



Issue Date: 08 October 2019

BALCA Case No.: 2019-TLN-00153
ETA Case No.: H-400-19211-030828

In the Matter of:

WISCONSIN BUILDING SUPPLY – US LBM LLC,
Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Aaron Bernard, Esq.
Ames, Iowa
For the Employer

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

Before: Natalie A. Appetta
Administrative Law Judge

**DECISION AND ORDER AFFIRMING THE CERTIFYING OFFICER’S DENIAL OF
TEMPORARY LABOR CERTIFICATION**

This case arises from the request for review filed by Wisconsin Building Supply – US LBM, LLC (“Employer”) of the Certifying Officer’s (“CO”) decision to deny its 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 (DHS). *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

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution.

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

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 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 July 30, 2019, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 16 carpenter helpers for the period of October 13, 2019 to December 20, 2019. AF 57-132.³ Employer indicated that the nature of its temporary need was “peakload.”

In its statement of temporary need Employer stated that it needed to supplement its permanent staff temporarily due to a peakload seasonal demand. It explained that it experienced an increased demand for its trusses and insulated wall panels during the warm weather months, specifically, from April through December. Employer further stated that cold weather inhibits construction and thus more trusses and wall panels are ordered during the warm weather months of the year. Therefore, Employer asserted that its need for workers also increases during this time. Employer stated that when its orders decrease from January through March it will no longer need sixteen additional workers. Employer also stated that its temporary additions to staff will not become a part of its regular operations because it is actively trying to recruit U.S. workers and it is only because it has not found workers, and has an increased need for work during its peakload season, that it needs these workers. AF-61.

Employer noted that it had already requested 20 H-2B workers starting April 1, 2019, however, since that time the company has had an influx of orders and needs even more carpenter helpers to make sure all the products can be produced. *Id.* In an accompanying statement in support of its application Employer noted it was attaching five exhibits labeled A-E, with Exhibit E being a listing of its current orders which it alleged totaled \$5,501,870. Employer explained that its current workforce produced \$107,000 of product per day and therefore it would require 50 days of work before it could quote any additional jobs. Employer asserted that it had told customers that it could not produce any product for six weeks. Accordingly it maintained that it needed the additional workers “so we do not have to turn work away, we can reduce our lead time to a more acceptable time of about three (3) weeks retain our customers, and reduce employee fatigue by reducing Saturday work.” AF-69.

A review of Employer’s attached Exhibits shows that the above referenced Exhibit E was mismarked as a second Exhibit D. AF 110 – AF 128.

“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.

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

The CO issued a notice of deficiency on August 6, 2019, listing two deficiencies in the Employer's application. AF 49-56. The CO noted the first deficiency as "[f]ailure to establish temporary need for the number of workers requested," and the second deficiency as "Failure to submit an acceptable job order." AF 53-54. The CO did not list the second deficiency in its final denial, and therefore it will not be addressed in this decision.

In regard to the first Deficiency, "failure to establish temporary need for the number of workers requested," the CO cited the regulations at 20 C.F.R. §655.11(e)(3) and (4), noting that an employer must establish that the number of worker positions and period of need are justified and that the request represents a bona fide job opportunity. AF-53.

The CO noted that the Employer had previously received certification for 20 carpenter helpers from April 1, 2019 to December 20, 2019 in its previously submitted application, H-400-19010-559312. However, Employer was requesting an additional sixteen carpenter helpers between October 13, 2019 and December 20, 2019. AF-53. The CO referenced Employer's statement in its application that it had attempted to hire U.S. workers but could not find enough workers to fulfil its needs. The CO noted that a labor shortage, no matter how severe did not constitute a temporary need. The CO determined that the Employer had not sufficiently demonstrated that it needs 16 additional workers and that further explanation and documentation was required to establish the employer's need for a total of 36 workers. *Id.*

The CO directed the Employer to submit further documentation including an explanation with supporting documentation to establish that the number of workers being requested for certification is true and accurate and represent bona fide job opportunities as well as other documents such as "contracts, letters of intent, etc., that specify the number of workers and dates of need, to support the employer's request for an additional 16 [carpenter helpers] for the same worksite," as well as summarized monthly payroll reports for a minimum of two previous calendar years identifying full time permanent and temporary workers in the requested occupation, as well as any other relevant evidence which serves to justify the number of workers requested. AF 53-54.

On August 20, 2019, Employer filed a response to the Notice of Deficiency providing summarized payroll information for 2017 and 2018 and further explanation of the submitted documentation. AF 40-48. Employer reiterated the argument it provided with its original application materials. Specifically, Employer again stated that since it had requested the twenty temporary workers in its prior application, the company has had an influx of orders and needs even more carpenter helpers to make sure all the ordered products can be produced in a shorter period of time. Employer referenced its previously submitted "Exhibit E" which it indicated was a listing of its current orders which it alleged totaled \$5,501,870. Employer explained that its current workforce produced \$107,000 of product per day and therefore it would require 50 days of work before it could quote any additional jobs. Employer asserted that it had told customers that it could not produce any product for six weeks. Accordingly it maintained that it needed the additional workers "so we do not have to turn work away, we can reduce our lead time to a more acceptable time of about three (3) weeks retain our customers, and reduce employee fatigue by reducing Saturday work." Employer further stated, "It is only due to our continued difficulty in hiring U.S. workers, coupled with the massive increase in orders which

has led to a six-week delay for projects, that we have a need for these H-2B workers.” Employer further explained that adding the additional workers would produce an additional \$28,000 of product per day. AF 42-43.

On September 4, 2019, the CO issued a Final Determination denying Employer’s application, stating that the noted deficiency regarding Employer’s failure to establish the temporary need for the number of workers requested still remained and therefore the application was denied. AF 32-38. Specifically the CO noted the Employer’s explanation for its increased need in which it referred to an actual order list which Employer referenced as Exhibit E. The CO noted that “the referenced documentation was not included with the employer’s application, nor was it provided with the NOD response.” AF 37. The CO also discussed the Employer’s payroll information and determined the payroll does not demonstrate that there are enough full time hours for 16 additional workers.

By letter received on September 17, 2019, Employer made a timely request for administrative review of the CO’s determination. (AF 1-31).

By Order issued on September 27, 2019, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before October 7, 2019.

Employer filed a timely brief with OALJ-filings on October 7, 2019. In said brief Employer restated the arguments and explanations previously submitted to the CO as well as those contained in its September 17, 2019 request for administrative review. In particular Employer argues that the CO acted arbitrarily and capriciously in failing to consider the document containing its listing of current orders which it had referenced as Exhibit E, but had, in fact, been mismarked as Exhibit D. Employer asserts that the CO should have conducted a thorough review of the file which would have revealed the labeling error on the Exhibit. Employer also argues that it provided sufficient explanation and documentation to support its need for the additional sixteen workers it requested. Employer argues that payroll is the wrong data to look at when there is a need for additional workers beyond what is considered normal. Specifically, the Employer restated the information provided in its application and in its response to the notice of deficiency. It noted that its current orders per the referenced Exhibit E total \$5,501, 870, and with the current workforce producing \$107,000 of product per day it would take over “50 days before any new work could be quoted.” Employer argues that the additional 16 workers could produce an additional \$28,000 of product per day which would thus reduce “lead time to a more acceptable time of about three (3) weeks, retain our customers, and reduce employee fatigue by reducing Saturday work.” Accordingly Employer argues that the denial of the labor certification should be reversed.

No brief was submitted by the Solicitor.

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)).

STANDARD OF REVIEW

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge's review of determinations by the CO in H-2B matters. BALCA has, fairly consistently, articulated an arbitrary and capricious standard to its review of the CO's determination in H-2B temporary labor certification cases. See *Brook Ledge Inc.*, 2016 TLN 00033 at 5 (May 10, 2016). However, see also *Zeta Worldforce, Inc.*, 2018-TLN-00015 (Dec. 15, 2017) and *Gallegos Masonry, Inc.*, 2018-TLN-00115 (May 10, 2018) (recognizing a distinction in BALCA's review of the CO's determination involving review of a long established policy-based interpretation of a regulation by the Office of Foreign Labor Certification ("OFLC"), in which case OFLC's interpretation would be owed considerable deference; but in the absence of such an interpretation, the CO's finding would be reviewed *de novo*).⁴

In the current case, which does not involve a longstanding policy-based interpretation of a regulation by the OFLC, the undersigned finds that deference need not be shown to the CO's determination. However, for the reasons discussed below, I find the record supports the CO's determination in this case, as Employer has failed to meet its burden of establishing a temporary need for sixteen additional workers between October 13, 2019 and December 20, 2019.

⁴ The approach taken in *Zeta Worldforce, Inc.*, is consistent with BALCA's discussion of the standard of review in *Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). In *Brook Ledge*, a three-judge BALCA panel held that the CO's definition of a "worksites" was not entitled to deference where the OFLC or the CO had articulated no clear definition of the term. BALCA noted that the CO offered "no reasoned explanation for its determination and apparently seeks deference based merely on the fact that the decision was issued by OFLC," adding that there is "no legal support for such a contention." While the *Brook Ledge* panel acknowledged that it reviewed the CO's decision under an arbitrary and capricious standard, the panel ultimately found that deference to the CO's determination was unwarranted. The panel explained that where the review did not involve a longstanding or clearly articulated interpretation of a regulation, and the CO had not shown that he had considered the relevant factors and articulated a rational connection between the facts found and the choice made, BALCA need not defer to the OFLC's or the CO's interpretation. However, the BALCA panel stated, "We take no issue with the assertion that BALCA should defer to OFLC's rational and reasonable interpretation of an ambiguous regulatory term." Cf. *Best Solutions USA, LLC*, 2018-TLN-00117 at footnote 2 (May 22, 2018) (BALCA judge declining to apply "the so-called 'arbitrary and capricious' standard of review ... and will instead simply determine whether the basis stated by the CO for the denial of the application is legally and factually sufficient in light of the written record provided").

ISSUE

Whether the Employer has met its burden of establishing its temporary need for an additional sixteen carpenter helpers for the period of October 13, 2019 to December 20, 2019.

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).⁵ 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 Employer bears the burden of establishing 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) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

In this case the CO’s final denial is based on Employer’s failure to establish the temporary need for the number of workers requested. An Employer must 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

⁵ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution.

denial where the employer's temporary and permanent employee payroll data did not support its claimed number of workers or period of need).

In the final denial letter the CO noted that the payroll chart provided by the Employer did not support an additional 16 workers. In this case the Employer has already received certification for 20 carpenter helpers between April 1, 2019 and December 20, 2019. The payroll data appears to support the need for approximately 20 temporary workers at least in the months of June through December in the prior year 2018. The CO determined the payroll did not support the need for the additional 16 workers, which would be 20 + 16 workers for a total of 36 temporary workers. Employer argues in its request for review that past payroll information cannot adequately show the need for workers based on an increase in orders.

Employer argues that it has provided adequate support by providing a list of its current orders as of July 30, 2019 which it has referenced as Exhibit E but in fact was mislabeled as Exhibit D in its original application materials. It is not clear whether the CO considered this information to any degree since it was provided but mislabeled as Exhibit D. However, the undersigned has considered the document coupled with the Employer's explanation and finds that the Employer has still failed to provide adequate support for the additional sixteen workers for the requested period of October 13, 2019 through December 20, 2019.

Employer points out that the list of its current orders contained in the mislabeled "Exhibit E" totals \$5,501,870. This listing was compiled on July 30, 2019. Employer estimates that its current workforce (which would include the 20 H-2B temporary workers currently certified) can produce \$107,000 worth of product per day. By Employer's own calculation it would take about 50 days for its current workforce to complete the orders totaling \$5,501,870. Assuming a five day workweek 50 days would equate to approximately ten weeks. Using Employer's calculations and estimates, and assuming work began the day after the order list was compiled, i.e. August 1, 2019, the work orders listed in "Exhibit E" would be completed by the current workforce (which includes the original 20 H-2B workers certified), by mid-October (assuming approximately 51 work days for completion, that is, \$5,501,870 divided by \$107,000 = 51 days). Therefore the listing of work orders found in Exhibit E provides no information concerning the requested period of need of October 13, 2019 through December 20, 2019 for the additional 16 workers requested.

If the Employer wished to use the listing of work orders found in Exhibit E to show a great influx in orders over the prior year, and therefore a need for additional workers over those employed in the prior year, it should have supplied a comparable listing of work orders from the previous year. In the Employer's response to the Notice of Deficiency Employer states the following: "In March of this year the assembly workers put in 8,282 hours, produced \$68,717 per day resulting in 197 jobs built worth \$1,443,053. So far in July they have put in 13,055 hours, produced \$106,747 per day resulting in 369 jobs worth \$2,348,440. This is a massive increase." However Employer's explanation fails to address the need for the 16 additional workers from October 13, 2019 through December 20, 2019. Employer's explanation compares the average produced in March (a nonpeak month), of \$68,717 per day compared to the nearly \$107,000 per day produced in July (a peak month), but comparing the nonpeak month of March to the peak month of July, does not speak to the requested period of October 13, 2019 through

December 20, 2019. Employer has already been certified for 20 H-2B workers for its peakload need in the current year but Employer has failed to address the bona fide need for 16 additional workers between October 13, 2019 and December 20, 2019. Employer points out that an additional sixteen workers would allow it to increase its production by \$28,000 of product per day. Although additional workers would always increase production, Employer has failed to address or show a bona fide need for the additional sixteen workers in the requested period of October 13, 2019 through December 20, 2019.

Although an Employer may provide additional information from that requested by the CO to establish its temporary need for workers, none of the supplied information in this case provides any reasonable basis to calculate whether the number of workers requested is based on “bona fide” job opportunities during the requested period of need.

Employer failed to provide documentation which would have allowed the CO to reasonably determine whether the request for an additional sixteen carpenter helpers during the period of October 13, 2019 through December 20, 2019 represented a “bona fide job opportunity” as required by 20 C.F.R. § 655.11(e) (3) and (4). *See Roadrunner Drywall Corp.* 2017-TLN-00035 (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). *See also North Country Wreaths*, 2012-TLN-00043 (Aug. 9 2012), slip op. at 6 (“it is the Employer’s burden to prove that the requested positions represent bona fide job opportunities, and the CO is not required to take the Employer at its word”). Accordingly, the CO’s denial of the Employer’s application for failure to establish its temporary need for the number of workers requested is supported by the record.

For the reasons stated above, Employer failed to meet its burden of establishing a bona fide need for sixteen additional carpenter helpers during the period of October 16, 2019 through December 20, 2019.

CONCLUSION

Employer has failed to meet its burden of establishing its temporary need for sixteen additional carpenter helpers during the period of October 13, 2019 through December 20, 2019. Accordingly, the CO’s denial of Employer’s application for temporary labor certification is **AFFIRMED**.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

NATALIE A. APPETTA
Administrative Law Judge