



Issue Date: 11 February 2019

BALCA Case No.: 2019-TLN-00028
ETA Case No.: H-400-18341-276367

In the Matter of:

UNITED FOREST SERVICES LLC,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearance: Flor Garcia
United Forest Services LLC
Hamlet, NC
For the Employer

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

Before: Jason A. Golden
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from Employer United Forest Services LLC’s request for review of the Certifying Officer’s (CO) Final Determination in an H-2B temporary alien labor certification matter. The H-2B non-immigrant 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

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 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. 24042 *et seq.* (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after

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. A certifying officer in the Office of Foreign Labor Certification of the Employment and Training Administration (ETA) reviews applications for temporary labor certification. Following the certifying officer'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 7, 2018, the ETA received an Application for Temporary Employment Certification from the Employer (Application). The Employer sought a temporary labor certification to hire 15 nursery workers (Occupational Title: Forest and Conservation Workers) from February 20, 2019 to May 15, 2019. (AF 1, 3, 34.)³ The Employer described the nature of its temporary need as "seasonal," and justified such need as follows:

United Forest Service holds a contract with the John S. Ayton State Tree Nursery in Maryland in 2019. This contract will be for harvesting and packaging pine tree seedlings.

After a tree seedling has spent time growing in a tree nursery, the seedlings must be removed from their containers, packed, and stored before they can be sold and be planted by contractors. Seedlings are packaged during early spring before the planting season begins in late spring, after the frozen ground has thawed and threat of frost is gone.

During the spring and summer, the seeds are watered, fertilized and weeded to keep them healthy while growing. In the winter they go into a dormancy. Right before temperatures rise and the seedlings resume growing is when they are harvested and packaged. This time frame is from the middle of February through the middle of May. Because of this seasonal need, we require a seasonal labor force to complete this job of packaging tree seedlings.

(AF 34, 40, 45 (emphasis added).)

The CO issued a Notice of Deficiency (NOD) on December 14, 2018. (AF 24.) The Employer timely responded to the NOD on December 18, 2018. (AF 19.) The CO issued a Final Determination denying Employer's Application on January 8, 2019. The CO identified the following deficiencies in the Employer's Application and response to the NOD: (1) a failure to establish the job opportunity is temporary in nature pursuant to 20 C.F.R. § 655.6(a) and (b); and (2) a failure to establish temporary need for the number of workers requested pursuant to 20

April 29, 2015, and that ha[ve] a start date of need after October 1, 2015." IFR, 20 C.F.R. § 655.4(e). The rules provided in the IFR apply to this case. All citations to 20 C.F.R. Part 655 in this Decision and Order are to the IFR.

³ References to the appeal file in this Decision and Order are abbreviated with an "AF" followed by the page number.

C.F.R. § 655.11(e)(3) and (4). (AF 12, 14, 17.)⁴ The Employer submitted this timely appeal to the Board on January 22, 2019, within 10 business days of the CO's decision. The CO has not filed a brief.

DISCUSSION AND APPLICABLE LAW

A. Standard of Review

The Board's standard of review in H-2B cases is limited. The Board may only consider the appeal file prepared by the certifying officer, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the certifying officer before the date the certifying officer issued a final determination. 20 C.F.R. § 655.61. After considering the evidence of record, the Board must: (1) affirm the certifying officer's determination; (2) reverse or modify the certifying officer's determination; or (3) remand the case to the certifying officer for further action. 20 C.F.R. § 655.61(e).

Additionally, the Board has adopted the position that review of the certifying officer's determination of H-2B applications is governed by the "arbitrary and capricious" standard. *Three Seasons Landscape Contracting Service, Inc. DBA Three Seasons Landscape*, 2016-TLN-00045, *19 (Jun. 15, 2016); *Brooks 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, if there is any rational basis for the certifying officer's determination, it must be sustained. *See Dellew Corp. v. United States*, 108 Fed. Cl. 357, 368 (Fed. Cl. 2012); *Erinys Iraq Ltd. v. United States*, 78 Fed. Cl. 518, 525 (Fed. Cl. 2007); *see also Spokane County Legal Services, Inc. v. Legal Services Corp.*, 614 F.2d 662, 669, n.11 (9th Cir. 1980).

The Employer bears the burden of proving that it is entitled to 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). To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. §§ 655.6(b), 655.11(a)(3). The Employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary." 20 C.F.R. § 655.6(a). The applicable regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

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

⁴ Although the CO listed several other deficiencies in her NOD, the other deficiencies were addressed in Employer's response to the NOD and not listed as reasons for denial of the Application. (See AF 12-18, 19-22, 28-33.) Therefore, the other deficiencies are not before the Board for review.

years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

To qualify as a seasonal need, the employer "must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees." 8 C.F.R. § 214.2(h)(6)(ii)(B)(2); *KBR*, 2016-TLN-00026 (Apr. 6, 2016); *Alter and Son General Engineering*, 2013-TLN-00003 (Nov. 9, 2012) (affirming denial of certification where the employer only made unsupported assertions about how weather conditions and contract patterns cause job openings to fluctuate); *Nature's Way Landscaping, Inc.*, 2012-TLN-00019 (Feb. 28, 2012); *Stadium Club, LLC d/b/a Stadium Club, DC*, 2012-TLN-00002 (Nov. 21, 2011); *Caballero Contracting & Consulting*, 2009-TLN-00015 (Apr. 9, 2009).

B. Deficiency No. 1 - Failure to Establish the Job Opportunity is Temporary in Nature

In her NOD, the CO elaborated on the first deficiency by stating that "the employer did not provide the contract from John S. Ayton State Tree Nursery indicated how many workers are needed to complete the work and dates of need. The employer did not demonstrate how its need meets the regulatory standard." (AF 15, 27.) The CO requested the following information to cure the deficiency:

1. A description of the employer's business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need; and
3. An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need.

The employer must submit supporting evidence and documentation that justifies the chosen standard of temporary need. The employer's response must include, but is not limited to, the following:

1. Monthly invoices from the previous calendar year 2017 clearly showing that work will be performed for each month during the requested period of need on the ETA Form 9142, Section B., Items 5. and 6.;
2. Signed service contracts from customers for the previous one calendar year; and;
3. 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 15-16, 27.)

In its response to deficiency no. 1, the Employer stated:

United Forest Services works in the forestry industry doing primarily the harvesting of forest products such as pine straw, pine cones, and tree seedlings. This work is done primarily in the winter and spring months, November through June, after most of the needles and cones have fallen to the ground and before the tree seedlings resume growing. Because our work has to be completed within these few months (seasonal), we are unable to provide work year round, and require a temporary labor force.

United Forest Services was established in 2018 and does not have payroll records or contracts from the previous year, as the company was not established yet.

(AF 19.) The CO found that Employer's response did not overcome deficiency no. 1. (AF 16.)

Given that the Employer was only established in 2018, the Employer's explanation for not providing any documentation from the previous calendar year, 2017, is reasonable. However, it remains Employer's burden to prove that it is entitled to temporary labor certification. If the Employer operated at all in 2018, it could have provided the CO with whatever invoices, contracts, and payroll records it had to support its asserted schedule of operations.⁵ This or other supporting documentation may or may not have satisfied the CO, but it would have given this Board something more to consider. The Employer did not submit any supporting documents with its response to the NOD, other than an amended job order, which does not address deficiency no. 1. The Employer did not even submit its contract with the John S. Ayton State Tree Nursery in Maryland for 2019, which it referenced in its Application. (See AF 34, 40, 45.) Absent any supporting documentation from the Employer, the Board cannot say that the CO acted arbitrarily and capriciously in denying the Application. The CO had a rational basis for finding that the Employer failed to establish that the job opportunity is temporary in nature.

The Employer attaches a letter of intent from Vin Woods LLC. It is apparent from Employer's response to the NOD that the Employer intended to submit this letter of intent to the CO. (See AF 19.) According to the CO, the letter was not included in the Employer's Application or response to the NOD. (AF 16.) A review of the appeal file confirms this. (See AF.) And, in its appeal, the Employer acknowledges that "[t]here could have been a possible issue that prevented the letter of intent from being uploaded [to ETA.]" (AF 8.) Unfortunately, the Board is precluded by regulation from considering evidence that was not submitted to the

⁵ Even if the Employer did not engage in any revenue producing operations in 2018, it remained the Employer's burden to prove its entitlement to temporary labor certification. To do so, the Employer must do more than pull numbers and dates out of thin air. Presumably, the Employer relied upon some business records or plan, data, and analysis to determine its asserted temporary need. If so, it should have submitted such documentation to the CO.

certifying officer before the date of her determination. 20 C.F.R. § 655.61(a)(5). Thus, the letter of intent does not assist the Employer in its appeal.⁶

Because the Board has upheld the CO's decision based on deficiency no. 1, i.e., the Employer failed to establish that the job opportunity is temporary in nature, it will not address deficiency no. 2.

ORDER

For the foregoing reasons, the Certifying Officer's final determination denying certification is AFFIRMED.

For the Board:

Jason A. Golden
Administrative Law Judge

⁶ Even if the CO had received and reviewed Vin Woods' letter of intent before making her determination, the Board cannot say that a denial by the CO would have been arbitrary and capricious. The Employer did not explain the relationship between Vin Woods and John S. Ayton State Tree Nursery. Moreover, although Vin Woods' letter of intent states that "[t]o complete the requirements of the intended contract within the dates of need requested a crew of 15 workers is needed," (AF 9), a certifying officer's inquiry should not focus on the needs of an employer's customer, but on the needs of the employer. Without any information about Employer's workforce, the CO was left with only Employer's bare assertions regarding its need for temporary employees, the period of time for such need, and the reason for such need, and, if the letter of intent had been considered, some corroboration from a potential customer. The CO could have reasonably required more information from the Employer before determining that a temporary need had been established.