temporary certification is AFFIRMED.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge